

May 2013

## Considerations Basic to Reform of Juvenile Offender Laws

Frederick J. Ludwig

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

## CONSIDERATIONS BASIC TO REFORM OF JUVENILE OFFENDER LAWS

FREDERICK J. LUDWIG \*

THE most common human stupidity, Nietzsche observed, is to forget what one is trying to do. Regrettably, this has often been the case of voluminous proposals for reform of our juvenile court laws.<sup>1</sup> Law is a means to an end. The pri-

---

\* Professor of Law, St. John's University School of Law.

<sup>1</sup> The most recent well-considered local proposals for reform deal with youths from 16 to 21. At present, two state-wide statutes and one statute operative in three counties make special provision for these adolescents.

(A) Under the Youthful Offender Act (N.Y. CODE CRIM. PROC. §§ 913-e—913-r), enacted in 1944, an offender from 16 through 18 at the time of the commission of a crime, who has not previously been convicted of a felony and who is not charged with a crime punishable by death or life imprisonment may, with his consent, be investigated to determine whether he should be given the specialized treatment and status known as "Youthful Offender," or whether he should be handled as an adult criminal. The decision is made by the judge of the trial court to which the youth is brought. Such youthful offender procedure may be initiated by the grand jury, the district attorney or the judge's own motion, but it does not occur until after the youth reaches the trial court. If he is found eligible for youthful offender treatment, the charge of "Youthful Offender" is substituted for the criminal charge against him, and the indictment or information on the original criminal charge is sealed. Upon a plea of guilty, or upon being found guilty after a non-jury trial to determine whether he committed the criminal acts originally charged, the youth is adjudicated a youthful offender and thus avoids the stigma of a criminal record. As such he may be committed for an indefinite term up to three years, or he may receive a suspended sentence involving a three to five-year period of probation. He may be committed to a public or private reformatory institution, but not to a prison.

(B) Under the Wayward Minor Act (N.Y. CODE CRIM. PROC. §§ 913-a—913-d), a minor over 16 and under 21 who conducts himself in such a manner as to endanger his own health and morals or those of his family or the community, but is not charged with the commission of a crime, may, upon the complaint of a parent, police officer or other interested person, be adjudicated a wayward minor by a magistrate other than a justice of the peace. Pursuant to such adjudication, wayward minors may be placed on probation for a period not to exceed two years, or committed to a public or private reformatory institution for an indeterminate period not to exceed three years. A wayward minor adjudication is not a conviction of a crime.

(C) The Adolescent Court procedure is permitted only in the counties of Kings, Queens and Richmond. Under it the Adolescent Court of the Mag-

mary end of laws affecting young offenders is prevention of offenses by young persons. Juvenile court laws are good or bad in proportion as they serve or disserve that end. If this is so, then official programs in this field cannot be justified merely because they provide jobs for guidance personnel, social case workers and probation officers. Neither can they be defended simply because they offer suitable subjects for grants from munificent foundations, or timely topics for businessmen at Rotary luncheons, or for public-spirited women at afternoon teas. If such laws are to be properly evaluated, it may mean that progress is not always synonymous with lenient non-punitive treatment of offenders, and at the same time that reactionary retrogress may not always be identified with painful, punitive proposals. If such laws are worthwhile at all, it is only because they are a means to the attainment of the worthwhile end of preventing crime and delinquency among young persons.

---

istrates' Courts of the City of New York is given power to dismiss, with the consent of the district attorney, a criminal information or complaint against a youth between the ages of 16 and 19 and to treat him in accordance with the procedures governing wayward minors. This procedure takes place early in the case when, after a preliminary hearing to determine whether probable cause exists to substantiate the criminal charge, the youth is temporarily released or remanded to custody pending investigation by probation authorities of his suitability for possible wayward minor treatment. If found suitable, the youth is adjudicated a wayward minor and is treated as such. Such adjudication, unlike that of "Youthful Offender," does not involve any finding that the youth committed the criminal acts originally charged. Special treatment is also given to adolescent narcotic addicts who may be voluntarily committed to hospitals or institutions for special treatment or who may be adjudged by a magistrate to be wayward minors.

The proposed changes would: (1) establish a single Youth Court presided over by a county court judge in each county; (2) extend jurisdiction over offenders aged 16 to 21 charged with a crime not punishable by death or life imprisonment and not previously convicted of a felony, as well as over wayward minors and adolescent drug users (this would extend youthful offender treatment to 19 and 20 year-old offenders); (3) remove the stigma of criminal arrest from such youths aged 16 and 17 who are taken into custody and charged with such crimes; (4) make unnecessary an indictment by a grand jury for felonies in such cases unless the youth wishes to have his case presented to the grand jury; (5) increase by two years the present maximum indefinite term of three years for institutional treatment. In addition, new institutional facilities of the "minimum security" type, such as reforestation camps and the small, familiar British-type hostel or foster homes, are provided for. For probationary treatment, provisions for scholarships, teachers of this work and a 50 per cent increase in personnel are recommended. See 1955 LEG. DOC. NO. 45, REPORT, N.Y. TEMPORARY COMMISSION ON THE COURTS 48-59, 68-117 (1955); N.Y. SEN. INT. 2512, 2514-2517 (Feb. 22, 1955).

## CIRCUMSCRIBED CONTROL OF CONDUCT BY CRIMINAL LAW

The fearful limitation of law and its sanctions as a means of influencing human behavior ought to be fully appreciated. The criminal law with all its centuries of experience has not yet been able to build character, or develop desirable habits, attitudes, interests and ideals. In this respect, a criminal code must always offer feeble competition to moral influences of home and community and familiar ethical effects of church and school.

Juvenile laws can affect juvenile behavior only by the manner in which they actually impinge upon juveniles who commit crimes. This influence makes itself felt by (1) subjecting actual offenders to unpleasant treatment in the hope (often in vain) that its memory will intimidate them from offending again; (2) treating actual offenders so that potential ones will be dissuaded by that example; (3) restraining those most likely to commit crimes; and (4) rehabilitating corrigible offenders.

## USE AND ABUSE OF PUNISHMENT

Men seek pleasure, avoid pain. The efficacy of punishment in intimidating actual offenders and deterring potential ones depends on its certainty of infliction and its intensity. It has taken many centuries of brutal experience to demonstrate that certainty of punishment is more effective in preventing crime than severity. During the reign of Henry VIII, 72,000 persons were executed for robbery and theft alone. This was an average of 2,000 per year in a population considerably less than three million. Even as late as 1819 in England, the death penalty was available for no fewer than 220 offenses. Proposed reforms met with vigorous opposition. When in 1814 a man was executed for cutting down a cherry tree, the judge observed that anyone who would maliciously cut down a tree would kill a man. When it was proposed to abolish the death penalty for stealing five shillings from a dwelling house, the Lord Chancellor and the Chancellor of the Exchequer expressed profound regret. Even Sir

Robert Peel considered this "a most dangerous experiment." And Lord Ellenborough, Chief Justice of the King's Bench, warned, "If we suffer this Bill to pass, we shall not know where we stand—we shall not know whether we are upon our heads or our feet." It was emphasized that severity of punishment was the single most important threat to the potential offender. Yet even at public executions, at a time when picking pockets was punishable by death, pickpockets plied their trade among the crowd gazing upward at the hangman's noose, "for they accounted executions their best harvest." The argument of Sir Samuel Romilly in the House of Commons that certainty, and not severity, of punishment was the important ingredient in deterrence, finally succeeded in abolition of brutal punishment for petty crime, only because the establishment of a police force in London in 1829 made that certainty a concrete reality.<sup>2</sup>

The limits of the effective use of punishment, however certain, must be appreciated. It is one thing to inflict punishment for its own sadistic sake as, for example, in vengeance, expiation or retribution. It is another to employ it as a means of influencing human behavior by intimidating actual law-breakers and deterring potential ones in order to prevent crime and delinquency. Under numerous varying conditions, punitive treatment may not be feasible. If such punishment involves, for example, hanging a 9 year-old boy, as it did in 1488, or executing an 11 year-old one, as was the case two centuries earlier, nullification will shut down the criminal law machinery.<sup>3</sup> This is so because laymen—as complainants, witnesses and jurors—refuse to participate in the enforcement of such drastic penalties. At the same time, prolonged and painful institutional confinement is likely to result in the return to society of embittered and vengeful individuals. And there is a limit to the cost any community can bear in institutionalizing everyone found to have committed a crime.

---

<sup>2</sup> See REPORT, SELECT COMMITTEE ON CAPITAL PUNISHMENT 9, 31-35, 44 (H.M. Stationery Office, 1930).

<sup>3</sup> See cases collected in Ludwig, *Delinquent Parents and the Criminal Law*, 5 VAND. L. REV. 719, 722 (1952), and *Rationale of Responsibility for Young Offenders*, 29 NEB. L. REV. 521, 527 (1950).

## LIMITATIONS OF LENIENCY

The optimum method of preventing crime and delinquency is, of course, to rehabilitate and reform the young offender. In so far as such a program involves some temporary restraint upon the offender, it inflicts a certain amount of pain. Its avowed purpose, however, is to prevent crime by a process of non-punitive re-education that will somehow transform a law-breaking youth into a law-observing one. There has been no large scale demonstration that our present knowledge makes possible exclusive reliance upon this non-punitive method of preventing delinquency. A generation ago, the Boston juvenile court cooperated with the celebrated Children's Clinic in that city in the cases of a thousand young offenders, whose average age was between 13 and 14. The Clinic made a scientific study of the treatment needs of these youngsters. They recommended which children should be left in their own homes on probationary oversight, and which placed in foster homes, or with relatives, or on a farm, or in a non-correctional institution. Five years later a study was made to determine what became of these scientifically treated young delinquents. Of the 923 boys about whose subsequent careers reliable information was available, 88.2 percent had committed crimes again, and 70 percent of these had committed serious crimes. Here we had Cabot, evidently one of the wisest and most enlightened of juvenile court judges, and Healey and Bronner, the most experienced and distinguished clinicians in the field of juvenile delinquency, pooling their wisdom and knowledge and vast experience in the effort to reform delinquents, with the net result that 88.2 percent continued delinquent, and 11.8 percent did not. Both they and we are utterly unable to explain the result. We do not know why the failures failed or the successes succeeded.<sup>4</sup>

One obstacle yet to be overcome in developing a workable program of rehabilitation is lack of reliable criteria to differentiate corrigible offenders from incorrigible ones. Take the

---

<sup>4</sup> See GLUECK AND GLUECK, ONE THOUSAND JUVENILE DELINQUENTS (1934); Michael, Book Review, 44 YALE L.J. 908 (1935).

case of Abe "Kid Twist" Reles. This cruel, sadistic slugger from the Brownsville section of Brooklyn began his criminal career in 1920 when he was just 13 with an arrest for juvenile delinquency. He was accorded the usual lenient treatment on that and numerous subsequent occasions. All told he was to be arrested 43 times during a career that included a stint with Murder, Incorporated. Before he mysteriously strode out of an upper-story window of the Half-Moon Hotel in Coney Island, he had confessed to no fewer than 18 murders. It would be more than a mild understatement to indicate that this is the case history of an incorrigible offender upon whom non-punitive rehabilitative measures were a waste of community resources.

Again, even if we could separate corrigible from incorrigible offenders, it is not yet possible to determine at what point the corrigible ones may be pronounced "cured" and in need of no further reformatory treatment.

#### YOUTH AND CRIME

The bulk of major crimes by minors are committed by the upper adolescent age group. With few exceptions, the *Uniform Crime Reports* confirm annually that upper adolescent ages predominate in the frequency of arrests.<sup>5</sup> Numerous studies substantiate this.<sup>6</sup> In 1953, 8,400 persons between 16 and 21 were arrested for major crimes in New York. This was 26.7 percent of the total major crime arrests

---

<sup>5</sup> Since World War II, the age of maximum arrests has moved upward to 21 years from 1946 to 1950 inclusive [FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 116 (1946); *Id.* at 117 (1947); *Id.* at 119 (1948); *Id.* at 115 (1949); *Id.* at 109 (1950)], then to 23 in 1951 [*Id.* at 108 (1951)], and finally to 24 in 1952 and 1953 [*Id.* at 113 (1952); *Id.* at 110 (1953)]. In the pre-war years, the maximum arrests were generally at age 19, as it was from 1932 to 1941 inclusive, except from 1935 to 1938 when arrests for ages 21, 22 and 23 exceeded those for age 19 [*Id.* at 204 (1941); *Id.* at 116 (1946)]. During wartime mobilization of draft-age youth, this age tumbled to 18 for 1942 and 1943 [*Id.* at 116 (1946)].

<sup>6</sup> "The age of maximum criminality lies . . . in the young-adult period of life. This maximum is not clearly defined, for delinquency or criminality increases from the age of ten to about nineteen, where it remains nearly constant until the age of twenty-seven, after which it decreases sharply with advancing age." GLUECK, CRIME AND JUSTICE 175 (1936).

in the state.<sup>7</sup> It is not surprising that crime culminates on the threshold of manhood. Adolescence is a period of critical growth. The greatest change in weight, for example, occurs in boys between the ages of 16 and 17. During adolescence comes the crises of puberty when well-known somatic changes are closely connected with psychological ones. Adolescence is the period of the functional crises of dispersion and release from family guardianship toward the synthetic substitute of neighborhood crowd and gang. Adolescence is also the time of sharpest contrast between economic inferiority, on one hand, and number and intensity of desires on the other. Consequently all of these crises make adolescence the period of greatest want because the teenager has so many things to long for and so few means to attain them. Chivalrous disdain for caution, characteristic of the youthful personality, is one reason for the great number of arrests in this age group. Another is the lack of necessary *modus operandi* to commit crimes more likely to escape detection.

Such over-representation of youth in the picture of major aggressive crime indicates that drastic modification of treatment of youthful offenders from a punitive method to a non-punitive one may be tantamount to making inoperative our entire criminal code.

#### SHOULD PUNISHMENT BE ABOLISHED?

The first major problem posed by youthful offenders is whether or not punitive treatment should be abandoned entirely, and if not, under what circumstances it ought to be employed. Consider the case of Billy A,<sup>8</sup> standing as well as he could on a crippled foot before the bar awaiting the word of the sentencing judge. Billy had just pleaded guilty to burglary—entering a dwelling by a second story window. The probation officer's pre-sentence report described Billy's loneliness and relentless search for companionship in the

---

<sup>7</sup> See 1955 LEG. DOC. No. 45, REPORT, N.Y. TEMPORARY COMMISSION ON THE COURTS 81 (1955).

<sup>8</sup> See Coulson, *Little Donald Took an Axe*, 196 HARPERS 385, 387 (May 1948).

city's barrooms and poolhalls. This was his first appearance in court although it appeared that he had committed seven burglaries. A psychologist who spoke with Billy reported that this was a pointed illustration of over-compensation. Billy A had committed burglaries to prove to himself that his lameness was no handicap. He had entered second story windows to convince himself that he was as agile as the next fellow.

Should Billy A be sentenced to prison? Our first humanitarian impulse wells up with an emphatic NO. But Billy A actually received a long term of imprisonment. He happened to be 42 years of age. Had Billy been 16 there is no question that every consideration consistent with lenient treatment would have been indulged in his behalf.

Ought chronological age separate those who are to be punished from those who are to be treated leniently for identical criminal behavior? If, of course, youthful offenders are a special kind of animal who neither seek pleasure nor avoid pain, then, of course, the threat of punishment posed by any criminal code cannot influence their behavior. But if, as may more likely be the case, young persons are capable of being intimidated and deterred by punishment and threat of punishment, then an exclusively non-punitive program of treatment for them must be justified on grounds other than that the punitive program can have no effect.

There are several serious defects in any system of treatment of young offenders that is exclusively of the painless type. Consider the case of Billy B. He made the untimely error of stealing his fourth automobile a month after his 19th birthday. Previously he reposed in the status of youthful offender and had grown accustomed to psychological tests and sociological treatment each time he had manifested an uncontrolled preference for hardtop convertibles. His environment had been unfortunate. His father deserted the family many years before. Billy B had come to regard this as a more perfect defense against punitive treatment than a combination of insanity, self-defense and duress. Now, as he faced the bar for the fourth time, he naturally expected the same effect to follow the same cause. Imagine his amazement

when the judge sentenced him to the penitentiary. "I didn't think that stealing a car was that serious," was the logical comment of Billy B.

Certainly, one consequence of abolishing punitive treatment for young offenders is to deprive the criminal law of its efficacy as an instrument of moral education. Billy C, 14 years old, has habitually refused to attend classes at junior high school and has just broken a neighbor's window with his baseball. Billy C may be adjudged a juvenile delinquent and is properly eligible for rehabilitative treatment. His neighborhood pal, Billy D, also 14 years old, has just eviscerated his grandmother. Strangely enough, Billy D acquires no more prestige in the rankings and gradations of our current criminal code than the petty truant. Billy D earns no more impressive status than juvenile delinquent and is entitled to no richer perquisites than the lenient rehabilitative treatment accorded to Billy C. Making treatment of all criminal behavior of young offenders, regardless of its seriousness or triviality, depend solely upon the individual need of the offender for rehabilitation may well lead our impressionable young community to conclude that fracturing someone's skull is no more immoral than fracturing his bedroom window.

Yet common considerations of humanity make clear that the community will simply not stand for drastic punishment of young law-breakers regardless of the seriousness of their crimes. To attempt to inflict mandatory penalties upon them in the same way as upon adults would nullify the possibility of any treatment at all. There are compelling considerations, not merely humanitarian, that justify at least the experiment of rehabilitative treatment for young offenders. Youth is primarily a period of adjustment. Adjustment demands an organism in the stage of formative flexibilities. The character of any person, adolescent or adult, is the sum total of his potentialities for good and evil. In the case of the young offender, it may well be that he has prematurely realized all of his potentialities for evil and has yet to develop the counteracting ones for good. If so, a program of treatment that provides maximum opportunity for fruition of undeveloped potentialities for good is likely in the long run to prevent

recurrence of delinquent behavior. At the same time a program of punitive treatment might suppress and inhibit not only the evil but also the good potentialities and lead to abortive growth of a dangerous and embittered personality more likely than ever to commit crime.

If punishment should not be totally abolished in treatment of young offenders, under what circumstances should it be used? Choice between subjecting an offender to punitive or non-punitive reformatory treatment involves at the outset the balancing of advantages and disadvantages of one method against those of the other. And this must be done in the light of factors peculiar to each case, favorable or unfavorable to mitigation or severity. How seriously undesirable was the behavior? Garroting a teammate in a playground is behavior more eligible for punishment than purloining his catcher's mitt. What does the criminal behavior itself indicate about the actor's character: Were his motives good or bad? Were his means of committing the crime unnecessarily dangerous and cruel, or not? Did he act on slight or great provocation? What does the history of the actor himself indicate about his character: Does his past life indicate bad habits or good ones? Can his behavior be attributed to unusually disadvantaged surroundings, or was his environment quite usual? Was the youth's reaction to his crime a sensitive or calloused one? Can some well-defined mental or physical disorder, temporary and remediable, account for his criminal behavior, or is there no genuine psychopathic condition?

Obviously, there is no calculus known to a legislator that will make possible any advance statutory chart prescribing a precise remedy based upon combinations of these symptoms. In the present state of knowledge, determination of the sort of treatment, punitive or non-punitive, can rationally be left only to the enlightened discretion of judge or administrator. Indeed, reform in sentencing adult offenders has proceeded in the direction of increasing the discretion of the criminal court judge. Only a handful out of thousands of crimes defined in penal codes have a legislatively prescribed minimum punishment. The most that the legislature now undertakes

in advance with respect to treatment of adult offenders is to prescribe maximum treatment.

#### UNIFICATION OF PROCEDURE AND PERSONNEL

The second major problem presented by young offenders is the administrative one of organizing personnel and procedures most efficaciously to accomplish the ends of whatever treatment is prescribed. Almost every state has achieved a separate juvenile court, with jurisdiction over offenders up to 16 or 18, except (in some states) in cases of crimes punishable by death or life imprisonment. The current need concerns the forgotten adolescent above the upper limits of juvenile court jurisdiction. Unification of procedures and personnel affecting the older adolescent offender might well take place in a single youth or adolescent court. Its jurisdiction would cover crimes committed by youths between 16, or 18, and 21, with the same exceptions and procedures that prevail in children's and juvenile courts.

In one jurisdiction, New York for example, there may be as many as four separate courts in a single county with independent probation and guidance services that are authorized to dispose of a single case involving an older adolescent offender. Throughout the state there are over 3,000 police justices and 60 city courts that have jurisdiction over criminal offenses by youths over 16 in addition to the county and supreme court. One advantage of centralizing the disposition of cases involving older adolescents in a single court with a territorial division in each county would be the assurance of uniform results in equal cases. The blindfolded depiction of Justice is to guarantee impartiality, not lack of discernment. When identical offenses involving materially similar offenders have widely diverse dispositions depending on the particular courthouse in which the determination is made, then equal justice is at an end. By confining cases of older youths in a single court, undistracted study would be possible to ascertain whether the treatment prescribed is actually curing the patient or making him more violently ill.

At the same time court jurisdiction and procedure is being unified and centralized on the county level, probation, parole and case work ought to be integrated and decentralized to the neighborhood level. Most cases of older adolescent offenders will be relegated to probationary oversight, if not because this may be the most efficacious treatment in a particular case, then because it is the most economic and often the only possible treatment when institutional facilities are overcrowded. What reform can be achieved by an overburdened case worker stationed many miles from the neighborhood scene on the basis of a semi-monthly interview? A more workable arrangement would begin at the grass roots level. A youth officer stationed in each neighborhood, precinct or ward would assume responsibility for all young persons in conflict with the law whether on probation, parole or some attenuated form of admonishment.

Much, of course, in this prolegomenon to reform is made to depend upon the wisdom, devotion, zeal and kindness of the administrators of the law rather than upon the black-letter text of statutes. It may well be, as Chesterton observed, that the ". . . horrible thing about all legal officials, even the best . . . about all judges, magistrates, barristers, detectives and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."<sup>9</sup> The remedy for callousness bred by getting used to injustice is not new laws. If this situation can be changed at all, it will be done by a constantly awakened community consciousness directed at preventing crime in the neighborhood.

---

<sup>9</sup> Quoted by Circuit Judge Frank in an address before the Criminal Law Section of the American Bar Association, August 26, 1953. See Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93, 103.