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Disposition Tribunal

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A DISPOSITION TRIBUNAL

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The Individualization of Treatment

If the prevention of crime is the aim of penal treatment then the method of treatment must necessarily be selected in light of the individual delinquent. The immediate aim of treating the individual offender is the means to the more mediate aim of protecting society. The deterrent effects of the particular method (and mode) of treatment selected for an individual offender become of secondary importance. If reformation within an institution is the method chosen, the fact of incarceration and deprivation of liberty itself probably carries a deterrent effect. If non-institutional modes of reform are attempted the deterrent effect upon others may be lessened but the possibilities of reforming the delinquent may be increased.

Greater reliance is being placed upon the method of re-forming the individual criminal. The assumption is made that a program of reform promises a reduction in the amount of crime, and, hence, increased social security. It is supposed that through education and training offenders can become law abiding. This supposition has as yet not been justified. There are relatively few penal institutions which have incorporated a genuinely reformative program.

The fact remains, however, that over ninety-five per cent of the inmates of all federal and state reformatories and prisons will return to society at the expiration of an average sentence from two to three years. The records in recent years have revealed that more than a majority of the released inmates will commit further felonies. Whether or not the punitive spirit of the prisons is responsible for this rate of recidivism one may conclude that the non-reformative methods employed have not deterred the former prisoners. One may argue that the prisons have not failed. They certainly have not succeeded in the majority of cases.

Punishment, deterrence, and incapacitation have been tried as major aims of penal treatment. What the general deterrent effect upon the *potential* criminal has been is simply not known. That

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such methods of treatment have not been successful in restraining more than half of the released prisoners is demonstrably clear. As a practical matter reformative schemes should be tried. The solid knowledge, gleaned from the psychological and social sciences, is pitifully meagre. But what we do know about the process of personality development suggests that constant repression leads to distortion and maladjustment and that kindly "guidance," encouragement and "socially approved self-expression" lead to more normal behavior.

The employment of reformative modes of treatment will necessarily depend upon the needs of the individual. But if the requirements of the individual prisoner are the basic criteria in the treatment program far reaching changes will have to be made in the administration of justice. The individualization of treatment shifts the emphasis from the crime, which traditionally has occupied the central position in the law, to the criminal. The individual offender, his backgrounds and his needs, become pivotal in the criminal law and in the administration of justice.

If the classical views of matching severity of offense with severity of punishment (for retribution or deterrence) are surrendered for the modern purpose of reforming the offender the criminal law must be radically altered. We now turn to some of the major alterations required by the shift in emphasis from the crime to the criminal.

The Disposition Tribunal[2]

The proceedings involved in the determination of the guilt or innocence of a defendant must be differentiated from the disposition proceedings. The methods of ascertaining the facts and the purpose thereof are different for the determination of guilt and the imposition of sentence. The average judge is legally trained. His function is to preside at a criminal proceedings and to see that the rules of criminal procedure which govern the conduct of the trial are not violated. His training and experience have been in the direction of analyzing legal elements, in sifting relevant evidence, in ruling upon questions of law, in charging the jury as to the law.

The task of determining what should be done with the offender is simplified by the criminal law which provides the "appropriate" sentence for the specific crime. In order to know what to do with

[2] Anyone interested in this idea should read Warner and Cabot, *Judges and Law Reform*, 1936.

the offender the judge need but turn to the proper section of the criminal code. An example of what will be found is the following:

Offence	*State*	*Statutory Punishment*
Burglary, first degree	Illinois	Minimum— 1 year
	Texas	" 2 years
Rape, " "	New York	" 1 year
	Texas	" 15 years
Forgery, " "	Washington	" 6 months
	Missouri	" 10 years
Assault, " "	Washington	" 5 years
	Missouri	" 2 years

Some criminal codes, however, grant the courts wide discretion in determining what sentence to impose. What factors determine the exercise of that discretion? There is no way of finding out. With relatively few exceptions there are no written opinions explaining the choice the sentence imposed. However, by comparing the type of sentence imposed for similar offenses by different judges in the same state (or city) some insight is obtained into the parlous state of judicial discretion.

In the district courts of Boston in 1934 wide variation in sentences was observed. The Boston Municipal Court fined slightly over two per cent of the defendants convicted of drunkenness and sentenced over forty-eight per cent to jail. The West Roxbury Court fined nearly thirty-four per cent and the Brighton Court imposed jail sentences upon a little over six per cent. Over forty-five per cent of the defendants were placed on probation in the Brighton Court but only fifteen per cent in the Charlestown Court. In the Roxbury court less than five per cent of the defendants convicted of (chiefly) larceny and burglary are fined whereas twenty-four per cent of the defendants convicted of these crimes receive fines in South Boston.

The arbitrary and even capricious imposition of sentences is matched by the utter failure of the courts to recognize abnormal criminals. The clear cut cases of insanity are easily recognized and the offender is sent to an institution for the criminally insane. But the larger number of offenders afflicted with more subtle forms of mental abnormalities, including the different psychoses, remain

I.

Per Cent Distribution of probation or suspended sentence, with supervision of defendants found guilty by trial courts, by offence and by states. (This reconstructed table is based upon the tables appearing on pp. 81-82 of Judicial Criminal Statistics. 1934.)

State	*Murder*	*Man-slaughter*	*Robbery*	*Aggravated Assault*	*Burglary*	*Larceny Except Auto Theft*	*Auto Theft*	*Embezzlement and Fraud*	*Forgery*	*Rape*
Ohio	11.8	....	22.8	32.5	37.7	40.4	49.4	38.6	48.5	12.8
Pennsylvania	0.8	15.3	13.9	24.4	20.4	28.4	27.0	23.2	20.1	9.2
California	...	30.3	13.6	3.6	34.4	32.0	43.4	34.6	39.7	30.4
Connecticut	...	....	6.3	....	29.0	29.0	....	....	....	....
District Columbia.	...	....	14.4	22.5	23.8	33.7	43.5	....	....	....
Kansas	...	....	3.1	....	12.9	10.8	11.9	....	23.5	....
Michigan	...	....	11.3	....	41.7	40.3	48.3	....	....	24.8
Minnesota	...	....	5.3	....	33.2	20.6	41.7	....	27.8	....
Missouri	...	....	4.7	11.9	12.9	12.5	12.7	10.9	8.9	....
New Jersey	...	....	11.7	29.3	37.8	46.1	43.1	46.2	....	27.6
Wisconsin	...	....	10.9	20.1	46.5	22.9	46.7	17.7	60.1	45.1
Arizona	...	....	....	....	21.3	....	....	....	....	....
Colorado	...	....	....	....	18.8	20.1	....	....	....	....
Iowa	...	....	....	....	17.8	18.0	....	....	....	....
Oregon	...	....	....	....	26.8	23.0	....	....	....	....
Nebraska	...	....	....	....	25.8	22.2	....	....	....	....
New Hampshire	...	....	....	....	21.8	....	....	....	....	....
South Dakota	...	....	....	....	17.0	13.8	....	....	....	....
Montana	...	....	....	....	15.7	....	....	....	....	....
Washington	...	....	....	....	11.1	12.0	....	....	....	....

II.

If we select the state using probation least often and most often for the same offence we obtain the following data.

Offence	*High State*	*Per Cent on Probation*	*Low State*	*Per Cent on Probation*
Robbery	Ohio	22.8	Kansas	3.1
Aggravated Assault	Ohio	32.5	California	3.6
Burglary	Wisconsin	46.5	Washington	11.1
Larceny	New Jersey	46.1	Kansas	10.8
Auto theft	Ohio	49.4	Kansas	11.9
Embezzlement and fraud	New Jersey	46.2	Missouri	10.9
Forgery	Wisconsin	60.1	Missouri	8.9
Rape	Wisconsin	45.1	Pennsylvania	9.2

III.

State	*Probation or suspended sentence with supervision*	*Probation or suspended sentence without supervision*	*Fines, costs or other money payment only*
Arizona	24.2	9.0	6.2
California	33.8	2.5	5.0
Colorado	16.7	0.3	3.7
Connecticut	13.7	7.7	16.2
Dist. of Col.	26.9	..	2.1
Idaho	18.1	0.9	9.9
Iowa	17.5	4.0	15.8
Kansas	14.8	1.6	5.6
Michigan	31.9	1.8	17.4
Minnesota	22.0	2.5	8.7
Missouri	14.4	1.1	13.7
Montana	12.7	3.0	7.7
Nebraska	27.4	2.5	12.6
New Hampshire	15.0	25.3	18.7
New Jersey	37.0	6.4	10.9
New Mexico	13.7	14.9	11.7
North Dakota	9.5	4.0	10.0
Ohio	32.9	1.9	12.2
Oregon	21.9	9.7	11.6
Pennsylvania	22.4	3.0	29.3
South Dakota	19.3	4.5	15.3
Utah	10.8	6.1	7.6
Washington	13.1	1.5	6.7
Wisconsin	10.7	14.6	49.3
Wyoming	13.5	7.1	4.1

unrecognized as they pass through the courts. They are sent to the wrong institutions or placed on probation or fined and in most cases do not receive the attention necessary for their possible adjustment —or incapacitation.

The average lawyer-judge is not prepared and should not be expected to individualize treatment. Where he is given discretion it is exercised haphazardly, in terms of the seriousness of the crime, the moral climate of the community, and personal bias.

If the purpose of treatment is to prevent crime by incapacitation or reformation of the individual offender the problem of who shall be incapacitated or reformed must be left to those qualified in diagnosing human nature and conduct. "Behavior experts" are not magicians. They can't turn gunmen into choir-sopranos. But they *are* more qualified than the average lay judge in evaluating and

interpreting the play of physiological, psychological, and sociological factors in the lives of men. Physicians, social workers, psychologists, psychiatrists are trained in definite techniques. They obtain clinical experience. Through their major activity, over a period of time, they acquire insights into the complexities of character formation and personality growth.

The conclusion is inevitable, for most students of this problem, that the determination of guilt should be left to the courts and that the determination of the sentence should be placed in the hands of a disposition tribunal.

The personnel of such tribunal should consist of lawyers and non-lawyers. A judge should be a member. His function would consist of directing the procedure in accordance with the statute defining the power and function of the tribunal. A second member might be the trial judge. His opinion and impressions of the defendant and evidence would be valuable. He, too, gains insight over a period of years on the bench. The other three members (or other two if the tribunal be limited to three) should represent the fields of psychology, psychiatry, social work and criminology.

Its task would be to "diagnose" the entire situation, to examine the personality of the offender, his backgrounds, his relative danger to social interests, the possibilities of his reform and to determine the method of treatment. Its decision and reasons therefor should be formulated in writing.

Provision would have to be made for periodic reports of the progress of the offender and for his reexamination. At once the need for cooperation with the probation, parole and prison administration is recognized. The disposition tribunal would be represented in every treatment agency.

Wherever wide discretion is given the danger of abuse exists. Therefore, an administrative board such as a disposition tribunal carries the risk of arbitrariness in determining the type and length of treatment. The rights and liberties of the offender must be safeguarded. The statute conferring jurisdiction upon the tribunal would have to be carefully drawn delimiting its power. It would have to be broad enough to confer discretion without at the same time placing the offender at the complete mercy of erring human beings. This might be accomplished through the statute defining the categories under which the offender falls or specifying the exact procedure to be followed by the disposition tribunal.

Provision for an appellate tribunal would act as a restraining

influence upon the decisions of the disposition tribunal. It would compel the latter to be responsible for its conclusions and to be ready to produce the written record in support of them. It would reassure the public that men's liberties are still protected by law rather than by men.[3]

The records of the disposition tribunal after a period of years can be compared with the results. The treatments recommended and the later careers of the offenders subjected to them will indicate the effect of various forms of treatment on different inmates. Mistakes will be observed and corrected. In time the sentencing of offenders will be based upon what has been learned from the past record of recommendations and results.

A disposition tribunal seriously concerned with individualizing treatment would indirectly effect changes in the criminal law. There would no longer be any point in maintaining distinctions between the degrees of an offense, attempts to commit crimes and the actual crimes, or providing in advance specific punishments for specific crimes.

What cases should be referred to the disposition tribunal? Obviously minor offenders, those violating city or police ordinances should be excluded. "Cafeteria courts" meet such problems. At the other extreme, i. e., in murder, kidnapping, and armed robbery, the public, at its present stage of opinion, simply would not support a disposition tribunal. Perhaps, then, the crimes which, in the several states, arouse the deepest indignation and resentment should also be excluded from the jurisdiction of the tribunal. The public generally is sympathetic to the juvenile delinquency courts. The disposition tribunal in intent and procedure is akin to the juvenile delinquency proceedings. The latter courts have jurisdiction of those up to sixteen or eighteen years of age or so. By placing those up to twenty-five years of age under the jurisdiction of the disposition tribunal the age to which juvenile delinquency proceedings apply would be merely raised. Furthermore, the disposition tribunal would thus handle not only the age class committing the largest number of crimes but the type of offenders who next to juvenile delinquents are probably most amenable to treatment.

The Indeterminate Sentence

A disposition tribunal would be interested in protecting society

[3] Hall, *Nulla Poena Sine Lege* (1937) 47 Yale L. J. 165.

by reforming types of individuals who appear reformable, and in incapacitating those who appeared incorrigible. In the absence of knowledge diagnoses may be unsound and society unprotected. Hence, the safeguard of an absolute indeterminate sentence. Society must not be asked to assume the risks involved in the judgments of "behavior experts," but at the same time their opinions as to incorrigibility must not remove the possibilities of reform. The judgment of the disposition tribunal would be an hypothesis—a wise guess, a guess more soundly informed than the irresponsible *conclusions* of the courts, the uninformed opinions of district attorneys, and the senseless punishment provisions of the criminal codes.

The tentative disposition of cases by the tribunal would be subjected to the test of experience. What, in fact, so far as the facts are ascertainable, happens to the inmate? If the judgment of the tribunal should be unsound it could be modified.

Furthermore, inmates may learn to understand that their own behavior and not the type of crime is the primary factor determining the disposition of their case or the length of their stay. There will no longer be an average sentence for a specific offense, so much "time" for this and so much "time" for that crime. The suspicion of graft and the resentment against politics underlying the disparity in terms of inmates will possibly be removed—if the disposition tribunal is unimpeachable in character and scrupulous in their work. Such understanding will have a salutary effect on inmate morale and prison discipline.

Parole boards would function under authority delegated to them by the Disposition Tribunal and their recommendations would be subject to the approval of the tribunal. The parole boards would also have the precommitment data of the individual gathered by the Tribunal authorities. It is reasonable to suppose that the parole board as an agent of the Disposition Tribunal and answerable to it would be more careful in its analysis and less arbitrary in its judgment. The net result would probably be greater respect for its function on the part of the inmate and improved methods in and standards for determining release.

There are several chief objections raised to the absolute indeterminate sentence:

(a) The deterrence of potential criminals as well as the reformation of the inmate should be considered. There is evidence to show that the average period of imprisonment under the minimum-maximum sentence is decidedly less than under the determinate

sentence. It is extremely probable that under an absolute indeterminate sentence periods of confinement will be longer for the "hardened" criminals as well as for many *misdemeanants* who receive sentences of 5 or 10 or 30 days four, fourteen or forty times. The deterrent effects of an absolute indeterminate sentence upon potential offenders would certainly be as great if not more effective than the present definite or minimum-maximum sentences.

(b) It is asserted that a completely indeterminate sentence would create hypocrisy among inmates, that they would conform externally to rules and regulations only to create a favorable impression upon prison officials so as to better their chances for release. This situation is no less true under a minimum-maximum sentence.

(c) It is maintained that an absolute indeterminate sentence is unworkable because the system requires well trained guards, non-political and extremely well qualified parole board members, and, above all, it is unworkable because there are no sound criteria for determining when an inmate is reformed and ready for release. The rejoinder is obvious. Poorly trained guards, corrupt and inefficient parole boards cannot be expected to determine wisely the time of release under a minimum-maximum sentence especially in the absence of sound criteria and when the bare facts of the formal prison record are the chief source of information.

In short, over ninety-five per cent of prisoners are released sooner or later and return to society. Some agency must determine when they are to be released.

At present the legislature fixes *in advance* either a definite term for specific crimes or sets the minimum-maximum terms within which the courts may exercise discretion. Matching offenses with sentences is directly connected with a retributive attitude and may be related to deterrence. It has little, if anything, to do with reforming offenders. The discretion permitted the courts in the minimum-maximum sentences, i. e., judicial individualization, is exercised haphazardly, inefficiently, or mechanically by legislative prescription.

"Scientific" individualization is the remaining alternative. To be sure, a little knowledge is a dangerous thing. But it is not quite so dangerous as a great deal of ignorance. No careful student has ever declared that human behavior is clearly understood. All that the scrupulous social scientist maintains is that there is a body of data and a series of techniques which promise measurably to reduce

the tragic and scandalous errors involved in the current mass-treatment of disposing of offenders.

Treatment and Law

Criminologists, psychiatrists and social workers who argue that the criminal act should be ignored and attention focussed only upon the individual criminal fail to sense the risk of personal security involved in that position. The positivists, I believe, are sound in the contention that the personality of the offender and his "social dangerousness" are important elements which should be considered. Complete abandonment of the rule *nullum crimen sine lege* would expose individuals to the whims of the court, city and state officials who identify themselves with the law and to the political currents of the day. The stability of social order and the security of person may be more important than repressing individuals considered to be socially dangerous by judges whose discretion is not bound by legislation defining specific crime. There is no guarantee that we will agree with the judges on what constitutes socially dangerous acts nor upon the standards used to identify socially dangerous individuals. The criminal law needs overhauling. Its basic assumptions need to be re-examined. Wider and perhaps narrower categories of crime need to be defined. Above all, we must not abandon the law. No people is safe unless rules of law limit the judgments of men.

The changes in our knowledge of character and conduct have shifted emphasis from the crime to the criminal. This shift challenges the maxim "no punishment without specific laws." The contributions of modern science to progressive penal ideas of treatment cannot be ignored. But treatment should not depend exclusively upon the personality of the offender any more than correction should depend upon the anti-social nature of the act or social dangerousness of the individual. Just as specific criminal legislation protects us against the arbitrariness in the administration of the law on the side of content, so our being subjected to treatment should be protected through legislation by clearly defining the limits within which various forms of treatment may be imposed. Otherwise the individualization of treatment can come to mean that anything can be done to anyone convicted of a crime.

It does not follow that the other extreme of the classical school should be supported; namely, that for every crime there should be

a specific punishment. The development of the indeterminate and suspended sentence, the reduction of pleas, probation, parole and "good time" laws indicate how far we have gone in modifying the classical view of similar punishments for similar offenses. We know now that such view which removed discretion from the judges did not make for fair and uniform justice in any real sense. Indeed we want to return the discretion to the courts or a disposition tribunal which Beccaria urged be taken away. We wish to treat the individual and not to punish the crime. We hope that the discretion given the sentencing agency will be exercised "soundly," in light of the "best" available knowledge. There is no guarantee, however, that sentencing boards will possess wisdom nor that there will be agreement on what knowledge is "best." Individualization of treatment can lead to concentration camps as well as to psychiatric therapy.

It is not a question of opposing rigid legal rules against enlightened discretion, but of relating law and discretion to each other. There can be no final answer given through logic alone. The limits, areas and techniques of discretion and rule must be empirically discovered through cautious and courageous change.