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JUDGE PERKINS' CRITICISM OF THE Y. C. A.

John Barker Waite¹

In an article in the July-August issue of this JOURNAL, Judge Perkins comments interestingly upon the American Law Institute's proposed Youth Correction Act. His is an important criticism of the proposal because it cogently expresses a type of opposition which must be reasonably dealt with before adoption of the Act can be expected. I believe Judge Perkins would agree with me that condensation of his comment brings it down to an admission that the present method of dealing with known criminals is somewhat stupid and wholly unsatisfactory, but that the method should be left as it is rather than that the provisions of the Youth Correction Act should be adopted.

The first of these propositions—that the existing system sadly needs change—I imagine no one would think of disputing. But Judge Perkins' objection to adoption of the proposed Act seems wholly disputable, on two grounds. In the first place, he considers only one aspect of the Act and ignores its other propositions. I hope to show that his criticism of even that aspect is not truly sustained. But for the moment assume that it is sound; it still does not militate against adoption of the rest of the Act, which covers three quite separable and individually maintainable proposals for improvement in the present methods of dealing with convicted criminals.

Its fundamental objective—in this sense its one objective—is protection of the public against further, repeated, crime by convicts who have already been dealt with. But it seeks that end through several processes. Without taking space to amplify them in this attempt to meet Judge Perkins' particular criticism of one of them, they may be described as follows:

1. The Act recognizes the fact that segregation of a convicted criminal from society is not always and inevitably necessary for the protection of society against further crime on his part; that actual imprisonment *may*, on the other hand, conduce to character degradation and increased likelihood of repeated crime; and that, in consequence, as a matter of social safety, some individuals ought not to be actually confined in prison at all, others should be released after a comparatively brief period of confinement, and still others cannot safely be released for considerable periods. The Act therefore invests a Commission with power to determine when segregation is no longer necessary to the prevention of further crime and

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to release accordingly. The power of this Commission to keep anyone in confinement longer than a narrowly limited time is carefully safeguarded against abuse.

2. The Act recognizes also that while the *wish* to abstain from further crime may be strengthened by the use of punitive imprisonment, it does not follow that the *ability* so to abstain will be increased or even preserved by such imprisonment. If convicts are turned back into society no better able to live a law abiding life than before they were imprisoned, or, as too often happens, even less able to do so, it is almost a foregone conclusion that despite every wish to the contrary, they will revert again to crime. The statistics of recidivism prove this fact beyond the need for argument. The particular cause of an inability to live within the law may be some correctable physical or mental defect; some anti-social psychological quirk which could be altered; just plain incapacity from lack of skill to earn an honest living; or something else which is possible of elimination. The proposed Act therefore makes it the duty of a Commission to search out such possible causes in the individual and, so far as it can obtain the facilities from the legislature, to set up and utilize all the corrective measures possible. The primary objective of this part of the Act is that when men are released from confinement they shall in fact be *more* likely to refrain from further crime, instead of less likely.

3. Under the existing practices of every state, when men are finally released from imprisonment they are cast into a competitive world where honest existence is infinitely harder for an "ex-convict" than it is for other men. They are turned out into that struggle with no job, with little prospect of getting one, with no chance, at present, to get a job in the "defense industries," and with no money except, in the words of a conventional statute, "\$5 with which to maintain himself until he can obtain self-supporting employment." Then, as much as ever in his life, a man needs active assistance, psychological as well as material, to keep him from reversion to crime. Some private agencies operate valuably in this field. But no state, save two, and those in slight extent, even pretends to offer any such help. Here again the Act recognizes the evil and proposes change for the better by authorizing a Commission, when and if it can get the money, to establish and operate agencies to furnish this crime preventive help.

What Judge Perkins attacks in his article is the first of these proposals; he quite ignores the others. Even if the first were in truth unwise, it by no means follows that the others would not be effective crime preventives which should be wisely and promptly adopted. But since I do not intend this article as a general exposition of why the Correction Act should be adopted, but only as a reply to the judge's specific criticism, I too shall ignore those

other and very important proposals of the Act and shall confine myself to his opposition toward any power in the Authority to release youths committed to it.

Yet even in respect of that particular proposal which he does attack, Judge Perkins' kicks, if I may say so forcefully though without ill-nature, seem directed less at the provisions of the Act itself than at some notion of his own creation. One might be tempted to suspect also—which would be quite contrary to fact—that the judge is unaware of some of the facts of life; of the powers of release which already exist in practice.

His objections are based primarily on a hypothetical assumption of two youths convicted of automobile theft. One, he says, the Authority created by the Act could, if it thought proper, release without actual imprisonment; for the other it might require incarceration. I remember that, as he says, he asked me at the Institute meeting if the Authority would have such power and I did answer, as I do now, that the proposed Act does so provide. So what? Frankly I cannot determine clearly what the judge's objection thereto is.

From a certain inconsistency in his statement of the hypothetical facts I suspect that his perturbation may be because such a power of discrimination in respect to release or confinement can be *abused*. In the first part of his illustration he presents the fact that there *are differences* in the characters of the boys. "No further experience is necessary to make it safe for A to be free. B, on the other hand, is superficial and unstable." But at a later point he inveighs against "arbitrary" power and its exercise "without objective evidence"; from which I deduce that he is less concerned with the fact that a youth who does not need confinement can be released while one who does need it can be confined, than he is with possible unjustified application of the power. On the other hand, he does seem, from some of his statements, to protest the investment of even a carefully selected Commission with any such power at all.

In either case, however, Judge Perkins cannot stand to his guns without taking the position, which I am sure he does not take, that modern development of the theory of pardon, probation and parole is all wrong and that the whole basic notion ought to be repudiated.

If his hostility to the Act is merely from fear that a power in the Authority to release from imprisonment, or to hold in confinement under the limited provisions and safeguards of the Act, may be *abused*, he must apply precisely that same criticism to his own judicial power to release youth A on probation and to order youth B confined indefinitely in an institution for juvenile offenders. That power of probation *can* be abused, even by judges. Indeed, from beginning to end of the present treatment of criminals, a power of discrimination exists; and just because it exists it can be abused.

Juries can, if they wish, acquit youth A but convict youth B on precisely the same evidence. Governors can pardon one but not the other. Judges can free one youth on probation but sentence the other to prison. If each youth has been sent to prison the parole board may release one promptly, though it holds the other till the end of his sentence. In this respect the Act proposes nothing novel; it does no more, at most, than to transfer the power of discrimination and its possible abuse from judges, who have no data for its intelligent use, to a carefully selected Commission required to investigate fully before it acts. To characterize this as "discarding the merit system" would be, frankly, absurd.²

If, on the other hand, Judge Perkins' objection is the other alternative, and he protests against all power of discrimination *in any one* concerning the fact or the duration of imprisonment, then he is merely advocating return to "those good old days" before probation and parole when *every* youth convicted of crime was obligatorily sent to prison and every prisoner was obligatorily kept there for the full period of a predetermined sentence. But no one will believe that even this part of the Act can be condemned because it does not accord with such a point of view.

² There is some possibility that the judge has in mind that release or imprisonment should be made to depend *only* upon conduct *while in prison*. This is suggested by his insistence that only "objective evidence" should be used and that the "merit test" must be relied on. But I cannot believe that he intended to depart so far from the teachings of accepted criminology as to urge that prognostication of future conduct must be confined to the simple facts of prison behavior. If he does, he must insist also that judges forego all use of probation, because probation does not operate upon "the merit system."

Gulliver's Travels

"They look upon fraud as a greater crime than theft, and therefore seldom fail to punish it with death; for they allege that care and vigilance, with a very common understanding may preserve a man's goods from theft, but honesty has no *defence* against superior cunning; . . . the honest dealer is always undone, and the knave gets the advantage."