

1949

A Legal Phantasy: The Parole Commission Law

Morris Ploscowe

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

Morris Ploscowe, A Legal Phantasy: The Parole Commission Law, 39 J. Crim. L. & Criminology 714 (1948-1949)

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.

A LEGAL PHANTASY

The Parole Commission Law

Morris Ploscowe

The author received appointment as Magistrate from Mayor LaGuardia in 1945. He had earlier, for a long period, been Chief Clerk of New York City's Court of Special Sessions. He has been consultant for many different Crime Commissions and governmental organizations engaged in the study of crime conditions and criminal law enforcement, such as: The Wickersham Commission, The Columbia Survey, The N. J. Judicial Council, The Liquor Study Commission, etc.—EDITOR.

The smooth-tongued criminal lawyer, who pleads for leniency for his hard-visaged, brutal client, has become one of the clichés of American criminal law enforcement. Bad as the man's record may be, vicious though his crime, his lawyer is sure to find something about his personality, his family, or his avocation, which may endear him to the judge who is about to sentence him. No one likes to pay the penalty for his crimes, and the surest way of avoiding or mitigating a "rap" is to convince the judge that there is still plenty of sweetness and light left in the poor defendant who has had the misfortune to be caught and convicted of a crime. When a man comes up for sentence, therefore, his closest friend would not recognize him from the description which the lawyer furnishes the judge. The eulogy may reach such a pitch that one may begin to wonder whether the man before the bar is a candidate for a prison sentence or a candidate for a Boy Scout decoration.

But there is a statute of the great and sovereign State of New York, the Parole Commission Law, presently applicable only to New York City, which compels a strange sort of candor from the gentry who make crime their racket and from their legal representatives. Under this statute, a man convicted of a misdemeanor may be sentenced to an indeterminate sentence of up to three years imprisonment in Riker's Island Penitentiary, if he is capable of being substantially benefited by the correctional or reformatory purposes of this institution. If he is incapable of benefiting from "the correctional or reformatory" purposes of Riker's Island, his maximum sentence *must be one year of imprisonment*. As Justice McGeehan puts it, "In other words, if two men jointly commit a misdemeanor in New York City, and one is so bad that the Court finds that he is incapable of substantial benefit from the correctional purposes provided by the Parole Commission Law, the maximum of his term of incarceration is one year, whereas his co-defendant, because the Court finds he is not incapable of substantial benefit as provided in the Parole Commission Law, may be incarcerated for three years."

Thus, the more promising a defendant, the more likely he is to get an indeterminate sentence of up to three years. The more vicious, depraved and hardened he is, the more likely he is to receive a lesser sentence carrying a one year maximum.

This turns the scale of values existing elsewhere in the criminal law completely topsy-turvy. This law is tougher on more decent offenders and easier on more wicked ones. Under such statutory provisions, it is to the advantage of a misdemeanant to have himself painted a black-hearted scoundrel who cannot possibly be reformed or rehabilitated.

However, the candor which would compel a lawyer to present his client in the worst possible light may not be displayed before the sentencing judge. For the latter has considerable discretion with respect to sentence. If a lawyer were to paint his client in his true light, the judge may impose the most severe sentence at his disposal, namely, the indeterminate sentence on the theory that no one is so vicious or depraved that he cannot benefit from the correctional purposes of the penitentiary. But this sentence is precisely what the lawyer would like to avoid. Accordingly, when the hardened burglar, thief or dope peddler, who has had the misfortune to be convicted of a misdemeanor stands before his judge for sentence, his lawyer will still try to characterize him as an erring Boy Scout in order to persuade the judge not to impose the indeterminate sentence.

However, if the judge is not impressed and imposes the three year indeterminate sentence, then candor will have its innings. For there is always an appeal and there is always recourse to a writ of habeas corpus on the ground that the indeterminate sentence imposed by the judge violated the express directions of the Parole Commission Law and was therefore illegal. Now the lawyer can pull out all the stops and blow up every peccadillo in which his client has been involved as evidence that he is one of the worst scoundrels on the face of the earth and therefore cannot possibly be reformed or rehabilitated by any institution.

Consider for example the case of *People v. Bendix* (1932, 260 N.Y. 590). Bendix was a hotel thief who had rifled many rooms of the Hotel Warwick. He pleaded guilty to unlawful entry and the Court imposed the indeterminate sentence. In his attack on this sentence in the Court of Appeals, the defendant's attorney stated, "The criminal record of the defendant is such as to call for the irresistible legal conclusion that he is so anti-social as to be considered an habitual criminal who is mentally unamenable to reformatory treatment." Calling upon the Bible for assistance (Jeremiah 13:23), the attorney for the defendant stated,

“He can no more be substantially reformed than an Ethiopian can change his skin or a leopard his spots.”

It was the District Attorney in this case who urged that the defendant was not so far gone in infamy that he was incapable of being substantially benefited by the correctional and reformatory purposes of the penitentiary. The District Attorney particularly noted the fact that for five years prior to the instant conviction he had “presumably led a good life,” since there were no entries on his criminal record during this time. However, the defendant’s attorney argued that, “In view of the past record of the defendant he may have committed crimes during this period,” since, “The police do not catch all offenders.”

Unfortunately, the judges of the superior courts who handle appeals and writs of habeas corpus have been only too ready to support the erring interpretation of their less highly-placed colleagues. Over and over again they have denied relief to black-hearted villains on the convenient fiction that as long as the judge imposed an indeterminate sentence, he must have believed that the defendant was capable of reformation or rehabilitation. For example, a drug peddler, named Granza, came up before the Court of Special Sessions and the Court in sentencing him to the penitentiary stated, “I don’t see how we can extend any leniency in these cases because, of all the despicable people on earth operating criminally, those who sell drugs are among the worst.” The defendant brought a writ of habeas corpus on the ground that the Court could not legally impose the indeterminate sentence because it believed the defendant incapable of reformation or rehabilitation. But the defendant’s contention was rejected on the ground that, “Under the authorities, the possibility of benefit by such sentence is to be conclusively presumed from the very sentence of the court however incongruous.” (*People ex rel. Granza v. Johnston*, 1946, 67 N.Y.S. (2nd) 181.)

The *reductio ad absurdum* of this type of reasoning is apparent in the case of *People ex rel. Wallace v. Ashworth* (1945, 59 N.Y.S. (2nd) 344: On January 15, 1941, the defendant came before Judge Freschi of the Court of General Sessions who determined that he was beyond reform and sentenced him to one year definite sentence on each of four misdemeanors, the sentences to run consecutively. This finding of Judge Freschi was based on the fact that the offender had been in and out of prison in New Jersey, Pennsylvania and New York almost continuously since 1912 on felony and misdemeanor convictions. He came out of the penitentiary on the above mentioned sentences and was again arrested and indicted for burglary, petty larceny and pos-

session of burglar's tools. He pleaded guilty to unlawful entry and Judge Goldstein of the Kings County Court sentenced him to an indeterminate term in the penitentiary. The prisoner sued out a writ of habeas corpus on the grounds that this sentence was illegal. The Court stated that it appears logical to regard a defendant who was determined to be beyond reform on January 14, 1941, as also beyond reform on August 29, 1944, a few months after his release on his latest sentence. Nevertheless, the court dismissed the writ of habeas corpus and sent the offender back to Riker's Island Penitentiary.

Occasionally, however, a judge of the appellate court will read the statute he is asked to apply and will decide that a sentencing judge cannot have it both ways. He cannot make a statement like the following: "You are practically beyond redemption. You don't mind committing crime and you don't mind going to jail, so you must love it," and then proceed to impose a sentence whose prerequisite is a finding that the defendant is capable of reformation and rehabilitation. The indeterminate sentence in such a case will be declared illegal and the defendant will be sent back for re-sentence for one year instead of three. (*People ex rel. Travatello v. Ashworth*, 1943, 43 N.Y.S. (2nd) 397.)

Since hope springs eternal in the human breast, each defendant receiving an indeterminate sentence to Riker's Island Penitentiary likes to believe that his own brand of villainy has been sufficiently deep-dyed so that the Parole Commission Law cannot be applied to him. Thus, writs of habeas corpus continue to be applied for, appeals continue to be taken, and the sorry farce of depicting the offender in the worst possible light so that he will receive a more lenient one year sentence instead of an indeterminate three year sentence, continues to be played. It often happens that the lawyer for the defendant is compelled to sing one kind of a tune before the sentencing judge and an entirely different one before the court in which he has applied for a writ of habeas corpus or to which he has taken an appeal. For example, in the case of *People v. La Rue* (1943, 266 A.D. 995), the attorney for a female drug peddler tried to convince the Court that his client was only a user of drugs whose twelve prior convictions for prostitution were only "social offenses, quasi-criminal in nature." He pointed out that she "has not done anything that is vicious or bad and should be given a chance to rehabilitate herself." Before the appellate court however, he urged strongly that because of the twelve prior convictions for prostitution, and the conviction for drug peddling, that the defendant was not a fit person for rehabilitation.

It is to Katherine B. Davis, John Purroy Mitchell's Commissioner of Correction from 1914 to 1915, that we owe this piece of legal fantasy. She was impressed with the fact that since 1905 New York City had been operating a reformatory for young misdemeanants based on an indeterminate sentence of up to three years. She wanted to have this indeterminate sentence law extended to misdemeanants who were sentenced to the New York City Penitentiary. She thought of the Penitentiary as a reformatory and rehabilitative institution and wanted to keep the more promising offenders for longer periods, so as to make certain of their reformation and rehabilitation. She was not concerned with the more unregenerate among the criminal fraternity convicted of misdemeanors, and believed that they should be kept for the maximum possible under the existing statutes, namely, one year. The fact that this would result in a shocking disparity of sentence, with the tougher criminals serving less time than the more promising ones, did not concern Miss Davis. For she was convinced that a penitentiary regime based on reformation and rehabilitation was quite a different thing from a penitentiary regime based on punishment. It was, therefore, justifiable to submit a more promising offender to the former, since it was in his own interest, even though he served a longer time than his more hardened confederate.

There might have been some justification for Miss Davis' views if Riker's Island or its predecessor, the Blackwell's Island Penitentiary, were ever reformatory or rehabilitative institutions. Both have been merely custodial institutions hardly distinguishable from any of the prisons of the State. Riker's Island Penitentiary has always lacked the basic tools of a reformatory and rehabilitative institution. It has never had an adequate educational, vocational or classification program, nor the therapeutic methods which are indispensable to a reformatory institution. As for the Blackwell's Island Penitentiary, its predecessor, the stench of its scandals hardly provided the atmosphere for reform. Worse yet, there is not even a pretence of providing a different type of penal discipline for the indeterminate sentence prisoners, who are supposed to be in the Penitentiary for the purpose of reform and rehabilitation and the workhouse prisoners who are on Riker's Island for the purposes of punishment. All prisoners sentenced to the workhouse for ten days or more, all prisoners sentenced to the Penitentiary on definite sentences of up to one year, and all indeterminate sentence prisoners are commingled in the same institution, and are subjected to exactly the same type of prison discipline. The so-called promising mis-

demeanant who has received a rehabilitative indeterminate sentence rubs shoulders with the chronic drunk or bum who has received a short workhouse sentence, or the more hardened thug who has a definite sentence for a misdemeanor or a felony. Life for all these offenders follows exactly the same pattern. To talk of reformation or rehabilitation in one case, and punishment or custody in the other, is merely to designate the same phenomenon by different words.

If the Riker's Island Penitentiary does not in fact provide a rehabilitative regime for indeterminate sentence prisoners, then there is no legal justification for the Parole Commission Law. What this statute does in effect is to make possible a severer punishment for misdemeanants in New York City than in the rest of the State. A person who steals a suit in a department store in White Plains can be sentenced only up to one year imprisonment. If he stole the same suit in a department store in New York City, he could be sentenced up to three years. Our learned appellate courts have sustained the discriminatory treatment of New York City's malefactors on the ground that they were to be subjected to a rehabilitative regime, while those in benighted Westchester County would receive only punishment for their crimes. They would not have sustained such discrimination if the Parole Commission Law had merely provided stiffer punishments for crimes committed in New York City. Criminal statutes are supposed to have a universal application throughout a state. They cannot go easy in one part of a state and provide for heavier punishments for the same crimes in a different part of the state. The equal protection of the laws is still a vital principle of constitutional law.

It is obvious that the New York appellate courts have been beguiled by theoretical differences between rehabilitation and punishment, which under the present corrective system are not realized in practice. They have felt that there is some qualitative distinction between these two phenomena which justifies the discriminations of New York City's Parole Commission Law. However, if we avoid semantics and look at the facts, then there is no legal basis for the Parole Commission Law, for it provides for a geographic discrimination in sentences for crime on the basis of non-existent qualitative differences in treatment after sentence.

The time has come when the numbo-jumbo of the Parole Commission Law must be eliminated. This may require an increase in the maximum punishments for certain types of misdemeanors which are committed by habitual offenders, for a one year term

is hardly enough to protect the community from a hardened burglar who is fortunate enough to be permitted to plead guilty to unlawful entry, a misdemeanor. But if the one year maximum punishment for certain misdemeanors or for certain types of offenders is to be increased, this must be done by laws of state-wide application, and not by laws applicable to New York City alone. Such laws should be framed frankly on the conception of protecting the community from the possibility of further deprecations by habitual or professional criminals, and not on any phony theory of the distinction between rehabilitation and punishment. If the penitentiary develops a rehabilitative regime, well and good. But a criminal statute should not be based on this dream, but on the fundamental notion of providing the state with the best possible protection against crime.