

1942

## Dead-End Justice

Joseph N. Ulman

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Joseph N. Ulman, Dead-End Justice, 33 J. Crim. L. & Criminology 6 (1942-1943)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## DEAD-END JUSTICE

Joseph N. Ulman<sup>1</sup>

Even the readers of this Journal would be surprised if on opening their newspapers tomorrow they should find an article running somewhat as follows:

Sixteen hundred and fifty criminals, many of them desperate characters with records of three or more previous convictions, were turned loose yesterday to take up their war against society. Among them were killers, robbers, burglars, and thieves. You and other decent and law-abiding citizens will be their next victims. They roam the countryside and infest the cities seeking new opportunities for crime.

Yesterday's jail-delivery might not seem so menacing if we did not know from past experience that many of these convicts will commit new crimes. Imprisonment has taught them nothing except skill in their trade. Confined for a few months or years in corroding idleness, they have swapped experiences and trained one another in the techniques of the under-world. They were turned loose yesterday. In a short time they will be at it again, robbing, knifing, shooting, making quick get-aways in stolen automobiles. Then states and cities will be put to the expense of finding and arresting them, trying them in the criminal court, locking them up again in prison. Some of their victims will be slugged, some will be killed. *You* may be one of these. Do you like the prospect?

A striking fact about these ex-convicts is the proportion of very young men among them. A great part of yesterday's crop of sixteen hundred and fifty was made up of youngsters between the ages of 16 and 25. These adolescents have already committed every kind of crime. They have done time for it, have "paid their debt to society"; and now society, having wreaked its vengeance, has set them free to go and to sin again. You may be sure they will take advantage of their opportunity. These twigs have been bent very crooked indeed; they will grow into boughs still more crooked. The weary round of crime, arrest, imprisonment, and release, followed by crime, arrest, imprisonment, and release will be repeated again and again until these young convicts are old convicts or until they die in the electric chair or on the gallows. Meanwhile society will pay, and pay, and pay.

But you will not read the above article in your favorite newspaper tomorrow. The facts it states are not news. They are not news because the release of over sixteen hundred convicts yesterday was no exception. The same thing happened day before yesterday, will happen today, and tomorrow, and the next day. These ex-convicts form an ever growing indigestible mass of corruption in our body politic, the material of the successive waves of crime that menace our very civilization. The authorities are helpless, for these thousands upon thousands of released convicts are not the product of political upheaval or executive clemency. They are simply the daily turnover of America's prison population, set free because their terms have expired. So it is useless for editors to blame judges or

<sup>1</sup>Judge of the Supreme Bench of Baltimore City. Associate Editor of this Journal.

for judges to criticize parole boards. The public suffers and pays.

What happens every day is not news. The crime news you will find in the press is quite different. You are regaled with the sensational details of some spectacular murder case or by the shocking particulars of depravity displayed by a public official who accepts a bribe. Your newspaper assumes naively that the businessman who did the bribing was an innocent victim of circumstances,—but we won't go into that. This much is certain:—the crime news in your paper is concerned primarily with one or two lurid cases and great emphasis is placed upon the length of sentence that might be imposed or that actually was imposed. If the sentence was for less than twenty years there is a subtle suggestion either that the presiding judge is a weak sentimentalist or that the laws of your state need amending. Throughout, the news is presented in a manner calculated to arouse your resentment against the criminal and to imply that the purpose of criminal law is to *punish* adequately.

“Let the punishment fit the crime!” We go on singing the silly song as though it makes sense. Not only singing it, but acting upon it. Only our tender-mindedness has restrained us from applying it literally in all cases. There are a few exceptions however. In Maryland our law still retains the whipping-post as a possible penalty for wife-beaters; occasionally a Maryland judge decides to use it. A little one hundred and ten pound woman comes into court, her eyes blackened and her jaw still swollen. The prisoner at the bar weighs a hundred and sixty; the only mark he bears is the bleary eye that proclaims him an habitual drunkard. It is his second offense of the same kind. The judge is indignant. Partly in anger, partly in despair, he imposes a sentence of five lashes at the whipping-post. He enjoys a sense of relief, almost of pleasure. The brute gets his just deserts; the majesty of the law is vindicated. And the citizens applaud. I wish I could add that husbands no longer beat their wives in Maryland. But they do. And men still steal chickens in Delaware where convicts are whipped for that heinous crime. These are straws showing that the purpose of the criminal law is conceived largely, if not primarily, in terms of punishment. The newer concept of its purpose as primarily protective of society and corrective of the corrigible has not yet had wide public acceptance.

Bearing in mind that legal rules and administrative practices must conform to generally accepted standards if they are to prove effective, this is important. When the Italian Beccaria, toward the close of the 18th Century, startled the world into planning a system of penology in which legally pre-determined measures of punishment took the place of arbitrary judicial vengeance, he succeeded because thinking men had come to revolt against the cruel excesses under the old system. In time his system became crystallized into the formula,—“punishment to fit the crime.” Such a formula set to

music and tripping from the tongues of the thinking and the unthinking alike, gets to be something in the nature of a folk-way, ingrained and almost impossible to eradicate. But somehow or other we who believe in the devices of modern penology must get more people to see things our way. We must invent a slogan that will say "Let us first of all protect society, and let us do it by making the treatment fit the man." This is too long and awkward for a slogan. Even if Irving Berlin were to set it to music I'm afraid it would never become popular. Nevertheless, we must put across something like this if we are to make real progress.

The outstanding feature of the crime problem in this country today is the great number of crimes against both the person and property committed by youngsters between the ages of seventeen and twenty-three. Let the cause for this be what it may—the breakdown of parental authority, the decay of the influence of organized religion, the movies, the radio, the economic disturbance incident to the war, the easy getaway supplied by the automobile, or what you will. I am not for the moment concerned with causes nor with ultimate cures. These are problems for the social engineer rather than for the penologist. The fact remains that the youth group furnishes a disproportionate and a growing number of law-breakers, and that our ways of dealing with these offenders are singularly ineffective and unutterably stupid.

We who sit on the bench and apply the old formulae of punishment because no better means are available are shocked by a realization of our own futility. When we discover that 35% of all crimes of violence are the work of post-adolescents less than 25 years of age, and that our punitive methods fail to such a degree that between 40% and 60% of the offenders commit new crimes within a few months after their release from prison, we feel that something must be wrong. Sometimes a dramatic case speaks to us more insistently, more clearly.

"Gimme a fag. I'm feeling kind'a limp." I heard these words from behind the mahogany screen that forms a passageway from our criminal court-room to the lock-up. They were spoken by Richard Callaway. A few moments earlier, I had asked him if he had anything to say before sentence was pronounced. "Nothing, except that I ask the mercy of the court," was his reply as he drew himself up with heels together and chest thrown out in perfect military posture. And I had replied:

"The sentence of the Court is that you be taken hence by the Sheriff and delivered to the Warden of the Maryland Penitentiary, in whose custody you are to remain until such time as the Governor by his warrant shall designate, at which time, and at the place which under the law has been provided, you shall be hanged by the neck until you are dead."

There really was nothing else I could have said. A jury had

found Callaway guilty of murder in the first degree. With two companions he had tried to shoot his way out of the Maryland Penitentiary where he was serving a term of life imprisonment for murder committed in the course of a pay-roll robbery four years before. Now he had killed a penitentiary guard who tried to block his escape. Under the law I had the choice of imposing a sentence of life imprisonment or of hanging. But he was already a prisoner for life so an inexorable logic left me no choice at all. And yet I could not keep myself from wondering about the workings of man-made justice as reflected in this case. Three weeks later, when I was told that Callaway had walked to the gallows with a firm step, scorning the merciful opiate offered him and smiling to the sheriff when the noose was adjusted round his neck, I wondered again. And I shivered a little when I tried to appraise the blame for what had happened.

For Callaway had become for me a symbol, a synthesized type of what our punishment penology can do to a young man. On the day of his death he was not yet twenty-four years old; almost six of those years had been spent in prison. He was first arrested when seventeen, for the theft of an automobile. He was too old for the Juvenile Court, so his case was tried in the Criminal Court of Baltimore. A kindly judge construed the evidence as proof of "unauthorized use of a motor-vehicle," a lesser offense than larceny and sentenced Callaway to thirty days in jail. His next crime followed swiftly upon the heels of his release. This time he not only took an automobile but ran it into a tree and wrecked it when a motorcycle policeman attempted to arrest him. This case was tried before me. I gravely lectured the prisoner upon his failure to learn a lesson from his former brief jail experience, and sentenced him to six months in the Maryland House of Correction. And that was the beginning of his end. Despite its name, our House of Correction is simply an old-line congregate type prison, housing indiscriminately men of all ages convicted of all kinds of crime. I sent Callaway there for six months; and there he worked, and ate, and spent hour after hour of enforced idleness with his teachers. The prison was overcrowded at the time, so Callaway was lodged in a cell with two old-timers, one a bank-robber, the other an habitual drunkard whose ideas of mine and thine were not too clear even when he was sober. It happened that all three cell-mates were released at about the same time. The pay-roll robbery with its attendant killing followed soon after; and the three participants were promptly apprehended. Because of Callaway's youth—he was still only eighteen—he was favored with a sentence of imprisonment for life.

There he was in the penitentiary, a healthy young male animal craving freedom even as you and I. He was of better than normal

intelligence, his physical condition was excellent. When an opportunity to shoot his way out presented itself, his reaction was that of a lion in a cage that sees a door carelessly left ajar. But he was caught; and the guard who blocked his escape was dead. So the jury heard the evidence and rendered its sworn verdict; and the judge did his sorrowful duty. But the judge could not forget that a few years before he himself had sent Callaway for six months to the House of Correction; and he knew that the remainder of Callaway's journey to the gallows was a natural ending of the trip then begun.

Do not think that these reflections upon the Callaway case indicate a morbid mood of self-accusation. This case was just one of some seventeen hundred that passed before me in kaleidoscopic review that year,—just part of my day's work. I have learned long ago that the day's work must be done and must be done with the tools at hand. But this knowledge does not make me believe that these tools are the best possible tools, nor that we ought not strive to make them better. Actually, I am more concerned about what crime reporters think of as the ordinary, run-of-the-mine, trivial case than the spectacular case that gets into the newspapers. When Callaway stole his second automobile and I sent him to the House of Correction I started him straight on his path to the gallows. The public paid no attention to that case, nor to the still earlier one when he was sent to jail for thirty days. Nor did we who are supposed to administer justice give these cases very intensive thought; we simply followed the conventional pattern, making the punishment fit the crime. Now it is quite possible that Callaway at seventeen was beyond redemption. He may have been one of those unfortunates marked for the gallows when in his cradle. But nobody tried to find out. For all we knew, he may have been susceptible of easy and complete reformation, if only the proper remedies had been applied. It is the ordinary case, the run-of-the-mine case, that is really the important case. The sensational crime, the crime that shocks the public and gives the pattern to our legal thinking and our penological system is, thank goodness, the exceptional crime. For every one gangster, for every one man who makes a business of war upon society, a hundred youthful Callaways come into our criminal courts, charged with minor offenses. Once there, though, we proceed to deal with them so unwisely, so haphazardly, so without consistent plan or purpose, that we do our best to drive them into the underworld. Shall we ever realize that a young offender caught by the police is at a cross-roads? If only we can learn to think straight, to plan intelligently, to carry out our plans vigorously and honestly, we may find that the discovery of a first offense is an opening of the door of opportunity, not the beginning of a descent into a life of continued crime.

First of all, we must put punishment into the background. It is so easy to get "mad," so easy to vent a feeling of rage. Remember the whipping-post and the wife-beater—or the chicken-thief, if you live in Delaware. But angry judges are not always socially useful judges, nor are punished criminals always reformed criminals. And it is an unprovable assumption to say that punishment as such deters others any more than it prevents repetition of offense by the individual who has suffered it. The simple fact that more than half the 160,000 men who are today in America's prisons and penitentiaries are not there for the first time is enough to prove that our conventional methods do not work.

Let us begin, then, with my slogan that isn't a slogan. We want to protect society and we want to reform and rehabilitate the offender if we can. We fail because we try to erect a modern office building with tools and materials not fit to build a wooden hen-house. Society is still so intent on punishing offenders that it fails to provide the means to make law-abiding citizens of them.

You deny this? You say society has set up probation departments, has established reformatories, has provided for the release of prisoners under supervision on parole? Yes, it has done these things. But, oh, how half-heartedly! Travel the length and breadth of the land. Everywhere you will find maximum-security fortress-prisons, most of them over-crowded, many of them manned by politics ridden wardens and guards to whom a prisoner is a wild beast to be confined safely in a cage. Examine probation departments, inquire about parole. Nearly everywhere you will find these step-children of penology struggling under case-loads so heavy that intensive social case-work is not even to be thought of. Worse than that, in many places you will find the ugly hand of politics strangling their efforts, broken down party-hacks with pull set to do work that calls for the finest equipment of trained professional skill. Go into our reformatories. Many of these are prisons that smell no sweeter for the high-sounding name we have given them. And the whole machinery creaks and groans because, like Topsy, it has "just growed." There is no consistent philosophy behind it, no plan about its construction. It creaks and groans, it spews out daily a mass of human wreckage that might have been saved. And you and I, we law-abiding people, we pay the price for our own folly.

### *A Way Out*

But I believe there is a way out and I see important beginnings toward real progress. The first step lies in a changed point of view. The general public must be enlightened. We need public realization that penological planning and the substitution of system for chaos lie at the bottom of any effective war against crime. We must make people, particularly people in legislatures, realize that in the long

run a planned and integrated program will pay, that it will pay not only in human values but in dollars and cents. Our traditional reliance upon prison walls, our blind superstition that the way to make men fit for liberty is to deprive them of liberty, is not only foolish, it is outrageously expensive.

These fortress-prisons cost \$5,000 and upwards per inmate to build. Their annual upkeep comes to about \$400 per prisoner. For the whole country this runs to millions upon millions of dollars; and the only excuse for the frightful waste of money and of human resources is that we have gratified our collective thirst for revenge. We have lashed the wife-beater—or the chicken-thief!

What is the bargain that a modern, planned penology has to offer? In the first place, we can close up a lot of our prisons. I have talked to prison wardens from more than thirty states; and I have not found a single one who thought that more than 60% of his inmates needed to be kept behind bars. The rest would have been safe risks on probation, or could be released on parole. These wardens were practical men, hard-boiled, many of them; and of course they qualified their statements by saying they meant real probation, real parole, under effective supervision. But the best up-to-date parole and probation systems we have—and there are a few very good ones—spend less than \$100 a year on each case. Roughly, here is a probable saving of \$19,000,000 annually as compared with the cost of keeping in prison men who do not belong there. That makes a fairly attractive bill of goods, doesn't it? And lest I seem to be talking fantastically let me tell you that in conservative old England, 30 prisons were closed in the 35 years ending in 1935 and the number of persons under confinement was reduced from 153,000 to 47,000. During a comparable period, our prison population increased seven times faster than our general population.

But that isn't all. We can save still more money, again to say nothing about human values, if we plan our institutions differently and run them more wisely. Of course we need some maximum-security prisons. I have visited Alcatraz, that last word in cages for the wild-beast type of prisoner; and, in passing, let me say that it is a clean and decent place, that its 300 prisoners are not treated like wild beasts at all, though they are confined so securely that escape is practically impossible. The striking fact about Alcatraz is that its 350 cells are more than enough for *all* the desperate criminals, *all* the most difficult disciplinary problem prisoners, of the 18,000 men confined in our Federal institutions. The Federal Bureau of Prisons, classifying its prisoners scientifically, finds that less than two-tenths of one percent of them are so dangerous that every conceivable means must be taken to prevent their escape. Meanwhile, in many of our states we go on building costly bastilles and filling them up with men who could be confined safely at less

than half the expense, — if, in fact, they need to be confined at all.

What ought we do with these men? Well, in a word, we ought to find out what manner of man each of them is and then deal with him appropriately. Individualization of treatment, this must be the keynote! We ought to place more reliance on brains, less on stone walls and steel bars. Obviously, this means a great extension in the use of probation. But probation is no panacea, is not desirable in many cases. It is a device whose value can be realized fully only as it is related to an integrated system of planned penology in which it will have its proper place.

Experience has shown this is no mere theory. If each prisoner is studied physically and psychically, if trained social-workers, educators, and vocational guidance experts bring to bear upon him their combined wisdom and experience, if the whole system is keyed to the day of the prisoner's release with the design and in the hope that he will come out of prison a better man than when he entered it, we are bound to get results. Not 100% results—but not the futile failures we now put up with. Let me repeat that on this very day 1650 men walked out of prison in this country of ours. And do not forget that far too many of them are going back again. Going back after committing new crimes; going back, many of them because they ought never have been released at all, many others because their life in the kind of prison we put them in has schooled them in the ways of crime. Recidivism is a price we pay for our chaotic, unplanned penology.

Individualization of treatment means, too, elasticity of treatment. A man committed to prison ought to be under the supervision of an administrative board that can move him about from one kind of treatment to another as he responds or fails to respond to what is offered. Such a board must have at its disposal and under its control many and varied facilities, ranging from probation through supervised homes and small hostels where properly selected prisoners may spend their nights while they go out to work or to school by day, all the way up (or down) to maximum security punishment cells for the unruly. There must be work-camps and prison farms. And obviously, no judge can tell at the trial where in such a scheme the individual prisoner belongs, nor how long he should stay there. This must be left for determination by a treatment board, for determination initially and from time to time until the prisoner is ready for release into society—on parole, of course.

#### *Youth Correction Authority*

Let me say again, I am not dreaming dreams. Most of what I have outlined is being done already in England. California, Washington and Utah have taken long strides in this direction. Far-flung plans of reform have been proposed in Oklahoma. Radical

action is demanded if we are to redeem our past and present folly. And radical action is on the way, action that will seem the more radical because of the conservative source from which it proceeds. I refer to the model Youth Correction Authority Act prepared under the auspices of the American Law Institute. For more than two years a committee of the Institute made up not only of lawyers but of outstanding representatives of the allied social sciences concerned with problems of crime and criminals worked on the preparation of this Act. Seldom in America have lawyers sat round the conference table with physicians, psychologists, penologists and others skilled in dealing with the behavior of youthful law-breakers, talked the same language, worked earnestly to find solutions for their common problem. The central feature of the proposed Act is the creation by law of a Youth Correction Authority to whose custody the courts will commit youths between the ages of sixteen and twenty-one convicted of serious crime. Minor offenders, punished by fine only, will not go to the Authority. Offenders liable to the death sentence will be sentenced by the courts under existing law. But all others will be placed in the custody of the Authority under a true indeterminate sentence.

The Authority will have the right to place the offender on probation, to confine him in an appropriate institution, to move him from one type of institution to another, and to release him on parole or absolutely. It is to have at its disposal a graduated series of penological facilities ranging from the mildest to the most rigorous. Normally it may continue its control of the convicted individual until he reaches the age of twenty-five. But in extraordinary cases, where the individual fails to respond to treatment, the Authority may continue its control over him for additional successive five-year periods, subject to review and authorization by a criminal court.

The Authority is to be composed of persons specially qualified for the performance of their duties who will take charge of the youthful offender from the moment his guilt has been judicially determined and will keep control of him continuously thereafter until his final release into freedom. The offender will first of all be studied as an individual, an effort will be made to determine his potentialities for good as well as his tendencies for evil. Then he will be treated as an individual; and his treatment will proceed not in a fixed groove or for a predetermined time, but in such ways and for so long a time as the nature of his individual case may indicate. No one feature of the proposed Act is really new; each has been tried, each is in actual operation in some part of the world today. What is new is the effort to bind them together into a planned, integrated system, a system of criminal justice with a beginning, a middle, and an end.

We who prepared this model Act believe that it is sure to produce better results than are now had from the practice of punishment to fit the crime. Every conceivable effort will be made to rehabilitate the offender and return him to freedom as soon as possible if he proves amenable to correction. On the other hand, he will be segregated from society permanently if he is a menace. The Act represents a rational system founded upon reality. The protection of society is its keynote, but the rights of the individual offender are safeguarded at every point.

This Act was published by the Institute in June, 1940. With some modifications it has already been enacted in California. A committee of Federal judges is drafting an Act for submission to Congress. State committees are actively promoting it in New York, Illinois, Ohio, Pennsylvania, and other states. Obviously the model Act will have to be modified in some of its details to make it fit into the existing legal framework in any state that undertakes its adoption.

President Taft said repeatedly in his public addresses: "The administration of the criminal law in America is a disgrace to civilization." This was true when he said it, would be almost as true today. But there is one great change—we have come to grips with the facts. We have begun to stir; and out of our national disgrace there will arise a social structure we can be proud of. A planned penology, designed to protect society and at the same time to make good citizens out of youthful offenders—this is the gist of the Youth Correction Authority Act. The interest it has evoked in widely separated parts of the United States is most encouraging. The Hon. Charles Evans Hughes, former Chief Justice of the Supreme Court, has described it as "The most important constructive suggestion for dealing with the crime problem that has been made since the original probation and juvenile court legislation." This proposed law is not offered as a panacea. Prevention of crime is and will remain the work of the home, the school, and the church. The resources of the community as a whole lie at the root of crime prevention. Well housed families with earnings sufficient to provide the decencies of life do not ordinarily breed criminals. Play-grounds may well do more to prevent law-breaking than prisons can accomplish in stamping it out.

But the fact remains that many youthful offenders do get into the criminal court and will continue to do so. If convicted they ought to be dealt with in such manner as to rehabilitate them as soon as possible, or to hold them under legal control as long as need be if they do not respond to corrective treatment. This, in brief, is the objective of the Youth Correction Authority Act. We believe it marks a long step forward in the rationalization of the criminal law.