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other business entity. Perhaps this is as it should be. It follows that those who lean toward the professions, whether they be doctors, lawyers, architects or others, should recognize a new tenet: the paths of professional glory lead but to liability.

GEORGE M. WHITE

Indeterminate Sentencing—Half-Step Toward Science in Law

I am a man
More sinned against than sinning¹

might well have been the lament of the convicted criminal a few decades ago. History abounds with accounts of inhuman and savage methods of punishing criminals. The modern social sciences have studied the social problem of crime and the criminal personality; they have concluded that the criminal is bred by social conditions and that society can better protect itself from crime by reforming criminals rather than punishing them. Today's penal legislation is a *partial* adoption of the knowledge of social science, but *complete* adoption has been obstructed by the lingering prejudices and ignorance of yesterday when punishment was the solution to crime.

The intent of this note is to outline the development of today's sentencing laws, to generally explain the early notions of punishment and the modern theory of reformation, and to point out how remnants of those early notions have impeded the progress of science in law.

INDETERMINATE SENTENCING LAWS

The American Prison Association held its first meeting in 1870 to discuss the new penal systems and theories that had been innovated in Bavaria, Australia and Ireland.² It was prevalent methodology at this time to punish criminals for their crimes by confining them in penal institutions where they were deprived of the conveniences and company of the society they had wronged. But a new school of thought, criminology, had developed the idea that it was not the criminal who had wronged society, but rather that society had wronged the criminal by inflicting upon him adverse environmental influences that molded his

1. King Lear.

2. Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L., C & P.S. 9, 18 (1926).

criminality.³ They reasoned that society could eliminate crime by reforming the criminal personality, by replacing anti-social personality traits with acceptable social traits; that as each criminal was a unique personality due to his unique environment, the treatment of each would be unique — the theory of individualization of punishment.⁴

The American Prison Association condoned the arguments of the European criminologists and the first American reformatory was established at Elmira, New York in 1877.⁵ Other states soon followed the New York experiment in penology,⁶ but the then existing sentencing laws were not suitable to the needs of reformation: convicted criminals were sentenced for a definite period of time which was determined by the penalty called for in the statute defining the crime; this "fixed sentence" was not suitable to individualization in that the time needed to rehabilitate a particular offender might be more or less than the duration of the sentence. To partially remedy this incongruity, indeterminate sentencing legislation was passed which provided for a period of detention with minimum and maximum limits — *e.g.*, five to twenty years — and prison parole boards were given the authority to release the sufficiently rehabilitated offender at any time within those limits.⁷

Today's indeterminate sentencing laws vary from jurisdiction to jurisdiction with the result that each jurisdiction has a combination of laws that makes its system somewhat unique.⁸ However, all the systems of sentencing can be arranged to fall within one of three general patterns:⁹

1) The statute defining the particular crime provides for minimum and maximum limits — *e.g.*, one to twenty years — and the judge is required to pronounce the "general sentence." The convicted can be released at any time between one and twenty years upon the determination of the parole board. The parole procedure is distinct from, and complementary to, the sentencing procedure; the former is the function of penology while the latter is a judicial process. The judiciary has the discretion to suspend the sentence by granting probation in the particular case.

2) The statute defining the crime declares the maximum limit of the

3. See generally, FERRI, *CRIMINAL SOCIOLOGY* (1917); LOMBROSO, *CRIME ITS CAUSES AND REMEDIES* (1918); SALHILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* (1911); TARDE, *PENAL PHILOSOPHY* (1912).

4. *Ibid.*

5. N.Y. LAWS ch. 173 (1857).

6. Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. C. & P.S. 9, 30 (1926).

7. *Id.* at 9; Note, 7 DUKE L.J. 65 (1958); Note, 50 HARV. L. REV. 677 (1936).

8. Note, 50 HARV. L. REV. 677 (1936).

9. *Id.* at 679-82.

sentence and allows the court or the jury to set the minimum limit. The provisions for parole and probation are the same as in No. 1.

3) The statute authorizes the court or jury to fix both the minimum and the maximum limits of the sentence, and again there are the usual provisions for parole and probation.

One feature all the jurisdictions share is the legislative reluctance to fully adopt the theory of individualization of punishment. No jurisdiction has a truly indeterminate sentence whereby a convicted criminal is placed in a penal institution until the penal authorities decide that he is sufficiently rehabilitated to be returned to society.

True Indeterminate Sentencing

A few jurisdictions, however, have experimented with true indeterminate sentencing in a very limited area — youthful offenders.¹⁰ The American Law Institute has fully adopted the idea of individualization of punishment for youthful offenders in its proposed Model Penal Code.¹¹ Youths who exceed the maximum age of the juvenile court's jurisdiction, and are less than twenty-one years old, are to be within the concurrent jurisdiction of the criminal courts and a youth authority.¹² A preliminary examination decides whether the individual is susceptible to rehabilitative treatment; if he is, he is placed with the youth authority which will guide and evaluate his training and decide when he shall be ultimately returned to society — this procedure is the only true instance of individualization of punishment in the United States. On the other hand, if the preliminary examination leads to the determination that the individual is not suited to the treatment facilities of the youth authority, he will be turned over to the criminal court to be sentenced in accordance with the criminal code.

The "Youth Correction Acts" and the related rehabilitative treatment are in the earliest experimental stages. Other jurisdictions would do well to study their experiences and learn from their successes and failures,¹³ and apply those lessons in drafting future indeterminate sentencing legislation.

The Accumulation of "Sentencing" Knowledge

The legislature's partial adoption of the philosophy of the individualization of punishment is an instance of true scientific experiment with a

10. Youth Correction Acts have been enacted in California, Wisconsin, Illinois and for the federal system.

11. MODEL PENAL CODE § 6.05 (Tent. Draft No. 7, 1957).

12. *Id.* § 4.10.

13. *E.g.*, Holton, *California Youth Authority: Eight Years of Action*, 41 J. CRIM. L., C. & P.S. 1 (1950).

social problem. The hypothesis that crime can be prevented by fitting the punishment to the individual¹⁴ has been modified and put into practice in the present indeterminate sentence. The experience of the law, social case workers and penologists showed that some modifications and additions should complement the indeterminate sentence. The result is a realistic approach to the crime problem by the dynamic interchange of experiences among law enforcement agencies, the courts, and social scientists. This can best be illustrated by showing the sentencing "scheme" of a single jurisdiction.

The Ohio indeterminate sentence calls for the court to pronounce the general sentence set forth in the statute defining the particular crime.¹⁵ While the court has no discretion in setting the upper or lower limits of the sentence, it does have the discretion of suspending the sentence by ordering the convicted to be placed on probation.¹⁶ Probation itself is an interaction of judicial and social-science experience in that the judge, in considering the suspension of a felony sentence, must require a written investigative report by a probation officer before he exercises his discretion.¹⁷ If probation is denied, the convicted will be sentenced to a penal institution and when the penal authorities and parole board determine that he is satisfactorily rehabilitated, he will be released sometime during the period of the general sentence.¹⁸ If they determine that he has not been rehabilitated, he will be detained for the maximum period of the sentence.

In addition to the indeterminate sentence-probation-parole complex, the experiences of the various disciplines of police, courts, social case workers, penologists, and psychologists have led to certain generalizations about the possible rehabilitation of convicted criminals. These experiential conclusions have been codified and consequently save time and expense by excluding certain classes of criminals from the individualization process. Their experience has shown that where a criminal has several felony convictions his possibilities of rehabilitation are slight, and, to protect the public from these incorrigibles, "habitual offender" laws¹⁹ have been enacted. A criminal convicted of three felonies must be sentenced for the maximum term provided for in the statute defining the felony of which he is convicted for the third time,²⁰ while a fourth felony

14. See SALELLES, *THE INDIVIDUALIZATION OF PUNISHMENT* (1911).

15. OHIO REV. CODE § 5145.01.

16. *Id.* §§ 2951.02-.03.

17. *Id.* § 2951.03.

18. *Id.* ch. 2965, §§ 2965.01-.34.

19. *Id.* §§ 2949.34, 2961.11-.12.

20. *Id.* § 2969.12.

conviction demands a life-sentence.²¹ Those persons convicted of crimes which experience has shown to be usually caused by personality disorders of a very serious and dangerous nature may not be placed on probation, *e.g.*, sexual deviates.²²

Despite the above "practical" sentencing scheme which is the result of the combined experiences of law and the social sciences, legislatures have been reluctant to enact true indeterminate sentencing laws. Some caution that the social sciences are not to be relied on as they are not truly sciences.²³ It is folly to expect the social sciences to predict social and human reactions with the same degree of accuracy that physical sciences predict physical results. The end to be attained by the social sciences is a more effective control of crime while possibly salvaging a human being from a life of criminality. The present sentencing laws hinder free experimentation in that courts and legislatures have determined who shall be received in penal institutions and how long they shall be there.

THEORIES OF PUNISHMENT

Science, and particularly social science, is a relatively new means for man's dealing with his environment. The scientific attitude has yet to permeate the thinking of the "layman" who guides his action by habit, platitudes, moralisms and old wives' tales. And lawyers have been trained in precedents that were made in a society dominated by such thinking.

While social science has discovered that criminals are the waste products of social influences and that they can be reformed to be useful citizens, the public and the law still tend to view them as they did in times preceding science. New ideas that question the old order are inhospitably received: Greeks poisoned Socrates, Jews crucified Jesus, and Christians persecuted Copernicus and Galileo, etc.

The remainder of this section is but a brief summary of the four basic attitudes toward criminal punishment in an attempt to show the "hereditary" attitude of the public and the law and to contrast that with the scientific attitude.

*The Attitude of Vengeance*²⁴

When John hits Joe, Joe "rights" the wrong by hitting back, *i.e.*, Joe avenges himself. In man's early history, this was law in action, the law

21. *Id.* § 2969.12.

22. *Id.* § 2959.04.

23. Glueck, *Principals of a Rational Penal Code*, 41 HARV. L. REV. 453, 462 (1928).

24. POLLACK AND MAITLAND, II HISTORY OF THE ENGLISH LAW 4 (2d ed. 1952); SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT, 20-26 (1911).

of self preservation. Early societies had this precedent to act on. At one time a wrong was only a wrong against the individual; there was no distinction between crime and tort. The method of righting the wrong was to require the injured or his kin to exact compensation from the wrongdoer.²⁵ But there were some wrongs that were not compensable; for these the group exacted vengeance against the wrongdoer by taking his property and his life — "outlawry" in the early English law.²⁶

Such emotionally laden punishment is quite understandable in view of man's limited knowledge of the human personality and the personal nature of law in a society that was so loosely organized.

*Free Will and Moral Responsibility*²⁷

Scholastic philosophers, particularly Aquinas,²⁸ taught that man had a free will, that is, the ability to deliberately choose his actions. They said that an individual knows whether a particular act will have a morally good or morally bad effect; therefore, a man who chooses to do an act that has a bad effect, a crime for instance, is morally responsible; society has then been offended by a deliberately criminal act and has the right to exact moral retribution by punishing the offender.

It is significant that this idea of moral responsibility is inherent in our criminal laws. As the king's peace was spreading over England, the common law courts began enunciating formulas for criminal felonies. The first felonies were those very outrages that were remedied by outlawry prior to the common law; then the courts started characterizing felonious acts as "wicked"; it then became an element of most felonies that the actor have a "guilty intent."²⁹ This intent to do a felonious act presupposes the individual to have the ability to know that his act is wrongful and consequently the courts will punish him because he chose to do the wrongful act. This is clearly the idea of the moral responsibility of the individual and that society punishes him as an act of retribution.

The Idea of Punishment as a Deterrent

The early Nineteenth Century was generally a time of social skepti-

25. *Ibid.*

26. POLLOCK AND MAITLAND, II HISTORY OF THE ENGLISH LAW 451 (2d ed. 1952).

27. SALBILLES, THE INDIVIDUALIZATION OF PUNISHMENT 63-73, 165-75; TARDE, PENAL PHILOSOPHY 83-148 (1912).

28. AQUINAS, SUMMA THEOLOGICA Quest, 83 (1274).

29. POLLOCK AND MAITLAND, II HISTORY OF THE ENGLISH LAW 468 (2d ed. 1952).

cism.³⁰ Beccaria questioned and criticized the judicial guilt-finding procedure and the reasons for which society punished criminals, *i.e.*, moral retribution.³¹ During this period punishment was decreed by the judge upon his own finding as to how "guilty" the criminal was. Beccaria was aghast at this subjective standard and wrote that the judge decided the punishment on the basis of "the intention of the accused; the dignity of the person offended; and the greatness of the sin."³² He said that a particular decision was the ". . . result of the good or bad logic of the judge and this will depend on his good or bad digestion; on the violence of his passions; on the rank and condition of the abused, or on his connections with the judge; and on all the circumstances which change the appearance of objects in the fluctuating mind of man."³³

Beccaria suggested that the subjectiveness of punishment should be replaced by legislation declaring a specific punishment for a specific crime.³⁴ The argument for this legislation was in step with the spirit of the Nineteenth Century that all men should be treated by the law as equals.

Jeremy Bentham was another strong advocate of penal legislation in which the "punishment fits the crime." He suggested that the punishment for a particular crime should be great enough that the threat of its infliction would outweigh the possible fruits of the crime, and, in this way, the possibility of punishment would deter the criminal act.³⁵

The Idea of Reformation

The three previous theories have one common feature: that the offender has acted intelligently in choosing to commit a crime, and because of this maliciousness he must be punished. Criminologists like Lombroso, and Saleilles analyzed the causes of crime by studying voluminous statistics and found that most "criminal types" had something else in common — an unfavorable environmental background. The earlier theories were based on untested opinions that criminals were criminals because they chose to be; but the criminologists have factual evidence based on statistics and the study of individual cases.³⁶

30. Voltaire, Rousseau, Locke, etc.

31. BECCARIA, CRIMES AND PUNISHMENTS (1872); MONACHESIE, *Pioneers In Criminology* — *Beccaria*, 46 J. CRIM. L., C. & P.S. 439 (1956).

32. BECCARIA, CRIMES AND PUNISHMENTS 33 (1872).

33. *Ibid.*

34. *Id.* at 461; Monachesie, *Pioneers In Criminology* — *Beccaria*, 46 J. CRIM. L., C. & P.S. 439 (1956).

35. COHEN AND COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 332 (1951).

36. See generally, FERRI, CRIMINAL SOCIOLOGY (1917); LOMBROSO, CRIME ITS

The idea of individualization of punishment is used as if it were synonymous with the idea of reformation; but the latter is only a part of the former. Individualization means simply that each individual should be treated uniquely; in many cases unique treatment will mean an attempt at rehabilitation, but in others rehabilitation is not feasible and is not considered.³⁷ Therefore, the reader should be aware that reformation is only one aim of penology; its advocates do not present it as *the* solution to the criminal problem, but only as a factor in easing the social problem while benefiting the individual delinquent.

The idea of reformation is directly opposed to the free-will doctrine. The psychology of determinism³⁸ holds that the criminal does not choose his anti-social behavior as he chooses to move a chess-piece, but rather that his environment has educated him in such a way that he knows of no other way to act; his behavior has been determined by his prior experiences. This is not to say that the individual has no control over his behavior; he can still think over the alternatives available to him, but the alternatives that he can think of and the means of carrying them out are determined along an anti-social path because that is the extent of his learning, *e.g.*, an individual, reared in a slum where young men steal what they desire and hate "cops," has learned to get what he wants by stealing and that "cops" are his enemies who are there to frustrate his desires and to plague and persecute him. It is true that this individual *chooses* to rob and steal, and is not insane in the sense that he is the victim of an uncontrollable impulse. Nevertheless, he has learned to behave in this way rather than in a more social way because of his school-of-hard-knocks education. It is in this sense that criminality has been determined by the individual's personal experiences. The aim of penology is to evaluate the offender in the light of his environment, and personal abilities, such as intelligence, and to then determine whether he can be rehabilitated.

The idea of reformation has also been described in terms of personal

CAUSES AND REMEDIES (1918); SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* (1911); TARDE, *PENAL PHILOSOPHY* (1912); WAITE, *THE PREVENTION OF REPEATED CRIME* (1943).

37. *E.g.*, *Williams v. New York*, 337 U.S. 241 (1949) where there was a conviction for murder while perpetrating the burglary of an inhabited dwelling. The jury recommended mercy but the Supreme Court upheld the trial judge's order for the death penalty under the theory of individualization. The trial judge based the sentence upon the reports of probation officers and police statements that the accused had been involved in some thirty burglaries.

38. Andennaes, *Determinism and Criminal Law*, 47 J. CRIM. L., C. & P. S. 406 (1957). See generally, ALEXANDER AND HEALY, *ROOTS OF CRIME* (1935); ALEXANDER AND STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* (1931).

maturity.³⁹ The criminal personality is immature in the sense that the criminal is not "trained" to adjust his infantile and selfish impulses to the routine "give and take" of life in society. While a personality is immature rehabilitation is possible. However, immature habits in an adult personality can become so engrained that the anti-social behavior is classified as psychotic. The problem is then exceedingly more difficult if not impossible. The combined experiences of law, penology and case workers have recognized the "practical" problem presented by the psychotic criminal as is evidenced by the "habitual offender" statutes.

THE NEED FOR FURTHER LEGAL UTILIZATION OF SCIENTIFIC KNOWLEDGE

The present sentencing procedure is a dynamic operation wherein the courts rely not only on the "experience of the law" but also on the experience and knowledge of the social sciences. There are still extant, however, remnants of a less enlightened period of criminal law: a criminal code that has its roots in ideas of moral responsibility and provides for a minimum and maximum limit to the sentence which impedes the individualization of punishment; judicial discretion is exercised in several instances where the discretion should be in a party better trained in the social sciences.

Legislation

The present sentencing laws providing for the upper and lower limits of the sentence are incompatible with the theory of individualization. Under the present laws, a dangerous criminal is released after he has served the maximum statutory period while the same individual might possibly be permanently confined if a truly indeterminate sentence law were in effect; at the other extreme, an offender, not placed on probation by a judge, must serve the minimum term provided by statute despite the fact that psychologists and peno-correctional professionals may consider him to be rehabilitated in a much shorter period of time.

An argument advanced for the retention of the present laws is that some period of confinement must be threatened to deter individuals from committing crimes. Law enforcement personnel and lawyers are said to view the purpose of punishment as deterrence while psychologists are opposed to that view by their adherence to reformation.⁴⁰ This is merely the usual pseudo-conflict between practice and theory. There is no con-

39. BROMBERG, CRIME AND THE MIND (1948).

40. HALL, READINGS IN JURISPRUDENCE AND CRIMINAL THEORY 243-44 (1958).

flict between the groups; they are each concerned with distinct and separate phases of the criminal problem — law enforcement on the one hand and penology on the other. The possibility of being sentenced should prove a sufficient deterrent to those few criminals who are mathematically calculating, in fact, the possibility of life-long detention if rehabilitation is considered impossible should be more deterring than the threat of the usual minimum-maximum sentence.

The more serious obstacle to further legislation seems to be the public attitude. The knowledge and theory of modern psychology has not yet trickled into the arena of life in society. The non-scientific public, which includes most lawyers and legislators, have grown up in an environment that teaches that criminals are "bad" and deserve to be punished: they also are caught in the web of psychological determinism in that their environment has determined their attitude toward crime. The language which is used to describe a phenomenon seriously prejudices our opinions:

If a person is described as a ruthless egoist, cynically exploiting others for his own ends, the moralizing terms used create an impression of a high degree of guilt and a well merited punishment. The situation is entirely different if the same person is described in psychiatric terms, for example, a psychopath, emotionally frigid with reduced powers of empathy and self-control. . . .⁴¹

And it has been suggested that the public's harsh regard for criminals is even more personal than the vocabulary they have been exposed to:

The criminal thus becomes a handy scapegoat upon which he (the citizen) can transfer his feeling of his own tendency to sinfulness and thus by punishing the criminal he deludes himself into a feeling of righteous indignation, thus bolstering up his own self-respect. . . . The legal punishment of the criminal today is, in its psychology a dramatic tragic action by which society pushes off its criminal impulses upon a substitute. The principle is the same as that by which an emotion such as anger is discharged upon an inoffensive lifeless object.⁴²

The principal obstacle to a true indeterminate sentence is not intelligent opposition to the theory of individualization, but rather the inertia of the uninformed mind which cherishes the "tried and true" and clings doggedly to yesterday's ignorance and superstitions.

Judicial Discretion

All those who deceive themselves into the belief that they put any thing but their own personalities in their work are the dupes of the most fallacious of illusions. The truth is that we can never get outside our-

41. Andennaes, *Determinism and the Criminal Law*. 47 J. CRIM. L., C. & P.S. 406, 412 (1957).

42. WHITE, *INSANITY AND THE CRIMINAL LAW* 13 (1923).

selves. . . . We are shut up in our own personalities as if in a perpetual prison.⁴³

The judge in setting the maximum or minimum limits of a sentence, or in suspending the sentence, can base his decision only on his own knowledge and experiences. Knowledge is rapidly increasing in all endeavors and judges and lawyers cannot be expected to have even an inkling of technical knowledge in all fields. Does that mean the law must close its eyes to what others know? If not, the only way of introducing "special" knowledge into law is to rely more fully on competent people who have specialized in the particular field.⁴⁴ In the area of criminal sentencing the judge's discretion should be reduced, or eliminated, and replaced with the discretion of social scientists.

The discretion of the trial judge has been questioned by members of the bench who have questioned the ability of judges to make decisions any more rationally than other men, for "judges are not a race apart. The hidden factors in the inferences and opinions of ordinary men are those of the judge."⁴⁵ It would seem that prejudices based on vengeance and moral retribution that cause ordinary men to be unsympathetic to the criminal's psychology are also the prejudices of many judges.

In a statistical survey of minor criminal cases decided by the several judges of the City Magistrate's Court in New York City, the result indicated that there is a "personal equation." In intoxication cases one judge found as many as 97% of the parties guilty while another found only 21% guilty; and in vagrancy cases the guilty findings ranged from 21% to 95.5%, and in the disorderly conduct cases the range was from 46% to 82%.⁴⁶ In minor criminal cases such uncertain justice might be tolerable, but when a prison sentence is involved, such judicial uncertainty is undesirable. Professionals trained and specializing in criminal problems are better qualified to pass sentence on convicted criminals than are "law-trained" judges.

CONCLUSION

The social sciences have made great advances in the study of crime. The crime rate should be reduced by the law's fullest utilization of that knowledge, but to adopt that knowledge seems to be a secondary task which must follow the purge of deeply-rooted ideas of vengeance and

43. FRANK, *LAW AND THE MODERN MIND* 15 (1930), quoting Anatole France.

44. COHEN AND COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 549 (1951).

45. FRANK, *LAW AND THE MODERN MIND* 105 (1930); See also, FRANK, *COURTS ON TRIAL* (1949).

46. FRANK, *LAW AND THE MODERN MIND* 112 (1930).