

The Indeterminate Sentence

Charles Dudley Warner

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What Shall Be Done With The Criminal Class?

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THE INDETERMINATE SENTENCE--WHAT SHALL BE DONE WITH THE CRIMINAL CLASS?

By Charles Dudley Warner

The problem of dealing with the criminal class seems insolvable, and it undoubtedly is with present methods. It has never been attempted on a fully scientific basis, with due regard to the protection of society and to the interests of the criminal.

It is purely an economic and educational problem, and must rest upon the same principles that govern in any successful industry, or in education, and that we recognize in the conduct of life. That little progress has been made is due to public indifference to a vital question and to the action of sentimentalists, who, in their philanthropic zeal; fancy that a radical reform can come without radical discipline. We are largely wasting our energies in petty contrivances instead of striking at the root of the evil.

What do we mean by the criminal class? It is necessary to define this with some precision, in order to discuss intelligently the means of destroying this class. A criminal is one who violates a statute law, or,

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as we say, commits a crime. The human law takes cognizance of crime and not of sin. But all men who commit crime are not necessarily in the criminal class. Speaking technically, we put in that class those whose sole occupation is crime, who live by it as a profession, and who have no other permanent industry. They prey upon society. They are by their acts at war upon it, and are outlaws.

The State is to a certain extent responsible for this class, for it has trained most of them, from youth up, through successive detentions in lock-ups, city prisons, county jails, and in State prisons, and penitentiaries on relatively short sentences, under influences which tend to educate them as criminals and confirm them in a bad life. That is to say, if a man once violates the law and is caught, he is put into a machine from which it is very difficult for him to escape without further deterioration. It is not simply that the State puts a brand on him in the eyes of the community, but it takes away his self-respect without giving him an opportunity to recover it. Once recognized as in the criminal class, he has no further concern about the State than that of evading its penalties so far as is consistent with pursuing his occupation of crime.

To avoid misunderstanding as to the subject of this paper, it is necessary to say that it is not dealing with the question of prison reform in its whole extent. It attempts to consider only a pretty well defined class. But in doing this it does not say that other aspects of our public peril from crime are not as important as this. We cannot relax our efforts in regard to the relations of poverty, drink, and unsanitary conditions, as leading to crime. We have still to take care of the exposed children, of those with parentage and surroundings inclining to crime, of the degenerate and the unfortunate. We have to keep up the warfare all along the line against the demoralization of society. But we have hereto deal with a specific manifestation; we have to capture a stronghold, the possession of which will put us in much better position to treat in detail the general evil.

Why should we tolerate any longer a professional criminal class? It is not large. It is contemptibly small compared with our seventy millions of people. If I am not mistaken, a late estimate gave us less than fifty thousand persons in our State prisons and penitentiaries. If we add to them those at large who have served one or two terms, and are generally known to the police, we shall not have probably more than eighty thousand of the criminal class. But call it a hundred thousand. It is a body that seventy millions of people ought to take care of with little difficulty. And we certainly ought to stop its increase. But we do not. The class grows every day. Those who watch the criminal reports are alarmed by the fact that an increasing number of those arrested for felonies are discharged convicts. This is an unmistakable evidence of the growth of the outlaw classes.

But this is not all. Our taxes are greatly increased on account of this class. We require more police to watch those who are at large and preying on society. We expend more yearly for apprehending and trying those caught, for the machinery of criminal justice, and for the recurring farce of imprisoning on short sentences and discharging those felons to go on with their work of swindling and robbing. It would be good economy for the public, considered as a taxpayer, to pay for the perpetual keep of these felons in secure confinement.

And still this is not the worst. We are all living in abject terror of these licensed robbers. We fear robbery night and day; we live behind

bolts and bars (which should be reserved for the criminal) and we are in hourly peril of life and property in our homes and on the highways. But the evil does not stop here. By our conduct we are encouraging the growth of the criminal class, and we are inviting disregard of law, and diffusing a spirit of demoralization throughout the country.

I have spoken of the criminal class as very limited; that is, the class that lives by the industry of crime alone. But it is not isolated, and it has widespread relations. There is a large portion of our population not technically criminals, which is interested in maintaining this criminal class. Every felon is a part of a vast network of criminality. He has his dependents, his allies, his society of vice, all the various machinery of temptation and indulgence.

It happens, therefore, that there is great sympathy with the career of the lawbreakers, many people are hanging on them for support, and among them the so-called criminal lawyers. Any legislation likely to interfere seriously with the occupation of the criminal class or with its increase is certain to meet with the opposition of a large body of voters. With this active opposition of those interested, and the astonishing indifference of the general public, it is easy to see why so little is done to relieve us of this intolerable burden. The fact is, we go on increasing our expenses for police, for criminal procedure, for jails and prisons, and we go on increasing the criminal class and those affiliated with it.

And what do we gain by our present method? We do not gain the protection of society, and we do not gain the reformation of the criminal. These two statements do not admit of contradiction. Even those who cling to the antiquated notion that the business of society is to punish the offender must confess that in this game society is getting the worst of it. Society suffers all the time, and the professional criminal goes on with his occupation, interrupted only by periods of seclusion, during which he is comfortably housed and fed. The punishment he most fears is being compelled to relinquish his criminal career. The object of punishment for violation of statute law is not vengeance, it is not to inflict injury for injury. Only a few persons now hold to that. They say now that if it does little good to the offender, it is deterrent as to others. Now, is our present system deterrent? The statute law, no doubt, prevents many persons from committing crime, but our method of administering it certainly does not lessen the criminal class, and it does not adequately protect society. Is it not time we tried, radically, a scientific, a disciplinary, a really humanitarian method?

The proposed method is the indeterminate sentence. This strikes directly at the criminal class. It puts that class beyond the power of continuing its depredations upon society. It is truly deterrent, because it is a notification to any one intending to enter upon that method of living that his career ends with his first felony. As to the general effects of the indeterminate sentence, I will repeat here what I recently wrote for the Yale Law Journal:

It is unnecessary to say in a law journal that the indeterminate sentence is a measure as yet untried. The phrase has passed into current speech, and a considerable portion of the public is under the impression that an experiment of the indeterminate sentence is actually being made. It is, however, still a theory, not adopted in any legislation or in practice anywhere in the world.

The misconception in regard to this has arisen from the fact that under certain regulations paroles are granted before the expiration of the statutory sentence.

An indeterminate sentence is a commitment to prison without any limit. It is exactly such a commitment as the court makes to an asylum of a man who is proved to be insane, and it is paralleled by the practice of sending a sick man to the hospital until he is cured.

The introduction of the indeterminate sentence into our criminal procedure would be a radical change in our criminal legislation and practice. The original conception was that the offender against the law should be punished, and that the punishment should be made to fit the crime, an 'opera bouffe' conception which has been abandoned in reasoning though not in practice. Under this conception the criminal code was arbitrarily constructed, so much punishment being set down opposite each criminal offense, without the least regard to the actual guilt of the man as an individual sinner.

Within the present century considerable advance has been made in regard to prison reform, especially with reference to the sanitary condition of places of confinement. And besides this, efforts of various kinds have been made with regard to the treatment of convicts, which show that the idea was gaining ground that criminals should be treated as individuals. The application of the English ticket-of-leave system was one of these efforts; it was based upon the notion that, if any criminal showed sufficient evidence of a wish to lead a different life, he should be conditionally released before the expiration of his sentence. The parole system in the United States was an attempt to carry out the same experiment, and with it went along the practice which enabled the prisoner to shorten the time of his confinement by good behavior. In some of the States reformatories have been established to which convicts have been sent under a sort of sliding sentence; that is, with the privilege given to the authorities of the reformatory to retain the offender to the full statutory term for which he might have been sentenced to State prison, unless he had evidently reformed before the expiration of that period. That is to say, if a penal offense entitled the judge to sentence the prisoner for any period from two to fifteen years, he could be kept in the reformatory at the discretion of the authorities for the full statutory term. It is from this law that the public notion of an indeterminate sentence is derived. It is, in fact, determinate, because the statute prescribes its limit.

The introduction of the ticket-of-leave and the parole systems, and the earning of time by good behavior were philanthropic suggestions and promising experiments which have not been justified by the results. It is not necessary at this time to argue that no human discretion is adequate to mete out just punishment for crimes; and it has come to be admitted generally, by men enlightened on this subject, that the real basis for dealing with the criminal rests, firstly, upon the right of society to secure itself against the attacks of the vicious, and secondly, upon the duty imposed upon society, to reform the criminal if that is possible. It is patent to the most superficial observation that our present method does not protect society, and does not lessen the number of the criminal class, either by deterrent methods or by reformatory processes,

except in a very limited way.

Our present method is neither economic nor scientific nor philanthropic. If we consider the well-defined criminal class alone, it can be said that our taxes and expenses for police and the whole criminal court machinery, for dealing with those who are apprehended, and watching those who are preying upon society, yearly increase, while all private citizens in their own houses or in the streets live inconstant terror of the depredations of this class. Considered from the scientific point of view, our method is absolutely crude, and but little advance upon mediaeval conditions; and while it has its sentimental aspects, it is not real philanthropy, because comparatively few of the criminal class are permanently rescued.

The indeterminate sentence has two distinct objects: one is the absolute protection of society from the outlaws whose only business in life is to prey upon society; and the second is the placing of these offenders in a position where they can be kept long enough for scientific treatment as decadent human beings, in the belief that their lives can be changed in their purpose. No specific time can be predicted in which a man by discipline can be expected to lay aside his bad habits and put on good habits, because no two human beings are alike, and it is therefore necessary that an indefinite time in each case should be allowed for the experiment of reformation.

We have now gone far enough to see that the ticket-of-leave system, the parole system as we administer it in the State prisons (I except now some of the reformatories), and the good conduct method are substantially failures, and must continue to be so until they rest upon the absolute indeterminate sentence. They are worse than failures now, because the public mind is lulled into a false security by them, and efforts at genuine prison reform are defeated.

It is very significant that the criminal class adapted itself readily to the parole system with its sliding scale. It was natural that this should be so, for it fits in perfectly well with their scheme of life. This is to them a sort of business career, interrupted now and then only by occasional limited periods of seclusion. Any device that shall shorten those periods is welcome to them. As a matter of fact, we see in the State prisons that the men most likely to shorten their time by good behavior, and to get released on parole before the expiration of their sentence, are the men who make crime their career. They accept this discipline as a part of their lot in life, and it does not interfere with their business any more than the occasional bankruptcy of a merchant interferes with his pursuits.

It follows, therefore, that society is not likely to get security for itself, and the criminal class is not likely to be reduced essentially or reformed, without such a radical measure as the indeterminate sentence, which, accompanied, of course, by scientific treatment, would compel the convict to change his course of life, or to stay perpetually in confinement.

Of course, the indeterminate sentence would radically change our criminal jurisprudence and our statutory provisions in regard to criminals. It goes without saying that it is opposed by the entire

criminal class, and by that very considerable portion of the population which is dependent on or affiliated with the criminal class, which seeks to evade the law and escape its penalties. It is also opposed by a small portion of the legal profession which gets its living out of the criminal class, and it is sure to meet the objection of the sentimentalists who have peculiar notions about depriving a man of his liberty, and it also has to overcome the objections of many who are guided by precedents, and who think the indeterminate sentence would be an infringement of the judicial prerogative.

It is well to consider this latter a little further. Our criminal code, artificial and indiscriminating as it is, is the growth of ages and is the result of the notion that society ought to take vengeance upon the criminal, at least that it ought to punish him, and that the judge, the interpreter of the criminal law, was not only the proper person to determine the guilt of the accused, by the aid of the jury, but was the sole person to judge of the amount of punishment he should receive for his crime. Now two functions are involved here: one is the determination that the accused has broken the law, the other is gauging within the rules of the code the punishment that, each individual should receive. It is a theological notion that the divine punishment for sin is somehow delegated to man for the punishment of crime, but it does not need any argument to show that no tribunal is able with justice to mete out punishment in any individual case, for probably the same degree of guilt does not attach to two men in the violation of the same statute, and while, in the rough view of the criminal law, even, one ought to have a severe penalty, the other should be treated with more leniency. All that the judge can do under the indiscriminating provisions of the statute is to make a fair guess at what the man should suffer.

Under the present enlightened opinion which sees that not punishment but the protection of society and the good of the criminal are the things to be aimed at, the judge's office would naturally be reduced to the task of determining the guilt of the man on trial, and then the care of him would be turned over to expert treatment, exactly as in a case when the judge determines the fact of a man's insanity.

If objection is made to the indeterminate sentence on the ground that it is an unusual or cruel punishment, it may be admitted that it is unusual, but that commitment to detention cannot be called cruel when the convict is given the key to the house in which he is confined. It is for him to choose whether he will become a decent man and go back into society, or whether he will remain a bad man and stay in confinement. For the criminal who is, as we might say, an accidental criminal, or for the criminal who is susceptible to good influences, the term of imprisonment under the indeterminate sentence would be shorter than it would be safe to make it for criminals under the statute. The incorrigible offender, however, would be cut off at once and forever from his occupation, which is, as we said, varied by periodic residence in the comfortable houses belonging to the State.

A necessary corollary of the indeterminate sentence is that every State prison and penitentiary should be a reformatory, in the modern meaning of that term. It would be against the interest of society, all its instincts of justice, and the height of cruelty to an

individual criminal to put him in prison without limit unless all the opportunities were afforded him for changing his habits radically. It may be said in passing that the indeterminate sentence would be in itself to any man a great stimulus to reform, because his reformation would be the only means of his terminating that sentence. At the same time a man left to himself, even in the best ordered of our State prisons which is not a reformatory, would be scarcely likely to make much improvement.

I have not space in this article to consider the character of the reformatory; that subject is fortunately engaging the attention of scientific people as one of the most interesting of our modern problems. To take a decadent human being, a wreck physically and morally, and try to make a man of him, that is an attempt worthy of a people who claim to be civilized. An illustration of what can be done in this direction is furnished by the Elmira Reformatory, where the experiment is being made with most encouraging results, which, of course, would be still better if the indeterminate sentence were brought to its aid.

When the indeterminate sentence has been spoken of with a view to legislation, the question has been raised whether it should be applied to prisoners on the first, second, or third conviction of a penal offense. Legislation in regard to the parole system has also considered whether a man should be considered in the criminal class on his first conviction for a penal offense. Without entering upon this question at length, I will suggest that the convict should, for his own sake, have the indeterminate sentence applied to him upon conviction of his first penal offense. He is much more likely to reform than he would be after he had had a term in the State prison and was again convicted, and the chance of his reformation would be lessened by each subsequent experience of this kind. The great object of the indeterminate sentence, so far as the security of society is concerned, is to diminish the number of the criminal class, and this will be done when it is seen that the first felony a man commits is likely to be his last, and that for a young criminal contemplating this career there is in this direction "no thoroughfare."

By his very first violation of the statute he walks into confinement, to stay there until he has given up the purpose of such a career.

In the limits of this paper I have been obliged to confine myself to remarks upon the indeterminate sentence itself, without going into the question of the proper organization of reformatory agencies to be applied to the convict, and without consideration of the means of testing the reformation of a man in any given case. I will only add that the methods at Elmira have passed far beyond the experimental stage in this matter.

The necessary effect of the adoption of the indeterminate sentence for felonies is that every State prison and penitentiary must be a reformatory. The convict goes into it for the term of a year at least (since the criminal law, according to ancient precedent, might require that, and because the discipline of the reformatory would require it as a practical rule), and he stays there until, in the judgment of competent authority, he is fit to be trusted at large.

If he is incapable of reform, he must stay there for his natural life. He is a free agent. He can decide to lead an honest life and have his liberty, or he can elect to work for the State all his life in criminal confinement.

When I say that every State prison is to be a reformatory, I except, of course, from its operation, those sentenced for life for murder, or other capital offenses, and those who have proved themselves incorrigible by repeated violations of their parole.

It is necessary now to consider the treatment in the reformatory. Only a brief outline of it can be given here, with a general statement of the underlying principles. The practical application of these principles can be studied in the Elmira Reformatory of New York, the only prison for felons where the proposed system is carried out with the needed disciplinary severity. In studying Elmira, however, it must be borne in mind that the best effects cannot be obtained there, owing to the lack of the indeterminate sentence. In this institution the convict can only be detained for the maximum term provided in the statute for his offense. When that is reached, the prisoner is released, whether he is reformed or not.

The system of reform under the indeterminate sentence, which for convenience may be called the Elmira system, is scientific, and it must be administered entirely by trained men and by specialists; the same sort of training for the educational and industrial work as is required in a college or an industrial school, and the special fitness required for an alienist in an insane asylum. The discipline of the establishment must be equal to that of a military school.

We have so far advanced in civilization that we no longer think of turning the insane, the sick, the feebleminded, over to the care of men without training chosen by the chance of politics. They are put under specialists for treatment. It is as necessary that convicts should be under the care of specialists, for they are the most difficult and interesting subjects for scientific treatment. If not criminals by heredity, they are largely made so by environment; they are either physical degenerates or they are brutalized by vice. They have lost the power of distinguishing right from wrong; they commonly lack will-power, and so are incapable of changing their habits without external influence. In short, the ordinary criminal is unsound and diseased in mind and body.

To deal with this sort of human decadent is, therefore, the most interesting problem that can be offered to the psychologist, to the physiologist, to the educator, to the believer in the immortality of the soul. He is still a man, not altogether a mere animal, and there is always a possibility that he may be made a decent man, and a law-abiding, productive member of society.

Here, indeed, is a problem worthy of the application of all our knowledge of mind and of matter, of our highest scientific attainments. But it is the same problem that we have in all our education, be it the training of the mind, the development of the body, or the use of both to good ends. And it goes without saying that its successful solution, in a reformatory for criminals, depends upon the character of the man who administers the institution. There must be at the head of it a man of character, of intellectual force, of administrative ability, and all his subordinate officers must be fitted for their special task, exactly as they should be for a hospital, or a military establishment, for a college, or for a

school of practical industries. And when such men are demanded, they will be forthcoming, just as they are in any department in life, when a business is to be developed, a great engineering project to be undertaken, or an army to be organized and disciplined.

The development of our railroad system produced a race of great railroad men. The protection of society by the removal and reform of the criminal class, when the public determines upon it, will call into the service a class of men fitted for the great work. We know this is so because already, since the discussion of this question has been current, and has passed into actual experiment, a race of workers and prison superintendents all over the country have come to the front who are entirely capable of administering the reform system under the indeterminate sentence. It is in this respect, and not in the erection of model prisons, that the great advance in penology has been made in the last twenty years. Men of scientific attainment are more and more giving their attention to this problem as the most important in our civilization. And science is ready to take up this problem when the public is tired and ashamed of being any longer harried and bullied and terrorized over by the criminal class.

The note of this reform is discipline, and its success rests upon the law of habit. We are all creatures of habit, physical and mental. Habit is formed by repetition of any action. Many of our physical habits have become automatic. Without entering into a physiological argument, we know that repetition produces habit, and that, if this is long continued, the habit becomes inveterate. We know also that there is a habit, physical and moral, of doing right as well as doing wrong. The criminal has the habit of doing wrong. We propose to submit him to influences that will change that habit. We also know that this is not accomplished by suppressing that habit, but by putting a good one in its place.

It is true in this case that nature does not like a vacuum. The thoughts of men are not changed by leaving them to themselves, they are changed by substituting other thoughts.

The whole theory of the Elmira system is to keep men long enough under a strict discipline to change their habits. This discipline is administered in three ways. They are put to school; they are put at work; they are prescribed minute and severe rules of conduct, and in the latter training is included military drill.

The school and the workshop are both primarily for discipline and the formation of new habits. Only incidentally are the school and the workshop intended to fit a man for an occupation outside of the prison. The whole discipline is to put a man in possession of his faculties, to give him self-respect, to get him in the way of leading a normal and natural life. But it is true that what he acquires by the discipline of study and the discipline of work will be available in his earning an honest living. Keep a man long enough in this three-ply discipline, and he will form permanent habits of well-doing. If he cannot and will not form such habits, his place is in confinement, where he cannot prey upon society.

There is not space here to give the details of the practices at Elmira. They are easily attainable. But I will notice one or two objections that have been made. One is that in the congregate system men necessarily learn evil from each other. This is, of course, an evil. It is here, however, partially overcome by the fact that the inmates are kept so busy

in the variety of discipline applied to them that they have little or no time for anything else. They study hard, and are under constant supervision as to conduct. And then their prospect of parole depends entirely upon the daily record they make, and upon their radical change of intention. At night they are separated in their cells. During the day they are associated in class, in the workshop, and in drill, and this association is absolutely necessary to their training. In separation from their fellows, they could not be trained. Fear is expressed that men will deceive their keepers and the board which is to pass upon them, and obtain parole when they do not deserve it. As a matter of fact, men under this discipline cannot successfully play the hypocrite to the experts who watch them. It is only in the ordinary prison where the parole is in use with no adequate discipline, and without the indefinite sentence, that deception can be practiced. But suppose a man does play the hypocrite so as to deceive the officers, who know him as well as any employer knows his workmen or any teacher knows his scholars, and deceives the independent board so as to get a parole. If he violates that parole, he can be remanded to the reformatory, and it will be exceedingly difficult for him to get another parole. And, if he should again violate his parole, he would be considered incorrigible and be placed in a life prison.

We have tried all other means of protecting society, of lessening the criminal class, of reforming the criminal. The proposed indeterminate sentence, with reformatory discipline, is the only one that promises to relieve society of the insolent domination and the terrorism of the criminal class; is the only one that can deter men from making a career of crime; is the only one that offers a fair prospect for the reformation of the criminal offender.

Why not try it? Why not put the whole system of criminal jurisprudence and procedure for the suppression of crime upon a sensible and scientific basis?

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