CHOICE OF PUNISHMENT

BY

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THE DANISH scholar Professor W. E. von Eyben published in 1950 his thorough study *Strafudmåling* (The Choice of Punishment). Von Eyben had served for a considerable time as judge of the City Court in Copenhagen. His theoretical and practical analysis of the problems concerned is based on conscientious observations of judicial practice, published and unpublished, and provided an impulse for further contributions to debate. Professor Hurwitz, Judge Poul Sachs and Professor Strahl,[1] among others, have taken part in a discussion which has resulted in a deeper understanding and a clarification of many aspects of the problems of punishment. Nevertheless the subject still contains much that is problematic.

It is clear that the question of the principles on which decisions regarding the meting out of punishment should be based is of great importance. In modern penal codes, the range of punishment for individual crimes tends to be elastic, and opportunity is often given to go outside the usual penalty limits if aggravating or extenuating circumstances are present. To take just one practical example: the punishment for larceny, according to Norwegian law, ranges from 21 days' to 6 years' imprisonment. In the case of attempted larceny, in certain cases of complicity and in other specific cases, the sentence can be reduced to a fine, while it may, on the other hand, be set as high as imprisonment for 9 years if several offences are involved or if it is a case of recidivism. Theoretically, at any rate, it is possible to say that the answer to the question of guilt is not so decisive for the fate of the accused. At least equally important is what point in the scale of penalties the judge will fix upon. An extreme example of the discretionary powers of our courts was seen in Norway during the legal processes that followed the war. Sentences that could be imposed for "assisting the enemy", which under our criminal code is one monolithic crime, varied from a trifling fine to deprivation of liberty for life or the death penalty.

Paper read before the Norwegian Association of Criminalists.

[1] See Hurwitz, *N.T.f.K.* 1950, p. 197, and *Den danske Kriminalret*, Copenhagen 1952, p. 708; Sachs, *N.T.f.K.* 1950, p. 293; Strahl, *Sv.J.T.* 1951, p. 401. Also "Forhandlinger ved Dansk Kriminalistforenings Årsmøde 1950", *Nordiska Kriminalistföreningarnas Årsbok 1950–51*, p. 1; Le Maire, *N.T.f.K.* 1950, p. 337 and *U.f.R.* 1951, B p. 16; Krabbe, *ibid.*, p. 293.

With this in mind it may seem paradoxical that the Norwegian Criminal Code, while defining with the greatest care the different crimes to which individual laws apply in order to establish as clearly as possible the border between punishable and unpunishable acts, is entirely silent as regards the extent and form of the punishment to be imposed within the limits provided by law. In many countries we can find specifically laid down in the statute the considerations to which the legislator has attached special weight for determining the choice of the punishment, but the Norwegian Code contains no such provisions. The committee which drafted the Code gave the reason that in any such specification it would be difficult to avoid either merely stating the obvious, or else saying too little or too much.

According to what principles, then, shall the courts proceed when deciding how severe a punishment should be? Opinions as to the aims of punishment vary, as is well known. To put it simply, one might say that the question is: Should the judge take as his starting point *individual prevention,* and mete out the punishment that he considers necessary in order to prevent the individual wrongdoer from committing fresh crimes?[2] Or is it primarily *general prevention* he should have in mind, and should he then mete out the punishment that he considers necessary out of consideration for general obedience to the law? Or should he perhaps let his own sense of what is right decide the *just retribution for the transgression,* and mete out punishment according to the principle expressed in article 62 of the Swiss Criminal Code of 1937: "The judge measures the punishment in proportion to the guilt of the wrongdoer"?

It is quite clear that the individual judge cannot base his decision on his own personal opinion as to which of the aims of punishment is the most important. It would lead to an impossible state of affairs if one judge were to mete out punishment on the basis of general-preventive considerations, another with a view to individual prevention and a third purely according to considerations of guilt. In penalty decisions the law's threats of punishment are given concrete form—the law's bidding is put into effect in

[2] In Scandinavian literature, and in European literature generally, it is usual to distinguish between individual prevention—that is to say, the power of punishment to prevent new crimes on the part of the offender sentenced—and general prevention, which is its power to deter others from committing crimes. See further Andenæs, "General Prevention—Illusion or Reality?", *Journal of Criminal Law, Criminology and Police Science,* Vol. 43, 1952, pp. 176 ff., particularly pp. 179–180.

the individual case. Decisions must therefore be made in the spirit of the law, not on the basis of the judge's personal opinion as to what is right in principle.

Probably there is no criminal code that consistently maintains one single aim of punishment. Certainly this is not the case in Norway. A criminal code is usually the result of a long historical development during the course of which different opinions have become deposited like geological strata in the earth's crust. Without pursuing this matter in further detail here, I nevertheless venture to affirm that the Norwegian Criminal Code is based upon both general- and individual-preventive considerations, as well as on considerations of retribution pure and simple. These considerations alternate with one another in taking precedence. It is natural that the judge who is to administer the law in the actual spirit of the legislation must follow the same procedure.

If we analyse individual provisions of the law, we shall indeed find many pointers. Take the provisions contained in the general section of the Norwegian Criminal Code concerning what circumstances must be considered extenuating or aggravating. When, for example, the law says that anyone under 14 years of age cannot be punished, and that a sentence can be diminished below the usual penalty limits for anyone who has not reached the age of 18, it is safe to conclude that youth can also be considered an extenuating circumstance in penalty decisions within the ordinary range of sanctions and that this is the case even when the wrongdoer has passed his 18th birthday. Provisions relating to complicity and attempted crime can also provide a basis for conclusions in situations other than the particular ones that these provisions directly regulate. The same is also true with respect to those provisions in the Code which concern the special crimes.

The above does not, however, give a realistic picture of the way in which penalty decisions are actually made in practice. For I have not yet mentioned the tremendous importance of *tradition* in such decisions. If a judge from a completely different cultural background—China or India, for example—after making a detailed study and analysis of Norwegian Criminal Code, were asked to make a penalty decision in the spirit of the law, I believe he would feel quite helpless. Everyone who has had practical experience knows that work on such penalty decisions consists only to a limited extent of conclusions drawn from statutory provisions or from an independent appraisal of what individual and general prevention demand in the particular instance, and that it is primarily a

question of finding *that penalty which corresponds to customary standards of punishment.* Through practice, both the *general level of punishment* for particular groups of crimes will be established and *each separate factor* contributing to the choice of punishment —age, former behaviour, environment, personal characteristics, etc. —will be set in a particular category and given its approximate value. This state of affairs is underlined in a comment by the Swiss jurist Pfenninger who says: "The meting out of punishment is a *traditional* and not a *rational* act". Von Eyben's observations are in much the same direction. If these observations are correct, then the freedom which the wide choice of punishment available seems to give the judge is only illusory. Where the law ceases, custom begins. It is this custom, and not the judge's appraisal of the expedient penalty, which primarily decides what the final sentence will be. We have no lists of fixed charges in the statute book, such as can be met with in laws from olden times, but we have in judicial practice constructed tariffs that are more detailed and take into consideration many more factors than it is possible for a statute to do.

At any rate as far as Norwegian courts are concerned, I consider the statements just cited too categorical and too generalized. I would prefer to put the matter in this way: *the choice of punishment is influenced both by rational and by traditional factors.* In the case of ordinary crimes, where a solid practice in penalty decisions has developed, it is the traditional factor that is usually the strongest. But besides traditional and rational factors, I think it is also absolutely necessary to take into account a third factor— *the emotional factor,* to which I will return later. These various factors do not operate separately and independently of one another, but are woven together in a complicated pattern.

In Norway hard words have been said concerning the tradition-bound "rating system" on which our penalty decisions are based. The critics have emphasized the lack of *rational principles* that the judge can follow. In the 1930's some authoritative criminalists in Norway spoke in favour of going over to the purely individual-preventive method. They held that the judge should decide what, having regard to the wrongdoer's character, must be considered necessary in order to keep him on the straight path in the future.[3] Discussion in later years has, for the most part, displayed a more understanding attitude towards practice in penalty decisions. Per-

[3] Kjerschow, *N.Rt.* 1934, p. 1; Nissen, *Forhandlinger ved Den Norske Kriminalistforenings møte 1935,* particularly pp. 18 ff.

sonally, I support the opinion that a rating system is, within certain limits, a practical necessity. This, however, does not necessarily imply any conscious disregard of what is rational. The reason, quite simply, is that it is not within the judge's power to decide upon any particular penalty on the basis of an independent opinion as to what is rational. I will now go into this further.

We know very little about the *general-preventive effects* of severe as compared with milder sentences. And above all we know little about what weight can be attached to the various principles for the grading of sanctions within the framework of the penal code. Further, we have to keep in mind that the sentence in *the individual case* will usually have no or little impact on general prevention. What can be considered of importance is the general level of punishment, and over this the individual judge has no control. It would therefore be a futile gesture if one single judge were to impose a severe sentence on general-preventive grounds without being able to rely on receiving the support of general practice. The Supreme Court alone has a unique position in this respect, inasmuch as it can draw up directives for the inferior courts.

In the majority of cases we do not know much more about the *individual-preventive effect* of a certain sentence in a criminal prosecution. Little is known for certain of how important it is to the individual, in a positive or negative direction, that he is tried and found guilty. And we have even less foundation on which to judge the probable effect of the punishment being set, for example, at 30 days instead of three or six months. As a rule the judge will have neither the training in psychology nor the intimate knowledge of the offender's character that are necessary for a reliable prognosis on the basis of various alternatives.

Nor does an *appraisal of the guilt of the offender as such* lead to any one particular result. There is no innate relation between a particular crime and a particular sentence. Whether a theft of 500 crowns, committed by a person of mature age, not previously convicted and with an average income, "corresponds to" a month's or a year's imprisonment, or perhaps only to a fine, can only be decided according to convention—and the convention to which it is natural to resort is, of course, none other than general practice in penalty decisions.

I believe, therefore, that even if the choice of punishment could be made with only one object of punishment in view, the guidance that this objective could give would be so uncertain that it would

leave the judge in a state of confusion, were he not able to find support in tradition. This is the case to an even greater degree when the various objects of punishment are weighed one against the other. In such circumstances it is very natural that a judge will, whether consciously or unconsciously, reason thus: "So many uncertain factors must here be taken into consideration, and so many points must be appraised subjectively, that it is not within my ability and powers to take an independent view as to the rational punishment in each single instance. The result would definitely be too casual and arbitrary if my colleagues and I were to proceed in that manner. It is clear that I can best fulfil my duties as a part of the legal machinery by keeping to the standards of punishment that have become established."

These standards of punishment, for their part, have not, of course, arisen by chance. Considerable experience of what is expedient and a feeling for what is reasonable have gone to their making. The words "feeling for what is reasonable" bring us to the factor I promised to return to—*the emotional factor*. Even the most exact knowledge of the general- and individual-preventive effects of this or that penalty decision would not provide the answer to the question of what is the correct punishment. Let us imagine that we know, for example, that by increasing the punishment for embezzlement threefold we could achieve a 50 per cent reduction in the total number of such crimes. Would it be justifiable to make such an increase in punishment? A decision of this question presupposes that an answer is given to some of the most difficult questions of evaluation, where the character, moral standards and sense of values of the individual judges, too, are involved.

One of the emotional factors that play an important part in the meting out of punishment is consideration of the offender's *subjective guilt*—by which is meant the moral judgment on his act. For those who consider that the main object of punishment is to establish a just expiation for the evil done, it follows that considerations of guilt must be the most important factor in making the choice of punishment. The view predominating among criminal-law jurists in the Scandinavian countries is basically different: we look upon punishment purely as a practical means by which the community can combat behaviour that would harm it. But even though we take this as our starting-point, conceptions of guilt make themselves felt and influence our sense of justice. That youth, feeble-mindedness, bad surroundings during childhood, strong temptation, etc., must be considered as extenuating cir-

cumstances is difficult to explain on the basis of general or individual prevention, yet we feel instinctively that it is reasonable to do so. We find it easier to sacrifice on the altar of "public policy" those who arouse our moral indignation than those who arouse our sympathy or pity. Even those who, having a determinist view of human life, believe that any estimation of guilt is based on an illusion, will find it difficult to escape from this emotional attitude, since conceptions of moral guilt and merit are woven into the whole texture of our spiritual milieu from the cradle to the grave.

It is not only the subjective guilt of the wrongdoer, however, that speaks to our emotions. The *consequences* of the crime affect us too. I will quote one single utterance in illustration of this. At a meeting of the Norwegian Association of Criminalists in 1935, Mr. Sund, who was at that time Attorney General, said: "When we... punish an intoxicated road-hog more severely when, by his manner of driving, he has knocked someone down and killed him, than when his driving has not had such an unhappy result, I believe that most people will admit that to do so is both right and just and to the advantage of public policy. But if one considers solely the mental state of the road-hog, one must realize that this may have been equally bad in both cases." There can, to my mind, be no doubt that in fact our emotional reactions when reckless driving has resulted in someone's death are different from what they are when the driver's luck has been better than his wits. We feel differently towards attempted homicide that has not resulted in death from what we do towards a consummated homicide; differently towards an informer in time of occupation, when men have suffered torture and death as a result of his action, from what we do when the information given has had no consequence. Nor can there be any doubt that this emotional attitude also influences penalty decisions in such cases. Some time ago, the Supreme Court of Norway, in a case of attempted homicide, imposed a sentence of one year's imprisonment, but granted a conditional discharge.[4] If, in the case, the weapon had been better aimed and the victim stabbed to death, it would certainly, in spite of there being strongly extenuating circumstances in favour of the wrongdoer, have been a question of punishment of quite another order of severity.

Another emotional factor is the *urge towards certainty and*

[4] 1951 *N.Rt.* 1166. In Norway, as in most European countries, conditional discharge is as a rule given in the form of *conditional sentence*, i.e. a penalty is fixed, but the execution is postponed subject to good behaviour.

order. In all human behaviour there is a tendency towards repetition and uniformity—a tendency to act in the same way as one has done before or as one sees other people acting in similar situations. Among jurists this tendency is particularly strong, both because they are accustomed to regard certainty and calculability as factors of considerable importance in legal matters and because the existence of established standards to which to refer and in which to find support for decisions diminishes the feeling of personal responsibility that can otherwise be burdensome at times. The existence of some system of rating can, therefore, satisfy the judge's emotional needs. On the other hand, general practice influences the feelings of the individual about what is a reasonable punishment: that to which we are accustomed we find easy to accept as reasonable and sensible.

In the ordinary categories of crime, tradition in penalty decisions exists as an established fact, and changes will as a rule occur only very slowly. It is difficult to demonstrate empirically the factors which have contributed to the establishment of our tradition as it exists today. We shall perhaps be able to cast some light on the factors that are at work if we take a case where the courts find themselves faced with new categories of crime, so that they have no former practice to fall back upon. As an extreme example, I will take the conditions prevailing during the post-war prosecutions of Norwegians who had been on the side of the enemy during the occupation.

As already mentioned, the range of sanctions varied from fines to life-imprisonment or the death sentence. Individual-preventive considerations were as a rule not the decisive factor, as, in most cases, the crime was a result of the special situation existing during the occupation and there was no reason to believe that the person prosecuted would repeat his crime under normal conditions. Further, it was generally agreed that it was necessary, for general-preventive reasons, to establish the fact that treason is a serious crime, and it was also clear that some consideration must be given to the agitated state of public opinion and the danger of people taking the law into their own hands. But at what point of the scale should one stop? To begin with there was a great deal of uncertainty. Internal discussions among jurists showed that in a case where one would set the sentence at between one and two years' imprisonment, another would impose a sentence of ten or fifteen years. A case that by one judge would be considered not punishable because the crime was committed under compulsion

or pressure, would by another be dealt with by a sentence of deprivation of freedom for quite a long term. It was felt to be absolutely necessary that a few typical cases should be brought before the courts and carried to the Supreme Court for decision as quickly as possible. The majority of the cases presented before the Supreme Court were, to begin with, simple questions of the choice of punishment. After the first few cases had been decided, addresses by counsel came to consist largely of comparisons with other cases that had come before the courts shortly before and which resembled to a greater or lesser degree the case at issue. Counsel knew that some members of the Supreme Court took a more severe and others a milder view of these cases, but it was only comparatively seldom that a dissenting opinion was openly expressed. As a rule, the more extreme opinions in either direction were waived, so that, in the result, opposing views were merged in a kind of "middle way". In this way the Supreme Court gradually drew up, both for its own use and for the use of the inferior courts, directives for the judging of various groups of treasonable acts and for assessing individual factors such as compulsion, pressure, youth, a Nazi background, and so on. The public attorney's office, for its part, made arrangements for the full and current publication of all decisions of the Supreme Court. It was possible here to observe a tradition of punishment in process of evolution. The achievement by these means of a degree of uniformity was undoubtedly of the greatest importance for the creation of confidence in the post-war legal reckoning. The criticisms made have been based on the ground—whether true or not—that this uniformity was not adhered to strictly: that certain judges were not sufficiently loyal to the opinion of the majority, and that the courts, as a whole, did not keep to a standard level of punishment as time went on.

There can scarcely be any doubt that the differences of opinion that made themselves felt during the construction of this practice arose, for the most part, from differences in emotional attitude—a varying degree of moral indignation, varying attitudes to the suffering that the punishment would cause the convicted person and his family. Arguments of a rational criminal-policy nature were of course put forward in the discussion—arguments, for example, as to the general-preventive value of the punishment—but so many uncertain factors were involved that such arguments could not have any great force. An appeal to indignation or to pity will, in such a situation, generally have greater effect. The progressive

fall in the level of the measure of punishment, as wartime events receded further and further into the distance and agitated feelings calmed down, also shows to what an extent emotional factors were at work.

It can be argued that this example from the post-war period is not characteristic, as such strong feelings were then engaged that more rational considerations were bound to be overshadowed. This is, of course, true enough. But I consider that experience gained in just such an exceptional situation can illuminate the powers that are at work on the more everyday plane also, though in a less obvious way. Let me take an example from a completely different field: penalty decisions in cases concerning the breaking of the price, rationing and currency regulations that are inseparable from modern "state control" (at any rate in times of economic crisis), or penalty decisions in "white-collar crimes" as a whole. Transgression of these regulations by a big business man can have consequences for the community's economy far greater than those of criminal practice performed by, for example, an habitual petty thief. Experience shows, none the less, that with the social structure that exists today it is difficult to get the courts to react by depriving such lawbreakers of their freedom, in spite of the fact that it must be accepted that deprivation of liberty in such cases would have considerable general-preventive effect. The courts are certainly influenced here by an emotional resistance towards the idea of sentencing to imprisonment an otherwise worthy and well-respected fellow citizen who has, it is true, been guilty of breaking the law, but has nevertheless not done something that, judged by general moral opinion, is dishonourable in the same way as an ordinary criminal act. In the case of treason, the emotional factor weighed on the side of severe punishment, while in cases of "white-collar crimes" its influence is in the direction of milder sentences.

I think it likely that, in a similar way, emotional factors have a strong impact on the creation of a tradition of punishment in regard to ordinary crimes, and I will give some examples to illustrate my point. In his book, Professor von Eyben compares the practice followed in different countries in apportioning punishment, basing his comparison partly on crime statistics and partly on answers to a questionnaire that he sent to a number of judges. Certain differences in practice are shown to exist in different countries. Rape, for example, appears to be judged less severely in Holland than in the Scandinavian countries. But what strikes one

immediately is, first and foremost, the surprising uniformity in the judging of the majority of crimes—a uniformity that cannot very well be ascribed to mutual influence. With the existing uncertainty as to all conclusions regarding the general- and individual-preventive effects of the various forms of punishment, it would be more than strange if a calculation based on these rational aims of punishment were to yield the same result in different countries. The uniformity that in fact exists indicates that there are deep-lying emotional factors at work, and that the effect of these factors is fairly uniform in countries that share the same culture and enjoy similar economic and social conditions.

Another circumstance pointing in the same direction and convincingly elucidated by Professor von Eyben, is that it is extremely difficult for the legislator to interfere, by means of directions to the courts, with established practice in penalty decisions. If such directions are not of an absolute, binding nature—in that, for example, they fix a definite minimum punishment—general practice will continue more or less unaffected by the admonitions of the legislator. This indicates that such practice has strong emotional roots. As an example from the Norwegian courts, we can mention that when the rules for conditional discharge and probation were revised in 1929 and the law specified, as a condition for the granting of probation or conditional discharge, that there must be *particular reason* to presume that the serving of the sentence would not be necessary in order to restrain the guilty person from committing new punishable acts, this did not prevent the courts from continuing their practice of imposing conditional sentences in the majority of cases concerning first offences. Indeed, the percentage of conditional sentences even continued to increase.[5]

I am also convinced that it is primarily emotional factors and not a change of opinion as to the effects of punishment that form the background for the fact that practice in penalty decisions has become considerably less severe during the last few generations. An outstanding German criminologist, Exner, touches on this question in a study, published in 1931, in which he deals with practice in penalty decisions in the German courts. He emphasizes that a large group of people have come to recognize that crime is a result of tendencies inherent in the individual, of upbringing and of numerous other environmental influences. This striving to understand the criminal has by psychological necessity led to the

[5] Bratholm, *N.Rt.*, 1952, p. 257.

imposition of increasingly mild sentences by the courts. As has also been said, we no longer mete out punishment with the same untroubled conscience as formerly. Emotional factors have, that is to say, gradually re-shaped the existing tradition of punishment.

Is it at all conceivable that emotional factors could be eliminated and decisions of punishment made a purely rational affair? Obviously not. It must always, to a large degree, be a question of feeling both how highly we are to value the interests that the law has to protect and what weight we want to give to the sufferings and the expense that the punishment involves. Emotional considerations must therefore of necessity make their influence felt both during the development of a tradition of punishment and in the judge's appraisal of each individual case. Indeed it is a fact that, even with the best intentions, no judge is able to keep separate all the complicated considerations of an emotional and intellectual nature which are the decisive factors.

The fact that the choice of punishment is bound up with a sense of justice also has a directly practical function. As judges for the most part react emotionally in approximately the same way as other members of the community, a penalty decision based on a feeling of what constitutes the reasonable punishment will result in a sentence that will accord in the main with the sense of justice of the general public—a fact that is undoubtedly of importance for the court's authority and for its significance as an educative force in the community.

At the same time, however, we must not blind ourselves to the fact that our feelings—including the emotion that we call our sense of justice—are often a poor foundation on which to build. Feelings can be influenced by ancient prejudice, mass-suggestion, class interests, casual impressions. Or there may be feelings involved which we will refuse to accept as legitimate when they are brought out into the light—the primitive desire for vengeance, for example, or individual neurotic reactions. It is essential that an attempt be made to clarify the emotional factors that influence a decision in order to expose these factors to the censorship of our intellect and our moral principles. The intellectual basis for an emotional attitude may disintegrate completely as a result of closer scrutiny. Even the idea of guilt, which has played such an important part both in philosophy and in the administration of criminal law, belongs to those concepts which become increasingly more problematical as more light is thrown upon criminality and its causes. Experience shows that the more one concentrates on

clarifying the causes behind an act, the more moral indignation tends to evaporate.

So far, I have dealt only with questions of the actual choice of punishment. Apart from penalties, however, other reactions to lawbreaking are also known—notably measures relating to *young offenders, abnormal offenders* and *dangerous habitual criminals.* The object of these measures is partly to give the offender the treatment that he needs for a period of sufficient length, and partly, by means of purely physical detention, to prevent him from committing new crimes. By giving these new forms of reaction their own labels, and by emphasizing that something other than punishment is here in question, the legislator has segregated them, in the mind of the general public, from the associations ordinarily connected with punishment, *inter alia* the idea of a relation between guilt and reaction.

In deciding whether or not such special measures shall be applied, the judge has to pay regard to other aspects than those upon which he has to focus his attention when making a decision as to punishment. The main consideration here is: What is the expedient treatment for this man? General-preventive principles and the question of guilt will not come into consideration or are, at any rate, pushed into the background. There is here, to a far less degree than in actual penalty decisions, room for standardization. The factor of greatest importance is the appraisal of the character of the individual offender. The judge has an easier task than in the case of penalty decisions, inasmuch as he is not required to decide how long the treatment is to last. This is determined later by the prison authorities, while the treatment is in progress.

It has been maintained that one phase in the choosing of penalties stands in a class by itself, viz. *the choice between a conditional sentence (conditional discharge or probation) and an unconditional sentence.* Professor Strahl has made the point that the test of whether or not a sentence shall be made conditional is of the same nature as the test of whether or not educative or supervisory measures should be applied. The decisive factor is the expediency and practicability of the different alternatives, and this is dependent not only on the circumstances surrounding the act, but also on a number of other factors—for example, what arrangements can be made for the accused if he receives a conditional discharge and is put on probation: whether a suitable supervisor and suitable living accommodation, work, education,

etc., are available. Strahl contends, therefore, that the question of conditional sentences should not be treated in the same way as the question of meting out the punishment. If I have understood him correctly, he holds that standards for the choice between a conditional and an unconditional sentence should preferably not be established in practice as they are in the case of the choice of other punishment.

I cannot share this opinion, and will now give the reasons why I disagree.

It is, in fact, extraordinarily difficult to decide which reaction is most expedient as a treatment of the offender. Varying opinions as to the effect of deprivation of liberty can play their part and influence the choice. If a judge were to be referred solely to this basis for decision, the choice between conditional and unconditional sentences would of necessity become extremely uncertain.

It is, moreover, obvious that, in making the decision, consideration must also be given to the question of general prevention—and this is expressly stated in the rules for conditional sentences now in force in Norway.

Finally, there are the emotional considerations, which can no more be disregarded in decisions as to conditional sentences than they can in other penalty decisions. To grant a conditional discharge or probation means that the accused is given a chance to avoid punishment. A judge—like other human beings—will feel most pity for those who in the general opinion are least blameworthy, and will therefore be more inclined to give such persons a conditional sentence. If a young man and a mature one have both committed the same type of crime, it is more likely that the young man will get a conditional sentence, even though the prognosis may not have been any different in his case. In the same way, a judge will find it difficult to refuse to grant an offender who is badly situated socially the same chance as is granted to a more fortunate member of the community, even if the prognosis is less favourable in the case of the former.

In other words, in the choice between conditional or unconditional sentences, as in the case of other penalty decisions, the question arises of how various factors are to be valued, and here, as elsewhere, it is natural that the judge should seek support in certain standards which have crystallized in practice. That this actually happens is incontestable. It is enough to mention as an example the well-established practice of not making sentences conditional in cases where the driver of a car has been under the

influence of alcohol, except in quite exceptional circumstances. As another example we can take sentences in cases of assault against police officers, in respect of which the Supreme Court has on several occasions expressly stated in its decisions that, for general-preventive reasons, sentences cannot be made conditional unless strong extenuating circumstances exist. For my part, I do not think that there are grounds for criticizing the formation of such standards. The question of what weight, for example, is to be given to general-preventive considerations is a point so controversial that it should not be left entirely to each single judge's individual opinion.

It is not my intention hereby to deny that individual views of treatment play—or at least should play—a greater part in the choice between conditional or unconditional sentences than in a decision as to whether a sentence should be fixed for example at 30, 60 or 90 days. And when one turns to the question of supervision and the provisions regulating probation, the expediency of the various forms of treatment is the ruling factor.

The foregoing is primarily an attempt to analyse the way in which the choice of punishment is, in fact, made and the considerations by which penalty decisions are influenced. It has, however, at the same time become in some measure a defence of the traditional rating system. On the basis of a realistic evaluation of the possibilities of the administration of justice, it is necessary to dismiss as unrealistic the idea that penalty decisions should, solely or for the most part, aim at finding out which reaction is most likely to restrain the offender from committing crimes in the future.

But this defence of a rating system is of a negative nature. It is based primarily on the fact that the existing system is a necessity because it is not, as a rule, possible to present one definite result as the rational one. If, in any concrete instance, it is possible to show tangible, rational considerations which prompt a departure from the conclusion usual in similar crimes, the judge, so far as I can see, should not hesitate to allow these considerations to weigh decisively. Tradition in penalty decisions should be something to fall back upon when there is no basis on which to make a different decision: it should not be a strait-jacket which prevents the judge from choosing a sensible conclusion. And the line to be taken for the future must be to strengthen the element of rational treatment of the individual in the administration of criminal justice through a wider knowledge of the character of the in-

dividual offender, a deeper insight into the laws of human conduct and a better knowledge of the facilities for treatment that different kinds of institutions offer.

Indeed, I have the impression that this is the trend nowadays. Penalty decisions are no longer so formalistic or so tradition-bound as formerly. This is clearly shown in the treatment of habitual criminals. The traditional treatment was successively to increase the punishment at each new relapse—for example, from 45 days to 60 days, 90 days, 120 days, six months. Prison officials have often emphasized how irrational this practice is. Prisoners get accustomed to enduring the punishment, and the long-term imprisonment that they finally attain loses in effectiveness. It is a good thing to try a conditional sentence, and it may also be rational to try a comparatively short prison sentence. But if neither of these remedies proves to be effective, then the time for leniency is past. It is false humanity, in such a case, to shrink from a firm reaction. On the other hand, it should not be out of the question, either, for offenders to be given another chance because of previous convictions. It has struck me, when studying the life of a criminal, that there may have been occasions when more might have been achieved by leniency than by the traditional, rather mathematical form of justice.

Suppose, for example, that a lawbreaker has offended again shortly after his release from serving sentence for an earlier crime, but before the new case is cleared up and brought before the court he has begun a regular way of life and has acquired a permanent job. In such a case, a new prison sentence can destroy beyond hope of recovery what was in process of being built up. Or the situation may be that a lawbreaker has made an honest attempt to pull himself together, has had work and managed to stand on his own feet for a year or two. But then things go wrong again, for some reason or other: there is a new prosecution, a new prison sentence and, as a consequence, the man is back to his old life. Since the amendment in 1955 of the Norwegian legislation regarding conditional sentences the courts have been given a freer hand in the granting of conditional sentences to recidivists. On a number of occasions the courts have taken advantage of this facility even in the case of recidivists who have been sentenced many times before.

It can be argued against a practice of this kind that it can lead to less uniformity and greater incalculability in the application of justice. I think that there is something to be said in favour of

this argument. What I have said earlier regarding the "rating system" may, perhaps, have given a somewhat exaggerated impression of the uniformity that prevails. Some have spoken—to my mind with too little justification—of "the glaring lack of uniformity that characterizes the choice of punishment in our courts". There have been those who have put forward this inconsistency as an argument for the abolition of all penalty decisions and for going over to a system of indeterminate sentences. For my part, I think we must face the fact that this inconsistency can be more noticeable when the aim of the court is to arrive at an *expedient* sentence than when it aims at a *proportional* sentence. When there is, in any given instance, reason for doubt as to whether it is a case for tolerance and a conditional sentence or, on the contrary, for severity and a long period of detention in an institution, it is naturally unavoidable that Judge A may choose one alternative while Judge B chooses the other. I do not, however, regard this argument as decisive. That much latitude for personal judgement must be allowed for in all treatment of human beings. Incongruous decisions are objectionable if the choice of punishment is looked upon as a just meting out of suffering in proportion to the guilt of the individual offender, but this is not necessarily so if punishment is looked on as a practical means of combating criminality. There is not necessarily an insurmountable gap between the views which form the basis for penalty decisions and those on which the administration of other reactions to lawbreaking is based. The more clearly it is apparent that a sentence is based on an individual judgement of character, the less room, moreover, will there be for direct comparisons.

If it is desired that the rational element shall be given greater importance in the administration of justice, arrangements must be made for the court to acquire as thorough a knowledge as possible of the offender's character and environment. Our Norwegian Code of Criminal Procedure of 1887 dates from a time when the courts did not have the choice of penal measures that they have today; according to the Code the decision as to guilt is the chief and overshadowing question, and less emphasis is placed on seeing that the choice of reaction is carefully prepared. Nevertheless, a considerable advance has been made in this sphere. Examination by a psychiatrist occurs far more frequently than it did a generation or two ago, and investigations by social workers, corresponding to the English probation officers, have been initiated as a new aid for the judge. In my opinion this development must

be continued. The service of social workers should be expanded and consideration should be given to whether the investigator ought not, to a greater extent than is at present the case, to attend personally in court as the English probation officers do, instead of merely handing in a written report. In England, probation officers are attached to the courts as advisers, and emphasis is laid on how important it is for the judge that he should in this way have direct contact with the social worker. The study of law in the law school does not aim at training the students in the understanding of human beings and human problems. That the judges should have regular contacts with representatives of other points of view is therefore essential. Otherwise the administration of criminal justice will become ossified in juridical traditionalism. A judge's experience is of limited value in this sphere, since he normally has no opportunity of keeping track of the fate of the accused after sentence has been imposed. "One calls a judge experienced", says the Danish criminal jurist Le Maire, "as soon as he has pronounced a sufficient number of sentences, even if he has not concerned himself with the results achieved and has, therefore, no more idea of what these results are than a druggist who, year after year, has handed out pills over the counter".