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## RECIDIVISM AND THE COURTS

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HAROLD M. METCALF<sup>1</sup>

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Recidivism is a technical term which is defined as a "falling back or relapse into prior criminal habits, especially after punishment." Legal control over it is generally considered an impractical and unattainable goal. Attention was directed toward it many years ago when it was said, "we punish an offender not because he has offended but that he may not offend again." Society has never ceased to hope however, that ultimately it would be able to rely upon the courts to handle criminal offenders in such a way that the commission of future crime would be definitely retarded. No matter how impossible it may seem that we will ever be able to predict with certainty what any individual may do in the future; and no matter how improbable it may seem that society can exercise any control over uncommitted acts, we must nevertheless, always keep our eyes fixed upon this objective. If we are willing to be satisfied with less we merely admit that the imposition of a criminal sentence is the sole objective of court procedure. It is apparent, however, that inflicting punishment for past offenses has not been uniformly successful in protecting society from crime. Obviously as long as we retain control over the person of an offender we can prevent him from committing further crime. If, however, we ever expect to release him his recidivistic tendencies are of vital social importance. A legal control over recidivism is therefore a legal objective toward which we must constantly strive if we expect a constructive social benefit to grow out of court action.

Those who are concerned with the administration of that part of our government which is devoted to dealing with crime have always contended that control over recidivism was not primarily a legal problem. They allege that there are certain legal barriers which make it impossible for the courts to exercise a uniform control over what a released offender may do in the future. It seems apparent that the courts are justified in refusing to accept responsibility for the acts of those whose legal punishment has failed to prevent their

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return to crime. Irrespective of where responsibility properly rests society has the right to demand the best possible protection from crime and we must bend every effort toward producing this benefit. If a modern age has made possible the attainment of more comprehensive objectives we must not hesitate to adapt our legal system to the performance of new duties. Even the iron hand of precedent must not be permitted to bar the way. It is interesting to observe that if we contemplate an adjustment of criminal procedure in line with recidivistic control that we will strike deep at the heart of established legal theory.

If we were to select one outstanding concept of the law which has never been the target of general adverse criticism it would probably be our theory of legal jurisdiction. We have always strived to keep intact the idea that no criminal court can ever exercise its delegated power to assess a fine or take away any personal rights unless it was first shown that there was a justifiable legal basis for such action. We have always taken it for granted that the proper basis was a committed criminal act upon which we predicate our legal right to sentence an offender. It is therefore apparent that all court action must follow upon the heels of a past offence. As soon as we attempt to use this theory to prevent uncommitted acts the impossibility of direct legal action is at once apparent and we realize that all hope of recidivistic control depends upon an indirect effect.

We also find that the law is now functioning under the theory that whatever punishment is imposed by statute for the commission of a criminal act must be determined by the act. Crime is nothing more than a statutory list of anti-social acts which are so detrimental to society that they cannot be tolerated by any well organized social structure. When society first considered what punishment should follow conviction for each act it was at once apparent that there was a great deal of difference between the different offenses in so far as the seriousness of their effect upon society was concerned. Surely the effect of the act of pocket picking was far less serious than the effect of the act of premeditated murder. To meet this situation fairly a penalty was devised which would arbitrarily reflect as nearly as possible a general conception of the seriousness of the offence. The possible punishments were death, life imprisonment and imprisonment for any length of time less than life. The first adaptation of these possible penalties to the various criminal offences has not been rigidly adhered to. As generation after generation considered this problem various alterations have evolved. While the punishments

of death and life imprisonment cannot be altered, there has been a gradual tendency to decrease the number of crimes to which they apply. Incarceration for a term less than life does however, present unlimited possibilities for variation. As a matter of fact this type of punishment covers by far the largest proportion of the acts listed by statute as crimes. Now the law has always assumed that for any term of imprisonment less than life the maximum length of time must be definitely fixed by law and as such constitute a legal mandate prescribing the extreme limit of court authority. Under our present system this maximum term is determined solely by an arbitrary legislative enactment which considers only the seriousness of the offence. For example in Ohio grand larceny calls for a penalty of imprisonment of "not less than one year or more than seven years." Burning property with intent to defraud demands a sentence of not less than one year or more than ten years." Burglary of an uninhabited dwelling rates a sentence of "not less than one or more than fifteen years" while if the dwelling is inhabited a sentence of "not more than thirty years or less than five years" is prescribed. While it may appear logical to impose penalties which reflect the difference in the degree of seriousness of the different offences it becomes obviously illogical when we observe that by so doing we automatically classify all criminals not as to the degree of protection which society should have from them but solely upon the basis of a particular offence which they have already committed. The latter classification is inherently unsound since it implies that the commission of the same act by different individuals indicates a similarity between them. It is apparent today that any such attempt to generalize is obviously erroneous. We are aware today that the same act may be committed by individuals whose behavior reactions emanate from radically different sources. With this in mind we can never expect a statute to intelligently predict in advance the maximum term when an offender should be legally entitled to release. By predetermining a definite maximum date when release must be allowed and predicating this date solely upon the offence, we disregard the known element of individual difference which is inherent in every criminal act.

Now when we consider the objective of controlling recidivism under these legal handicaps it becomes apparent that without alteration they present unsurmountable barriers. Before we can ever expect to accomplish our purpose the theory of jurisdiction must be expanded so that it will include a legal right of control over every criminal offender who is potentially dangerous, such control to be legally justi-

fied for as long a time as potential danger continues to exist. Society is much more concerned with what an offender may do in the future than with what he has done in the past. If we do this we will require a legalized court jurisdiction which is predicated solely upon a capacity to predict. It extends the limit of court control for as long a time as the offender remains likely to offend again. It involves divorcing the criminal act from the sentence and basing it upon the particular individual who is to serve it.

While this may appear theoretically sound it is nevertheless open to the charge of impracticability. The number of convicted offenders is so great that it seems impractical to try and individualize the process. We must recognize, however, that our present capacity to predict is limited and that it applies only to one of two definite and determinable classes of offenders. One class consists of those who, as far as we can now determine, are physically and mentally normal and who have had at all times complete control over their own behavior reactions. The other group falls definitely under the abnormal and subnormal classification. As to the first class, punishment is probably the safest weapon of social defence and we can rely upon it as creating a fairly uniform deterrent effect. As to the latter group punishment is completely impotent since we can never expect that those who compose it will react uniformly to the same treatment. As to each one we must know what their abnormalities or subnormalities are, and with this data as a determining factor, society must proceed intelligently to protect itself from them.

If we contemplate any theory of criminal jurisdiction which will legalize a right to impose a sentence predicated upon a capacity to predict what it seems will happen in the future, we must never expect to apply it to the so-called normal individual. Where no mental or physical abnormality or subnormality can be found, there is no ground upon which we can base a prediction with reference to future behavior reactions. In sentencing normal individuals we must rely upon the direct deterrent effect of a prescribed predetermined punishment to curb whatever recidivistic tendencies may exist and hope that some indirect beneficial result will also be accomplished.

If we eliminate all those who are normal we open the door to recidivistic control, only over those who come under the abnormal or sub-normal classification. As to this group we can no longer safely disregard the fact that science can find out things about them which bear directly upon the problem of crime control. With this in mind we find ourselves confronted with a problem which requires an en-

tirely different method of attack. Here possibilities are presented for establishing a direct control over recidivism. It is not based solely upon a desire to determine the exact degree of responsibility with which it is fair to charge an offender but adopts the point of view of diagnosing recidivistic tendencies and establishing the necessary social protection from them. Scientific knowledge of individuals gives us information about them which can be used as a warning indicating what we must be on our guard against in the future. In many instances, it is data upon which we can fairly base a prediction as to what a certain individual's reactions will be in the future. When this is possible we are able to determine with a high degree of accuracy the potential danger of an individual which at once establishes the type of treatment and degree of protection which society must have from him.

Take for example a scientific diagnosis of a chronic alcoholic condition. Thirty days in the workhouse cannot possibly deter a return to the offender's previous condition simply by reason of the fact that his condition remains unaltered. Unless the sentence prescribed tends to bring this condition under control the entire treatment is an economic waste. No social benefit can result and the individual is exactly the same after sentence as before. What must be done with him to protect society from him has no relation whatsoever to any particular spree. Drug addiction, venereal disease and a host of other definitely determinable physical conditions may be diagnosed beyond question of a doubt. There are many instances in which cures may be effected and others for which no cure is now known to exist. Without relying upon speculation it would be safe to predict that a confirmed drug addict will commit whatever criminal offense may be necessary to satisfy his craving. That venereal disease will spread infection is not a guess but predictable fact. Any one of these predictions may be safely made without working any injustice upon the individual. A host of sex abnormalities can be accurately diagnosed and the prediction made that serious criminal offenses will normally result from them. It is not a mere guess when we say that surely sometime in the indefinite future, when conditions favor their expression, that society will have to suffer the effects of vicious crime. Progress in the field of mental diagnosis has attained an amazing degree of accuracy in classifying those who are in a greater or lesser degree abnormal or subnormal. Science can compare observable individual conditions with previously established standards of normality. We can recognize today intermittent

states of emotional instability which fall short of complete mental irresponsibility but which nevertheless are discernible potential danger. We find examples of slight feeble-mindedness and those who are definitely feeble-minded. We find the moron, the psychopathic personality along with the complete irresponsibility of dementia praecox. The extent of this field is indicated by recent statistics showing that approximately eighty per cent of the inmates of one Ohio penal institution were mentally defective. Irrespective of the degree of control which the various defectives can exercise over their own behavior the existence of these conditions are today determinable scientific facts. Each type of mental weakness carries with it a danger signal which is expressed in no uncertain terms. While the precise act which may be committed cannot be known in advance any more than the name of the innocent person who will suffer from it, the potential possibilities are an apparent fact. We can even go further and point out the type of social environment which is favorable to the growth of crime. The crime spots in any large urban center stand out with unquestioned clarity. It is no idle boast to say that those who are informed can predict the percent of crime which will come out of the population of any given district.

All of this leads us to the fair conclusion that we have today a limited capacity to predict which did not exist at the time our criminal procedure system crystallized into its present form. The acquisition of this power has created a distinct advance in our capacity to protect society by bringing within the realm of possibility a limited legal control over recidivism. If the law refuses to recognize this newly acquired means of defense and continues to cling to its prerogative of dealing exclusively with crime, we will continue to turn out of our criminal control system a continuous stream of individuals whose recidivistic tendencies can be accurately predicted but over whom we have voluntarily released control.

If we ever intend to benefit practically by these scientific advances the law must open its own door to permit their application. It is a restricted field however, in which the law is not supreme and its successful use depends upon the application of an entirely different kind of knowledge and procedure. The law as a specialized science is designed to determine fairly and justly whether or not a certain act comes under the statute and if it does whether or not the one who is accused of committing it is actually guilty as charged. The process safeguards the accused against the possible error of being found guilty of doing something which he did not do. If he is found guilty after

this procedure he cannot charge unfairness if his ultimate disposition is determined by an ex parte proceeding. To delegate this problem largely to science is not only doing justice to society but to the individual as well. An enhancement of the scope of legal jurisdiction over the person, predicated upon scientific determinations and conclusions is not an elimination of the right to "due process of law." If abnormal and subnormal individuals are today a scientific reality then there should be a social right to differentiate them from those in whom no abnormality is found to exist. Modern society has the right to demand protection from potential danger in so far as it is possible to furnish it. Insanity must not be the only pathological condition recognized by the law since the recognition of lesser conditions is equally important. We must exercise our capacity to sentence abnormal and subnormal offenders in such a way as to guard against predictable recidivism. In no other way can the courts avoid the absurdity of using their powers solely for the purpose of imposing ineffectual punishment which must fail to accomplish the ultimate protection of society.

No discussion of these questions can disregard the fact that our present system is now functioning along with parole boards, probation departments and that the indeterminate sentence is now in force in Ohio. While these relatively recent developments are without doubt distinct advances in our theory of penology their only practical effect is to permit the mitigation of the prescribed maximum statutory term. The right and power of the legislature to fix and predetermine this maximum term has never been delegated. Without denying that these humanitarian developments are necessary and justifiable we must not forget that the maximum protection of society demands that the criminal sentence result in a decrease in the commission of future crime. A desire to promote the welfare of the offender by providing the legal machinery by which a prescribed statutory term may be decreased does not alter the fact that our present maximum criminal sentences are grossly inadequate to control the recidivism of those who are not permitted to take advantage of mitigation procedure but who earn their release by serving their sentence in full.

It is not difficult to find ample legal provision for mitigating the strict letter of the law. Parole boards may release an offender prior to the expiration date of his full term of sentence. This right is exercised by them only after acquiring complete data upon every individual. Probation applies to a group of carefully selected convicted offenders who appear deserving of aid in accomplishing their

own rehabilitation. In certain cases the judge may permit supervision outside of prison to take the place of incarceration. The indeterminate sentence is designed to allow the release of an offender at such time as he appears qualified to receive it but the maximum term is still operative as the extreme limit of court authority. Even under the indeterminate sentence the offender must be released when he has served the extreme statutory term prescribed for his act. While these are obvious advances over the old system they do not cover the necessity of retaining jurisdiction over an offender for as long a time as he is known to be potentially dangerous.

To point out that a need exists without suggesting any constructive method of meeting it is merely destructive criticism. New benefits must be obtained by expanding our theories as to our right to impose sentence. The first step is to provide for the classification of every criminal offender. It could be initiated in our felony courts. This procedure must permit a pause between conviction and sentence. During this pause every convicted offender must be examined, diagnosed and classified. The first objective would be to separate the normal and subnormal. This must follow conviction and precede sentence. All normal offenders should then be sentenced as provided by law today. There would be available to them all of the present legal machinery which permits mitigation and for the same reasons. Those who are found to be in any degree abnormal or subnormal must come under the scope of a new theory of sentence. Those whose defects can be cured and those whose condition holds out some hope of reacting favorable to intelligently prescribed treatment would be required to undergo whatever regime presents the most hope of remedying their condition. As to them, their release would be permitted by the court only as such time as the examining board were willing to assume the responsibility of recommending it. Others whose abnormalities were such that no method of treatment could be prescribed would remain in custody for as long a time as their condition indicated the existence of potential danger. This could mean that a relatively minor offense might direct the attention of the agencies of law enforcement to incurable defects which would require permanent supervision by the state as the price of adequate social protection.

To obtain adequate data and to make the necessary diagnosis requires time and the training and skill of those who are scientifically trained. No intelligent sentence can be imposed immediately after conviction since the controlling facts must be acquired. The classifica-

tion of individuals depends upon the compilation of scientific data and its use by adequately trained and qualified specialists. While we may feel that the world is overemphasizing specialization we must admit that a trained observer is better able to formulate an intelligent scientific conclusion than a legislature which makes an arbitrary generalization. The effectiveness of the courts depends upon their capacity to accomplish a series of effective individual results and we can never expect uniform results as the product of a generalized criminal law. To relate a criminal sentence intelligently to an individual offender requires that the time, the place and the facilities be provided where this type of work can be done. Each offender immediately after his conviction should be sent to an institution which might be designated a House of Criminal Classification. The prime objective would be to determine how much protection society should have from each offender and how this could best be provided. Such an institution organized, staffed and equipped to classify all types of persons the normal and the curable and incurable defective would at once become a recognized part of the strong arm of the law. After compiling the necessary data and making the necessary diagnosis from it the examining board could submit a report to the trial judge which would contain their recommendations as to the most effective type of sentence. The trial judge would then impose sentence in each case with this information before him. As to all abnormal cases however, there must be no legislative limitation upon the court authority to retain jurisdiction over the person of the offender. The date of sentence termination cannot be prescribed at the time sentence is imposed. It must be within the power of the examining board to make recommendations as to release at such time as the individual's observed condition indicates that it is safe to do so. This right must not be denied upon the basis that it is in conflict with established jurisdictional rights. Under such a system the determination as to when release should be permitted becomes a part of the procedure but may be acted upon at any time. When sentence is imposed under such an arrangement neither the offender, the court or society could have any idea as to the date when society would voluntarily relinquish its control over an offender. If the law will substitute for its present theory of maximum criminal sentences the conception that societies right to be protected from crime is paramount to any abnormal individual's right to release at some arbitrarily predetermined date we will make it possible for court procedure to exercise recidivistic control over a high percentage of criminal offenders.

Modern courts must adopt the conception that both mitigation and continuing jurisdiction play a part in dealing successfully with crime by means of the criminal sentence. There must be no legal barriers which prevent society from receiving the greatest possible benefit from scientific advances which if properly used will augment the social capacity to handle crime. Any advances which are predicated upon the intelligent application of known principles open the door to a broader opportunity for the law to accomplish a higher standard of social protection. The adaptation of the old order to the performance of new duties is an expression of growth which cannot be long denied.