

Spring 1941

## Current Notes

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### Recommended Citation

Current Notes, 31 *Am. Inst. Crim. L. & Criminology* 738 (1940-1941)

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## CURRENT NOTES

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### Indeterminate Sentence for U. S. Courts?

—In the Annual Report of the Attorney General of the United States for the year 1940, Hon. Robert H. Jackson had an opportunity to recommend the adoption of the indeterminate sentence plan for the Federal System. It is interesting to note that in some states, Illinois for example, where the indeterminate sentence plan is in question, the newspapers gave scant attention to Mr. Jackson's statement although it is of great importance. He said:

"Inequality and disparity between sentences imposed in different districts for similar offenses involving like circumstances is a troublesome and vexatious problem that has been receiving considerable attention for the past few years. It is obviously repugnant to one's sense of justice that the judgment meted out to an offender should be dependent in large part on a purely fortuitous circumstance; namely, the personality of the particular judge before whom the case happens to come for disposition. While absolute equality is neither desirable nor attainable, a greater approach to similarity of treatment than now prevails appears to be desirable, if not essential. As an illustration, I may call attention to the fact that in some districts certain crimes are generally penalized by either a fine or probation and never by imprisonment, while the same offenses in other districts are punished by incarceration for a considerable period. Some judges in some districts impose a term of imprisonment of short or at best of moderate duration for offenses which by other judges in the same or other districts are punished by long terms of imprisonment. These differences are too wide to be explained merely by distinguishing circumstances surrounding the individual offenses or the prior record and personality of the defend-

ants. They are due undoubtedly, to very large extent at least, to differences between the personality and points of view of individual judges.

"The Department of Justice has instituted the publication of a bulletin for the information of the United States attorneys and of Federal judges, listing the sentences that are imposed from day to day in the various Federal courts throughout the country, summarizing in each instance the salient facts so far as they are available. It is hoped that the data so gathered may possibly be of assistance in reducing at least the more marked disparities. The information may also prove useful as research material for students of criminology and penology.

"Basically, however, a change in the present system seems essential. In England some of the inequalities in sentences have been minimized by empowering the Court of Criminal Appeals to revise sentences. Such authority might well be conferred on the Circuit Court of Appeals and the United States Court of Appeals for the District of Columbia. This Department has already recommended legislation to that end.

"A more fundamental question is whether it would not be in accord with modern advances in the administration of criminal justice to withdraw from the courts entirely the power of fixing sentences. A trial judge has but restricted time and limited facilities for the purpose of apprising himself of all of the facts that should be considered in determining the penalty that should be imposed in any one case. In addition to considering the facts of the offense and the defendant's prior criminal record, a thorough study should be made of his background, environment, training, education, and experience. The

defendant's aptitude and his physical and mental condition must likewise be considered in reaching a determination as to the type of institution and length of treatment which is apt to have the best influence on the defendant. A number of States have enacted indeterminate-sentence laws, the effect of which is to withdraw from the courts, in whole or in part, the authority of determining the duration of imprisonment to which any defendant should be subjected. In some States every person convicted of an offense and sentenced to imprisonment is deemed to be sentenced to confinement for the maximum period permitted by law for the crime of which he has been found guilty. In other States, the court fixes a minimum and a maximum sentence within the limits permitted by law. In both cases an administrative board, after making a comprehensive study of all of the factors that should enter into the determination of the matter, later fixes the exact duration of imprisonment that should be served by the defendant.

"The Congress some years ago installed an indeterminate-sentence system in the District of Columbia, where on the whole it has operated successfully, needing only some minor adjustments from time to time.

"The Judicial Conference, which convened on October 1, 1940, recommended the adoption of the indeterminate plan of sentences for all criminal cases. The specific plan favored by the Conference is that in which all sentences are deemed to be for the maximum terms fixed by law, and a definite term of imprisonment to be served by the defendant is thereafter fixed by an administrative board after a suitable study of the case.

"The resolution of the Judicial Conference on this point reads as follows:

"That the Conference favors the adoption of the indeterminate plan of sentence in criminal cases, along the line of the system set out in Draft B prepared in the Attorney General's Office, with the reservation that the Conference prefers a system whereby a board in each circuit or at each Federal prison shall exercise the powers of a parole board.

"It gives me great pleasure to concur in that recommendation of the Conference in this respect and to urge the enactment of appropriate legislation to that end."

**Wire Tapping Comment**—Another interesting statement appeared in the recent Report of Attorney General Jackson and because of its peculiar importance it is printed below. It deals with the wire tapping decisions of the United States Supreme Court (See 30 J. Crim. L. 945).

"Section 605 of the Communications Act, approved June 19, 1934 (U. S. Code, title 47, sec. 605), contains a provision that 'no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person.' It is reasonable to assume that the intent of Congress in enacting this prohibition was to prevent unauthorized persons from intercepting radiograms or telephone conversations and to penalize telegraph and telephone operators who may divulge the contents of a message which goes through their hands or which they overhear.

"In view of the broad language of the statute, however, the Supreme Court, in December, 1937, held that this provision rendered inadmissible in a criminal case in a Federal court evidence obtained by Treasury agents by means of tapping telephone wires. *Nardone v. United States*, 302 U. S. 379. This case was limited to interstate telephone conversations. By a decision rendered 2 years later, however, the ban was extended to intrastate communications as well. *Weiss v. United States*, 308 U. S. 321. In June, 1940, the Circuit Court of Appeals for the Second Circuit carried the prohibition still further and applied it to a situation in which one of the parties to a telephone conversation, without the knowledge of the other party, had the conversation mechanically recorded. *United States v. Polakoff*, 112 F. (2d) 888.

"Prior to December, 1937, when the first *Nardone* case was decided, interception of telephone conversations was considered by law-enforcement officers a proper and legitimate form of investigation. In principle it is no different from any other form of eavesdropping or undercover investigation. Many serious crimes were solved by this means. The validity of such a practice had been sustained by the Supreme Court, which held that it did not constitute a violation of any constitutional guaran-

ties. *Olmstead v. United States*, 277 U. S. 438.

"Realizing the possibilities of abuse, however, the Department of Justice resorted to this practice but rarely, and then only under supervision of higher authority and solely when it appeared indispensable for the purpose of solving a crime of exceedingly grave character, such as kidnapping.

"Wire-tapping presents a problem of proper balance and nice adjustment as between rights of individuals on the one hand and the needs and interests of society on the other. Unrestrained and uncontrolled wire-tapping, even on the part of law-enforcement officers, would be intolerable. It would constitute an unwarranted intrusion into the right of privacy and would be subject to serious abuses. On the other hand, to prohibit law-enforcement officers from intercepting messages no matter what the circumstances may be, is to guarantee the safe use of the channels of wire and wireless communications to spies and criminals. One would not think of providing that a police officer shall not stop a suspect who is driving an automobile on the highway, and yet today the criminal and the spy may use the highways of communication without restraint or even surveillance.

"Experience has shown that monitoring of telephone communications is essential in connection with investigations of foreign spy rings. It is equally necessary for the purpose of solving such crimes as kidnapping and extortion. In the interests of national defense, as well as of internal safety, the interception of communications should, in a limited degree, be permitted to Federal law enforcement officers. In order to preclude the possibility of abuse, the cases in which and purposes for which such mode of investigation should be permitted should be strictly limited and confined to a narrow scope. In addition, suitable safeguards should be afforded, such as the requirement of authorization in each instance by some higher authority.

"I recommend legislation to carry out the foregoing recommendation. I may call attention to the fact that at this writing there is pending before the Senate, House Joint Resolution 577, which has already passed the House of Representatives, and which, subject to specified limitations,

would permit the interception in certain instances of telephone conversations in connection with investigations relating to espionage, sabotage, and other similar matters relating to national defense.

"I also desire to call attention to the fact that in 1938, during the third session of the Seventy-fifth Congress, a bill (S. 3756) dealing with this subject was favorably reported by the Senate Committee on Interstate Commerce and the House Committee on Interstate and Foreign Commerce and passed both Houses, but failed to become law owing to a slight difference in the phraseology of the bill as it passed each House. This legislation would have authorized Federal law-enforcement officers to intercept any communications in connection with any criminal investigation, upon authorization of the head of an executive department or independent establishment."

**Illinois Plans**—The Youth Correction Authority Act proposed by the American Law Institute is being considered by many of the States. In Illinois, Governor Dwight H. Green announced on February 28 that the Youth Correction Authority would be a division of the department of public welfare in a proposed reorganization of state government. Welfare Director Rodney H. Brandon sponsored the proposal for adoption of the Y.C.A. plan just as he sponsored the idea of hiring graduates in sociology as house fathers at the St. Charles training school. He is chairman of the Governor's committee which drew up the plans for the reorganization of the welfare department and the creation of a department of public safety.

The new public safety section of the state government, if approved by the general assembly, will replace the present parole board with five officials of a new department division, the division of correction. Those five will be the superintendent of prisons, the superintendent of paroles, the superintendent of parole supervision, the superintendent of crime prevention, and the state criminologist. These five would sit together in all parole cases, but their verdict would be subject to the approval or veto of the director of public safety.

**Model Sabotage Prevention Act**—As an outgrowth of the Federal-State Conference on Law Enforcement Problems of National

Defense the Model Sabotage Prevention Act was drafted. Professor Sam Bass Warner served as reporter. An explanation of the Act was prepared by Professor Warner and printed in the February, 1941, Harvard Law Review—LIV:602. In the same issue was a criticism by three New York lawyers, Messrs. Pressman, Leider and Cammer. The most important parts of the Act are printed below.

*"Section 2. Intentional Injury to or Interference with Property.*

"Whoever intentionally destroys, impairs, injures, interferes or tampers with real or personal property with reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, shall be punished by imprisonment for not more than ten years, or by a fine of not more than ten thousand dollars, or both: *Provided*, if such person so acts with the intent to hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, the minimum punishment shall be imprisonment for not less than one year.

*"Section 3. Intentionally Defective Workmanship.*

"Whoever intentionally makes or causes to be made or omits to note on inspection any defect in any article or thing with reasonable grounds to believe that such article or thing is intended to be used in connection with the preparation of the United States or any of the states for defense or for war, or for the prosecution of war by the United States, or that such article or thing is one of a number of similar articles or things, some of which are intended so to be used, shall be punished by imprisonment for not more than ten years, or a fine of not more than ten thousand dollars, or both: *Provided*, if such person so acts or so fails to act with the intent to hinder, delay or interfere with the preparation of the United States or of any of the states for defense or for war, or with the prosecution of war by the United States, the minimum punishment shall be imprisonment for not less than one year.

*"Section 4. Attempts.*

"Whoever attempts to commit any of the crimes defined by this act shall be liable to one-half the punishment prescribed for the completed crime. In addition to the acts which constitute an attempt to commit a crime under the law of this state, the solicitation or incitement of another to commit any of the crimes defined by this act not followed by the commission of the crime, the collection or assemblage of any materials with the intent that the same are to be used then or at a later time in the commission of such crime, or the entry, with or without permission, of a building, enclosure or other premises of another with the intent to commit any such crime therein or thereon shall constitute an attempt to commit such crime.

*"Section 5. Conspirators.*

"If two or more persons conspire to commit any crime defined by this act, each of such persons is guilty of conspiracy and subject to the same punishment as if he had committed the crime which he conspired to commit, whether or not any act be done in furtherance of the conspiracy. It shall not constitute any defense or ground of suspension of judgment, sentence or punishment on behalf of any person prosecuted under this section, that any of his fellow conspirators has been acquitted, has not been arrested or convicted, is not amenable to justice or has been pardoned or otherwise discharged before or after conviction.

*"Section 6. Witnesses' Privileges.*

"No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court, magistrate, referee or grand jury upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this act or attempt to commit such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him by the state may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be

received against him, upon any criminal investigation, proceeding or trial, except upon a prosecution for perjury or contempt of court based upon the giving or producing of such testimony.

*"Section 7. Unlawful Entry on Property.*

"Any individual, partnership, association, corporation, municipal corporation or state or any political subdivision thereof engaged in, or preparing to engage in, the manufacture, transportation or storage of any product to be used in the preparation of the United States or of any of the states for defense or for war or in the prosecution of war by the United States, or the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water, or any of said natural or artificial persons operating any public utility, whose property, except where it fronts on water or where there are entrances for railway cars, vehicles, persons or things, is surrounded by a fence or wall, or a fence or wall and buildings, may post around his or its property at each gate, entrance, dock or railway entrance and every one hundred feet of water front a sign reading 'No Entry Without Permission.' Whoever without permission of such owner shall wilfully enter upon premises so posted shall be punished by imprisonment for not more than ten days, or a fine of not more than fifty dollars, or both.

*"Section 8. Questioning and Detaining Suspected Persons.*

"Any peace officer or any person employed as watchman, guard, or in a supervisory capacity on premises posted as provided in section 7, may stop any person found on any premises to which entry without permission is forbidden by section 7 and may detain him for the purpose of demanding, and may demand, of him his name, address and business in such place. If said peace officer or employee has reason to believe from the answers of the person so interrogated that such person has no right to be in such place, said peace officer shall forthwith release such person or he may arrest such person without a warrant on the charge of violating the provisions of section 7; and said employee shall forthwith release such person or turn him over to a peace officer, who may arrest him without a warrant on the charge of violating the provisions of section 7.

*"Section 9. Closing and Restricting Use of Highway.*

"Any individual, partnership, association, corporation, municipal corporation or state or any political subdivision thereof engaged in or preparing to engage in the manufacture, transportation or storage of any product to be used in the preparation of the United States or any of the states for defense or for war or in the prosecution of war by the United States, or in the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water, or any of said natural or artificial persons operating any public utility, who has property so used which he or it believes will be endangered if public use and travel is not restricted or prohibited on one or more highways or parts thereof upon which such property abuts, may petition the highway commissioners of any city, town or county to close one or more of said highways or parts thereof to public use and travel or to restrict by order the use and travel upon one or more of said highways or parts thereof.

"Upon receipt of such petition, the highway commissioners shall set a day for hearing and give notice thereof by publication in a newspaper having general circulation in the city, town or county in which such property is located, such notice to be at least seven days prior to the date set for hearing. If after hearing the highway commissioners determine that the public safety and the safety of the property of the petitioner so require, they shall by suitable order close to public use and travel or reasonably restrict the use of and travel upon one or more of said highways or parts thereof: "Provided, the highway commissioners may issue written permits to travel over the highways so closed or restricted to responsible and reputable persons for such term, under such conditions and in such form as said commissioners may prescribe. Appropriate notices in letters at least three inches high shall be posted conspicuously at each end of any highway so closed or restricted by such order. The highway commissioners may at any time revoke or modify any order so made.

*"Section 10. Penalty for Going upon Closed or Restricted Highway.*

"Whoever violates any order made under section 9 shall be punished by imprison-

ment for not more than ten days, or a fine of not more than fifty dollars, or both.

“Section 11. *Rights of Labor.*

“Nothing in this act shall be construed to impair, curtail or destroy the rights of employees and their representatives to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.”

**Y. C. A. Questions**—The Youth Correction Authority Act has attracted nationwide attention and naturally there have been many inquiries concerning it. Those who have not read the model act itself may place orders by writing to the American Law Institute, 3400 Chestnut Street, Philadelphia, Pennsylvania. A list of the research reports and other publications developed during this investigation will be furnished upon request. Those who have studied the act but who have questions concerning its scope and legal effects will receive much help from a recent publication of the American Law Institute, “Twenty-seven Questions and Their Answers About the Plan for a Youth Correction Authority.” (10c.) This was compiled for the Institute by Professor John Barker Waite of the University of Michigan Law School. The content is indicated by the questions asked. They are:

What aspects of the law are particularly affected by the Correction Authority Act?

Why is it necessary to make any change in the treatment of convicted youths?

Why are the changes made by the Act confined to the treatment of youthful convicts?

Could not the punitive system be made more effective by increased certainty of conviction and greater severity of punishment?

What is the reason for the failure of the punitive system?

How does the proposed plan differ from the traditional system?

Are not the objectives stated in the preceding answer based on theory, without much probability of practical attainment?

Could not the rehabilitative ideas of the proposed plan be carried into effect as a modern development of the punitive system, without setting up a new administra-

tive agency such as the Correction Authority?

Would it not be simpler and equally satisfactory merely to extend juvenile court jurisdiction to cover these youthful offenders?

How will existing prison administrators, parole boards, probation officers and other officials and employees under existing methods be affected by adoption of the Correction Act?

Can the Authority put a youth convicted in one part of the state in an institution supported by taxation of some other part?

How will the use of probation and parole and the employment of probation and parole officials be affected by adoption of the Act?

What control over private agencies is given to the Authority by the Act?

How will adoption of the Act affect private agencies now engaged in the correction of youthful wrongdoers?

How will adoption of the Act affect organizations engaged in pre-crime prophylaxis?

If the Authority is given no control over existing institutions and agencies, by what means can it carry out its purposes?

For how long can convicted youths be held in custody under the Correction Act?

Should not the Act set out specifically the particular conditions upon which the court must rest its finding of continued dangerousness and consequent unfitness for release?

What are the standards by which the authority will determine a youth's fitness for release after commitment?

Is it not both unwise and unconstitutional to make the period of confinement depend upon the judgment of a board such as the Correction Act creates?

If release by the Authority is dependent upon conduct probabilities for which there are no standards, is there not danger that some youths will be kept under supervision, or even in confinement, unnecessarily long?

What is the justification for punishing one youth by possible imprisonment for several years or even for life while another, whose offense may have been far more serious, is released after brief confinement?

Will not the effectiveness of the proposed plan depend upon the character of the men who constitute the Authority? And is it

not probable that under existing political conditions these men will be of a high type?

Will not the cost of operation of the proposed plan be prohibitive?

Some youthful criminals are already vicious and hardened; would it be possible to keep them safely confined in mere trade schools, or correction farms, or anything of that sort?

If we turn the penitentiaries into schools, and otherwise make them into pleasant places, will we not lose the value of threatened punishment as a deterrent of original crime?

How effective will the corrective plan be in preventing repeated crime?

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**The Decline of the Jury**—Writing for the Survey Graphic William Preston Beazell, Director of the Citizens Committee on the Control of Crime in New York, discussed criminal statistics under the title, "What Do We Know About Crime?" He found two "very curious" facts from his data. One was the commanding position adolescents have taken in major crime and the other was "the continued and accelerated thrusting out of the jury from its traditional place in our criminal courts." He said: "This much is true: the fundamental character of our criminal courts is being altered. They are becoming administrative agencies, and less and less places of judgment based on exploration and appraisal of the facts involved.

"It is the plea of guilty that is shouldering trial by jury out of the position it has held in our polity for a score of generations. If the plea of guilty meant complete acknowledgment, no one could quarrel with its acceptance, or doubt that its use should be extended. But in practice this is not at all what the plea of guilty means.

Essentially the plea of guilty is a seeking after a bargain. The defendant offers it in the hope of conviction of a misdemeanor instead of a felony, of conviction of a lesser instead of a higher degree of felony, of a lighter sentence, or of release on probation. The prosecutor accepts the offer (or makes it himself) because his case against the defendant is weak and a jury's reaction to it would seem to be doubtful; because conditions in his office call for as many 'quick' dispositions as possible, or for actually corrupt reasons.

"At many times and at many places throughout the United States the 'bargain' plea has been, and still is, the commonest form of fulfillment of 'contracts'—agreements entered into outside the court as to what is to happen in court later on when a defendant with 'influence' comes to the bar. When justice cannot be thwarted through the police, the arraignment magistrate, or the grand jury, the 'bargain' plea remains. Often, for the sake of appearances, it is 'contracted' for in preference to any of the other avenues of escape.

"Nevertheless, there is a good side to the 'bargain' plea. There are cases in which a man whose guilt was beyond any moral doubt might legally still escape any punishment if he were not willing to bargain. With first offenders it is often the part of justice no less than of mercy to permit light punishment and set the defendant on his way toward a better life without the mark of a felon upon him. Actual trial must be within the mathematical terms of the law; if we strive for punishment of the criminal rather than for the crime itself, the plea of guilty affords a way toward that the directness of which must be conceded."