

## INDETERMINATE CONTROL OF OFFENDERS: REALISTIC AND PROTECTIVE

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The keystone of the Youth Correction Authority Act is the principle that the length of the period of treatment must be completely within the control of the Authority. Since the Act completely abandons the notion that punishment alone is the panacea for crime, it follows logically that the time required to redirect the offender must be gauged by the necessities of each individual case. This idea is neither radical nor untried. Rather it is a realistic facing up to the hard facts learned from a long fruitless effort to curb crime through fear, retributive punishment, and uncoordinated action. It stems also from the conviction that the failure to check crime is because our criminal laws are not broadly enough framed adequately to protect society as a whole.

The Model Act provides that the Authority may keep under continued study a person in its control and retain him under supervision so long as this is necessary to the protection of the public. The Act also provides that the offender be given full liberty as soon as there is reasonable probability that he will not be a menace to the public. The Act, however, does not give *carte blanche* to the Authority to determine how long an offender may be held since one of its sections provides that court approval must be obtained, if he is held beyond his twenty-first birthday if he was originally committed before he was 18, or beyond the age of 25 if he was committed subsequent to his eighteenth birthday. The Act also establishes machinery whereby the Authority may apply at specified intervals to the appropriate court for an order authorizing continued control over any offender whom it believes to be dangerous because of his mental or physical condition, disorder, abnormality, or because of his lack of improvement under corrective training or treatment. The request for continued control must be in writing and fully supported by a statement of facts and reasons. The offender is, of course, free to appear by counsel or in his own right to rebut such statements. Thus, it is theoretically possible for the Authority to release completely an offender the next day after he is placed in its control, or it may hold him for life.

Admittedly the Act places broad discretion in the Authority and frankly places dependence upon the judgment, integrity, and ability of its members. But, even so,

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the Act provides more safeguards than do other parts of our legal machinery. It depends on group judgment rather than upon the decision of a single judge whose knowledge of the offender is limited to the facts and evidence which can be legally produced in court. The Authority also has the benefit of actual observation of the offender over an extended period as well as the advice of the experts who deal personally with him. And finally the members of the Authority must reduce their views to writing in such form and with such clarity that they will withstand the challenge of public criticism, the rebuttal of the defendant, and the analysis of the court. Certainly under such a procedure there can be no semblance of "star-chamber" proceedings or possibility of arbitrary, capricious, or prejudiced action.

Thus protected and thus safeguarded, the principle of indeterminate control of law violators is not only in conformity with our best legal traditions, but is also in accord with modern scientific concepts of human behavior. The indeterminate sentence idea has long been recognized as fundamental to any system of individualized treatment of the offender. It arises from 150 years of experience—that imprisonment for a specified period does not assure the reformation of those who violate the law nor deter others from similar conduct.

The indeterminate sentence as a method of dealing with offenders was first enacted into law in Michigan in 1867 as a part of their parole law. It appeared next in connection with the establishment of Elmira Reformatory in the middle 70's. Its use since those early days has been extended to the prison field, so that today we find the principle of the indeterminate sentence in a full third of our state jurisdictions.

Had the drafters of the original Elmira Reformatory statute insisted on the inclusion of a fully indeterminate sentence provision in the bill which they presented to the legislature, it is extremely likely that this principle would have found its way into the then new reformatory experiment, and we should not at this point still be championing its merits. As matters now stand, we must strive to persuade the public no less than the prison and parole administrator that under a limited indeterminate sentence law, society is not adequately safeguarded, nor has the public any assurance that the offender will not be released before he has given sufficient evidence that he no longer constitutes a serious threat.

As the framers of the Youth Correction Authority Act have themselves pointed out, many of our juvenile courts and most of our juvenile institutions are empowered by law to take control or custody of the young offender until he is 21. When we consider that the lower age for juvenile court jurisdiction is usually set at age seven, there exists a maximum period of 14 years during which the court or the institution may exercise full control over the offender, with no requirement for any periodic appraisal of his development and no questioning of their authority except through a writ of habeas corpus.

Under the defective delinquent laws in New York,<sup>1</sup> Pennsylvania,<sup>2</sup> Illinois,<sup>3</sup>

<sup>1</sup> 10B N. Y. CONSOL. LAWS (McKinney, Supp. 1942) §§430-448, 450-451.

<sup>2</sup> PA. STAT. ANN. (Purdon, Supp. 1941) tit. 61, c. 6A.

<sup>3</sup> ILL. REV. STAT. (Supp. 1938) c. 38, §820.

Massachusetts,<sup>4</sup> and Minnesota<sup>5</sup> the psychopathic criminal may be retained in custody for a period well in excess of the term he might have received as a routine sentence if a psychopathic condition had not been indicated. Similarly, cases of mental defect and disorder, whether juvenile or adult, where there is no element of criminality, may be held in custody for indefinite periods of time without the necessity for a further court appearance or court order.

In the past, any attempt to supplant a punitive philosophy with one of individual rehabilitation has met with opposition from students of constitutional law and those who see in these new devices an attempt to strip from the individual the civil rights and guarantees plainly established in our national charter. It is common knowledge that these safeguards of individual rights came into being as a protest and a protection against the tyrannical power of the rulers of medieval England. Those who advocate the principle of the indeterminate sentence and the administrative control of individual treatment must guarantee that in asking for some liberalizing of these traditional safeguards they are seeking to establish in their place a principle of individualized rehabilitation which will more than compensate for the changes wrought in our structure of civil liberties. As but one instance, we cite the fact that the appellate judges of this country have fairly uniformly upheld the principle that where the aim of the juvenile court is the aid, encouragement and guidance of the child, certain traditional procedures—trial by jury, indictment, technical rules of evidence, and other paraphernalia of formal criminal court procedure—may be set aside. Certainly this precedent may be used to argue for the extension of these same aims to the group just above juvenile-court age range.

An indefinite period of control over the offender is basic to the treatment as opposed to the punitive process of redirecting the antisocial tendencies of the offender. The statistics and data on recidivism abundantly demonstrate that somehow we must get away from the purely legalistic approach and apply the knowledge and skill of the physician, the psychiatrist, and the sociologist. The proposed statute deals with offenders at a critical period of life when mental and physical structures are undergoing rapid and significant changes. The thought processes, mood and behavior trends as observed among adolescents are ever changing. Of course, this is to be expected since it is well known that mental alterations accompany bodily changes. For example, during childhood both physical and mental components are exceedingly elastic and adaptable to changes, whereas during senescence they become rigid and fixed. During the period of adolescence, a marked transition from the weak and plastic phase of childhood to the more powerful and inflexible state of maturity is encountered. It is during this period that sudden spurts of physical growth take place, accompanied by definite mental changes. It is during this period that allowances are usually made, within reasonable limits, for the restlessness, rude behavior, and egoism so characteristic of youth.

<sup>4</sup> MASS. GEN. LAWS (1932) c. 123, §113.

<sup>5</sup> MINN. STAT. (1941) §§526.09-526.11.

While the overwhelming majority of youths are able to control themselves, there are some who are so clearly devoid of self-control, so inclined to give way to their instincts and react in an offensive and dangerous manner to trivial difficulties and unimportant frustrations that they can be regarded only as a hazard to the community. It is definitely accepted that some such persons, although not insane in the narrow legalistic sense, are, nevertheless, mentally abnormal. Some of these mental abnormalities are due to specific bodily and physical changes. Mild and unrecognized attacks of encephalitis and other infections of the brain may cause such changes. Latent injuries, undetected brain tumors, misunderstood glandular disturbances, and undiagnosed brain lesions are frequently responsible for such behavior. So also are certain hidden sex abnormalities.

When considering the necessity for an indeterminate period of control for youthful offenders, it is of the utmost importance to remember that the individual's behavior while within the control of the Authority is one measure for determining his potential danger. There are other definite criteria and standards which can be developed by skilled persons to determine just how long the offender should be kept under control. By careful investigation and the case history method it can be shown that there are certain individuals whose behavior is so perverse and predatory that they do not respond to any of the usual forms of punishment, treatment, or control. It also can be demonstrated that a considerable number of individuals manifest misconduct of such a nature and degree as to indicate that the natural mental inhibitory mechanisms or brakes against offensive conduct entirely fail or are markedly impaired. When the inhibitory mechanisms fail, then such impulses as selfishness, cruelty, perversion, aggressiveness, emotional storms, and destructiveness easily come to the surface in an unrestrained fashion. The literature on criminology, the classification summaries and case history records of our prisons and reformatories, as well as court proceedings, are filled with examples of this type of case. It is unnecessary to cite any of them in detail here. But certainly there is a large group of persistent violators, whose conduct is so poor and extreme and who are so unresponsive to correctional methods that they are often included in an ill-defined and poorly understood borderland between the normal and the abnormal. This group is characterized by the behavior characteristics mentioned above and is often labeled as psychopathic.

The necessity for indeterminate control of youthful offenders is further demonstrated by the utter failure of present methods to prevent or deter crime or to rehabilitate the offender. Time and time again it has been shown that well over fifty per cent of the adult predatory offenders began their delinquency careers in childhood or adolescence. The parole violation rate for young persons is twice as great as for older offenders. Practically all of the habitual and professional offenders, those who are in and out of prisons for the better part of their lives and who present the most serious problem to law enforcement agencies, began their careers in the age period covered by the Youth Correction Act. These facts alone, substantiated again and again by prison and parole reports and crime surveys, prove that youth is the crux

of the crime problem. Something must be radically wrong with an inelastic system of definite sentences and judge-prescribed treatment which shuttles the same offender back and forth, time after time, between the institution and the community. The present system has failed. A new approach is in order.

One of the great advantages of the Youth Correction Act is that it permits a wide variety of treatment methods. The Authority can utilize commitment to different types of correctional institutions; it can place the offender in a hospital, in a vocational training or educational institution, require him to undergo a course of treatment in a mental hygiene or other clinic, or in fact put him in any community situation it may consider helpful. It would be futile to undertake such programs as these unless they could be followed through to their logical conclusion. Why spend time and money on half-way programs or attempt to improvise a plan of treatment to fit into an arbitrary, predetermined time schedule which is bound to be too short or too long? Could there be anything more disheartening than to force an individual to continue in confinement or under supervision after the training period has been fully and satisfactorily completed? What incentives are there for the young man who knows he must serve a period of time prescribed in advance by a judge unfamiliar with his needs and responses? How can the special needs of youth be met if every effort is circumscribed by demands for punitive treatment?

Just as the Authority must have power to release from control when the treatment period is concluded, so also must it be able to retain control of those who continue to be a menace to society. This is the feature of the Act which incites the opposition of those who shudder at granting such power to an administrative agency. But society has always demanded that the liberty of the individual be curtailed, if necessary, to protect the well-being of the group. Those afflicted with communicable diseases which cannot be controlled by known methods are isolated. So also are those with mental disorders of the type that make the individual a menace to himself or to others. Because of the impossibility of deciding just how long the disability will last or the danger will continue to exist, such isolation, which curtails the liberty of the individual but protects society, is necessarily prescribed for an indeterminate period. It should be obvious that the same principle is equally applicable to individuals with known delinquent or criminal tendencies. It should be obvious because of the acknowledged inability of judges or anyone else to predict at the time of discovery of evidence of such tendencies just how dangerous they are, just what treatment is necessary, or just how long they will continue.

In this respect, the provisions of the Act are similar to the commitment of mentally ill persons to state hospitals. It is very rare, indeed, that a patient is now committed who really should be at large while many are permitted to retain their liberty, without any restraint or supervision whatsoever, who should be hospitalized. Similarly the determination and measurement of pronounced and well-grounded criminal behavior, psychopathy, and other abnormal characteristics can be made by experienced persons and reviewed by the court. The court and the Authority can base their

judgment on the delinquency history of the offender, on his conduct while under observation, on his attitude as reflected by periodic examination, on various kinds of psychological tests, on the opinion of those who have observed him, on the manner in which he reacts to carefully devised situations and programs to which he can be subjected, on his physical condition, on his emotional responsiveness, on the normality of his brain waves as shown by the micro-electric brain-wave machine (electroencephalograph) now extensively used in mental hospitals, and on a variety of other factors which are subject to specific measurement. The techniques of the psychologist, the psychiatrist, and other members of institutional staffs have advanced to the point where they can quite accurately predict delinquency and the possibilities of abnormal behavior. They have definite objective standards of the kind mentioned to aid them in reaching their determinations. Moreover, the Authority can in any case where doubt exists release a person under its control for a period of trial in the community. Under such circumstances there is little or no danger of keeping a person in confinement who should be entitled to his liberty.

The existing system of definite sentences cannot be defended on any ground other than obscure legalistic dialectics and by emotional references to traditions of the law. References to Coke and Blackstone or unfounded fears that individuals on the board will be arbitrary and unreasonable give no consideration to the indisputable fact that the existing system of definite sentences displays the utmost capriciousness and lack of understanding of the individual offender.

Disparity of sentences for offenses which are substantially similar in kind is one of the outstanding weaknesses of our present judicial system. The recent report of the committee of federal judges on punishment of crime in federal courts points out once more the wide inconsistencies in the length of sentences given by different judges.<sup>6</sup> It also shows that the same judge gives widely different sentences for the same offense at different times. For example, it points out that some courts consistently grant probation to more than 80% of those convicted while other judges sitting in the same district and handling the same type of case have never given probation to more than 10% of the cases. Indeed, there are some judges who do not believe in probation and have not once used it in the hundreds of cases that have been before their court for trial. This discriminatory treatment of offenders naturally breeds resentment among prisoners sent to the same institution and hampers efforts to rehabilitate them.

No one, of course, has the naïvité or hardihood to defend present sentencing practice as providing "equal justice under the law." Its protagonists resort rather to making fine distinctions about the seriousness of the offense, the degree of culpability of the defendant, the need for deterring others and similar fine-spun rationalizations. Never do they seek to justify it on the ground that it provides opportunity for training and treatment of individuals with widely varying needs. Strange how this idea

<sup>6</sup> REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON PUNISHMENT FOR CRIME (1942) 6, 27, 49-51.

of being able to weigh out pain and atonement has survived so long after the science of detecting witches has all but disappeared from the Courts of Justice!

No, we cannot measure a moral wrong against a physical pain. We cannot adjust the known to the unknown. We cannot curb crime or save the offender by any system of retributive punishment or proportionate retaliation. We cannot continue to talk only of laws, and judges, and prisons. We must look behind all of these to the handicaps, the problems, the inner-drives, the insecurities, the abnormalities and the perversities of the offender himself and gauge the period of his control and treatment accordingly.

The old system has failed—failed because the machinery of criminal justice is outmoded and because we have timidly limited our past attempts at improvement to the making of minor repairs. A system based upon the principles of retribution, punishment, and making the punishment fit the crime, cannot by slight changes be made to accomplish the purpose of public protection. The machinery of criminal justice must be redesigned, with basic structural changes forged around the principle of indeterminate control of offenders, if an effective program of crime control is to be finally established.