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Defect in the Youth Correction Authority Act

John F. Perkins¹

Every year we put a large number of criminals into prison
Every year we let a large number of criminals out of prison
Every year we put back a large number we have previously let out
It seems a futile procedure.

Naturally this has evoked the criticism that the criminal law does not adequately protect the community, and our method of sentencing criminals immediately stands out as a major defect.

A Judge gives a sentence for a definite period. It may be not more than, nor less than, a certain number of years but it is fixed within limits and this fixed period need have no relation to the time necessary for the individual's rehabilitation. As a consequence men who are still dangerous get out of prison and commit new crimes, and men who are not dangerous are kept in prison, their spirit and standards destroyed, and through contact with vicious criminals they are manufactured into vicious criminals themselves.

The rule at many summer camps for boys is that no boy is allowed to go in a canoe until he has shown that he can swim a hundred yards. The non-swimmers are put into the hands of the swimming instructor, who helps each boy to learn. Some boys learn quickly, others find it slow work, and occasionally there is a boy who somehow does not seem able to learn how to swim.

The present method of dealing with criminals applied to a summer camp would be this: The boys would be assigned dates in advance when they would be allowed to go in a canoe. For some the date and the ability to swim a hundred yards would coincide. For some the date set would be long after they had learned to swim. For others the date would arrive before they had learned to swim; they would go out in canoes and some of them would be drowned.

In short to attempt to determine in advance how long rehabilitation will take is a mere guess, an attempt at prophesy; and there seems no reason to prophesy when you can wait to see what happens, and then decide.

Use of Indeterminate Sentence Should Be Extended

Therefore for many years various plans have been suggested to take away from the Court the power of determining the length of sentence. Advocates of these plans urge that the true function of the Court is to determine whether the law has been violated and whether the violation is sufficiently serious to make it necessary

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to put the offender under control. The work of correction i.e. the training and rehabilitation of the offender, they maintain, is a separate function, and should be placed in the hands of an entirely separate body, a correctional authority, to whom the court should commit the offender without attempting to prescribe the period during which he shall be kept under control. There is a difference of opinion as to whether the correctional authority should itself have the power to decide when an offender has sufficiently shown his fitness to return to the community, or whether the correctional authority should be required to bring him before a court and present evidence which will enable the court to determine whether he has satisfactorily demonstrated his right to be re-instated. But regardless of which of these two procedures is adopted many thoughtful people feel that by adopting one or the other of them, by taking away the Court's power to determine the period of control, we shall remove one of the most serious obstacles to the successful reform of criminals.

Present System Inaccurate and Unjust

The present system is bad because it is inaccurate, but far more serious than its inaccuracy is the fact that it leads to injustice. Inevitably the Judge in passing sentence is influenced by the personal qualities of the prisoners; inevitably he allows this feeling to affect the length of the sentences he imposes. Furthermore, different Judges are affected differently by various crimes. One Judge is particularly severe on sex crimes and lenient on crimes of violence, and another Judge is just the opposite. So we find this universal complaint among prisoners: "X did just the same thing that I did. He got five years and I got ten." Instead of having it made clear that *they are deprived of their freedom for what they have done in the past, that their reinstatement depends on what they will do in the future and that they all start at scratch*, they see that they have been given unequal sentences for similar crimes, and not being willing to admit that their personal qualities justify discrimination, they feel that the Court's decision is purely a matter of favoritism, due to political influence or bribery.

Correction Requires Self-Discipline

Now the central and controlling fact in the correction of people is that correction is self correction, and that they have the final decision as to whether they will or will not make the necessary effort. *They* decide whether they will or they won't. *We* don't. To accomplish our purpose we must *get them to do something*, not merely *do something to them*; for if they are to correct their faults, they must do it by self-discipline and that involves systematic and persistent effort *by them*.

Self-Excuse Destroys Self-Discipline

When men have committed crimes, when they are "outsiders" and have earned the fear and distrust of their fellowmen, it is a tough job to get their confidence, and create in them the desire to go to work to correct their faults, and the courage to face all the difficulties which confront them. It is so much easier to excuse oneself, blame some one else, and say "What's the use?" In this connection a man who used to take the histories of men committed to the Charlestown Prison told me this: "After I had examined the incoming prisoners for a year, I went to the Warden. 'I thought,' said I, 'that this was a prison for criminals.' 'What are you talking about?' said he. 'Of course it is.'" " 'No,' said I, 'I have examined every man who has come in here for a year and they all tell me that they have never done anything wrong!'"

A Merit System of Penology

What we are seeking for, what every one really wants is a merit system of penology. This would give criminals the chance to redeem themselves by effort and achievement. Hope is a powerful force, and if criminals realize that there is a real opportunity for them to wipe out their failures and restore themselves to good standing, many who now give up will try their best and succeed. But to be successful such a system must be fair and honestly administered. The criminals must believe in the integrity of the officials, and that if they earn their freedom, they will get it. They must believe that a man's freedom depends on himself, on his ability to meet the standard of conduct which the community requires, on his power to prove to himself and to others that he has this ability. Offenders and the public alike must get rid of the demoralizing belief that an offender's freedom depends on the whim and favor of a judge or a parole board, a belief which prevails today and for which there is far too much justification.

If a doctor is guilty of malpractice he forfeits his right to practice. He must earn his re-instatement. If a lawyer is disbarred, he must earn his re-admission to the bar. His violation of the prescribed standard is not waived or disregarded. He is not let off. That would be the equivalent of saying that he had committed no violation, or else that he personally was privileged and exempt. He must prove that he can meet the standard, that he can now succeed, where previously he has failed. He must convince others that he *will* succeed. So with those who commit crimes: they forfeit their independence and subject themselves to control. To regain their independence, they must earn it. They must demonstrate their ability to meet the required conditions. They must convince other people that they *will* meet them.

American Law Institute Discards Merit System

Now the American Law Institute in its Youth Correction Authority Act took the first important step by taking away from the Court the power to prescribe the length of the period during which an offender shall be kept under control. But having taken this vital step forward it took two steps backward. It has removed inaccuracy but increased injustice. A merit system must be based on the principle: "By their fruits shall ye know them." The American Law Institute has discarded this principle and in its place, has substituted the idea of a superintelligence which can decide what shall be done without needing to use an objective measure. It has gone further, and has provided that it shall act in disregard of an objective measure, and contrary to it.

The Youth Correction Authority Act says in Section 29 (2) "The Authority shall discharge such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public."

Immediately on reading this, one asks the meaning of "opinion." Is it an opinion which may reasonably be formed at once or must it be supported by objective evidence? There seems to be a difference on this point among the members of the committee who drafted the law. In Mr. Leonard Harrison's address in San Francisco, October 10, 1939, he says: "We actually propose to throw the key away after closing the door upon those offenders who *do not demonstrate* a capacity for improvement . . . we propose the greatest freedom and the earliest possible release for those who *demonstrate* that they are ready to abide by Society's rules."

On the same day at the same meeting, Judge Ulman, another member of the committee said: "It (the Authority) may dismiss him in a year, or in six months, in six days, or *at once*."

In the pamphlet, "Twenty-seven Questions and Their Answers," issued by the American Law Institute, Mr. Waite, the reporter of the committee, in his answer to Question 17, says—"Youths committed to the Authority will not necessarily be imprisoned at all; they may be discharged *at once*."

At the meeting in Washington in May 1940, when the American Law Institute adopted the Youth Correction Authority Act, I submitted the following case.

Two boys A and B steal a car, are chased by the police, drive recklessly through the streets, try to jam the police car against the sidewalk and end in a smash-up in which an innocent by-stander is killed. They are brought to Court, tried and convicted and committed to the Youth Correction Authority.

The Authority studies the boys. A is overwhelmed by what he has done, is penitent and anxious to avoid any mistake of this kind in the future. So far as anyone can see no further experience is

necessary to make it safe for him to be free. B, on the other hand, is superficial and unstable. He expresses penitence, but it seems highly probable that unless his good intentions are crystallized by some form of discipline he is likely to forget them and yield to a temptation to do the same thing again.

Both boys have the same background, similar homes, and there is nothing to indicate that either is dominated by the other. Under Section 29 the Authority discharges A and keeps B under control. So A goes free, and B is sent to the Reformatory.

I asked Mr. Waite if this was a correct statement of what would be done in such a case. He said it was. Clearly, Mr. Harrison's interpretation is wrong and objective evidence is not required as a basis of the Authority's opinion. If an offender may be discharged at once, his discharge must be based on an unsupported opinion.

Youth Correction Authority Act Unfair

Here we have a law which not only permits discrimination between A and B without objective evidence, but also makes such discrimination mandatory, if the Authority forms a favorable opinion of A and an unfavorable one of B.

Let us consider for a moment how such action would work. B sees A go home while he is sent to the Reformatory. He protests: "Why should I go to the Reformatory and A get off? He was in it just as much as I was." "Oh," says the Authority, "It is not what you did that counts. It's what you are. Your act was a mere incident. You have an unstable personality. Before it will be safe to let you be at large in the community, you need corrective treatment. The public must be protected."

To which B replies: "You have no right to do this. I have learned my lesson. I will never break the law again. You say I am unstable. I say I am not unstable. I have been watching you all through your examination of me and your real reason is that you are prejudiced against Unitarians. I have as much right to say you are prejudiced as you have to say I am unstable. You cannot back up your opinion by proof of any kind. You have produced no standard of measurement to show I am different from A. What you are doing to me is absolutely unfair. You can show no evidence to justify refusing to give me the same chance that A gets."

And B would be right. Put this case to any set of boys, or school teachers, or managers of factories, or officers in the army or navy and their answer would be the same,—"It is unfair to B."

Unfairness Creates Resentment

Now B is the boy the Authority is going to work with, the boy they are going to correct. And B feels that he is unfairly treated. If there is anything in the world which produces flaming resentment

and antagonism, it is *unfair discrimination*. So at the very beginning of the relationship an impassable barrier is created between the boy and the Authority. Hope of inducing him to do anything except in a resentful, automatic way is gone. The chance of building the relationship and the attitude without which rehabilitation is impossible, has been destroyed. The plain fact is that we will not willingly accept any restriction of our independence without objective proof of the justice of the restriction. And if this restriction is accompanied by discrimination against us and in favor of some one else without clear-cut justification, it produces a fury that is likely to lead to serious crimes and to a bitterness almost impossible to eradicate. That is what we feel injustice is.

Fairness is the first requisite for a successful teacher, manager, officer or correction official. I have talked to great numbers of them. They all say: "If you get a reputation for being unfair, you are washed up." And here is a law put forward as a reform which not merely adopts unfair discrimination as its guiding principle, but makes it mandatory. It just won't work.

Arbitrary Power of Authority

There is another principle involved in the Youth Correction Authority Act which if embodied in our law means a serious danger. In this particular Act it is so largely offset by safeguards that it is likely to escape unnoticed. But the danger is there and it is serious. It is the principle of arbitrary power; of absolutism.

Acting under its powers the Authority studies the persons committed to it, forms an opinion of the character and personal qualities of each person committed and decides whether he shall be locked up or go free, whether he shall be put in an institution or placed on probation, when he shall be paroled or transferred from one institution to another. Under this system the arrest, conviction and commitment of a violator of the law is merely a preliminary step. The test of criminality is not what a man has done. The way he is dealt with is not based on his behavior. What really determines whether a person is a criminal or not, and what shall be done with him is the *opinion* of the Authority which may be reached on any basis it sees fit. On this point it has unrestrained discretion.

Obviously this assumes that the Authority has the ability to read character and to prophesy what people are going to do, to select those who are likely to commit a crime, and those who are unlikely to commit a crime.

If this ability exists where does the logic of the situation lead us? The American Law Institute says that the objective of the Criminal Law is the protection of the public, in other words to prevent crime. If this is true are we using the ability of the Authority as effectively as we should? Under the Youth Correction Authority Act, the Authority studies only those who have already

committed a crime. This is locking the door after the horse is stolen. Those whom it studies are selected by the haphazard method of arrest and conviction. If the real test of criminality is the opinion of the Authority, if the Authority has the ability to read character and foretell future behavior, why should we go through the long, expensive and inefficient process of arrest, trial, and conviction? Why not act effectively and comprehensively?

All children at eight, twelve, sixteen and from time to time thereafter should be studied and those who are likely to commit a crime taken under control. By this method we should check crime at its source, and protect the community.

I can see no escape from this conclusion if Section 29 is sound. It would, however, change the form of our government. We should replace the principle "By their fruits shall ye know them" under which we now live with the principle of an all-wise, all-powerful authority which knows what is best for us and decides accordingly.

To some people the foregoing may seem extravagant but if they had sat, as I have, at conference after conference where it has been urged that the Juvenile Court take charge of pre-delinquents they would realize it is not extravagant. The proposal was that the Court should impose its authority on Juveniles who *are going to be* delinquent. The Youth Correction Authority Act extends the idea to adolescents but limits it by safeguards. Experience has shown, however, that once the idea has gained a foothold, it spreads, and the safeguards disappear. In our zeal to improve conditions we often act like a boy who, intent on the recovery of his ball, rushes into the street directly in the path of an automobile.

Altogether the Youth Correction Authority Act has been a great disappointment. So much has been hoped from it. If it had been left simple it might have been very effective.

Suppose that instead of trying to get a penological experiment tried on a nation-wide basis, an effort had been made to set up a Youth Correction Authority *with its own facilities* in one state only; and that it was provided that youths should be committed to it, in the language of an old penological report, "To be educated, reformed and made worthy of society," and that as soon as they had *demonstrated* their fitness to return to society they should be discharged. If a simple educational institution based on the merit system had been set up, if the total energy now dispersed over many states had been concentrated on getting a really first class Board of three men for the Authority, and they had been given a long term of office and allowed to work out the problem, great benefit might have resulted. The objection raised by the American Law Institute is that the merit system is impossible, that there is no standard by which conduct can be measured. Is this true? We have a standard for failure. Can't we develop one for re-instatement?

Let us take a college as an example. A number of students come there to get knowledge and training. The students have different aptitudes, and interests. Many courses are offered, but each student must select one field of concentration and make himself proficient in that. The different fields of concentration call for different kinds of ability, but the standard of achievement required in each field to earn a degree is pretty closely equivalent to the standard in all the rest.

Suppose we consider the Youth Correction Authority a College and those committed to it candidates for freedom. The College should have its own institutions, its own staff and facilities. Courses in carpentry, machine work, farming, etc., etc. would be available so that every youth would have an opportunity to develop proficiency in some form of trade if he was capable of any proficiency whatever. Discipline through pressure of work, unexpected difficulties, temptations to impulsive action could be woven into the courses. The question of equivalent standards in the various courses is undeniably difficult, but so it has been in the colleges, and it has been worked out.

Growing Recognition of the Need for Standards

Standards have been worked out for the practice of law and of medicine, for civil service, for engineering, for social work. In fact in more and more fields of human activity has the principle of standards been developed. With careful observation, with ingenuity in devising tests, with opportunities to work without supervision, it should certainly be equally possible for an Authority to decide from objective performance that men and women had shown sufficient proficiency in living with others to be allowed to return to society.

It seems ungracious, even churlish, to criticize the work of the able and devoted men who drafted the Youth Correction Authority Act. But I spent many years in the development of new machinery and I learned then the importance of working the bugs out of a new invention before manufacturing it. It is much less expensive to find mistakes in the drafting room than after the machine is built. I believe the Youth Correction Authority Act is seriously defective in its present form. In addition to the questions of principle which I have discussed other points need clarification.

Social legislation is full of pitfalls and should be subjected to the most searching scrutiny before it is adopted.

The need for improvement in our penal methods is extreme. But the extremity of a need does not put virtue into a defective remedy, and if we keep arousing enthusiasm for reforms which misfire we shall destroy enthusiasm for reforms which will work.