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The Concept of Treatment in the Criminal Law

Sol Rubin

THE CONCEPT OF TREATMENT IN THE CRIMINAL LAW

SOL RUBIN

I. INTRODUCTION

When I first entered this field of work, that is, the field of dealing with criminals, I, like others, accepted the idea of *treatment*, efforts to rehabilitate criminals, as being not only essential, but almost the motivating spirit of all I wanted to do. The concept of "treatment" is, in effect, an article of faith for most people in the correctional field. It is not a bad article of faith. But in recent years I have come to feel that it is not enough as a guide, and standing alone it may be wrong.

Some years ago in a book on crime and delinquency I had an introductory chapter on philosophy in dealing with criminals. In the book I took what I believe was, and is, a humanitarian point of view. After going on for a while about rationalism, science, and humanitarianism, I said: "In brief, in the human sciences, to be scientific one must be humanitarian; to be anti-humanitarian is to be unscientific."[1]

It is still not a totally bad statement. In fact, it is not a bad statement at all. After all, what is more humanitarian than treatment? But if I were to say it again, I would not say it that way. For me, at least, bad things have been done and are being done under the guise of treatment. "Treatment" is giving humanitarianism a bad name. Let me make clear that I am most concerned with the wide use of commitments, whether in a sentence or the so-called "civil" commitment of law violators.

If I were to rewrite the statement I would be careful to say that treatment may *not* be humanitarian, that treatment may be an invasion of civil rights, that treatment may be harmful. I would be sure to say that before one decides on treating a person, even a convicted criminal, one must consider whether leaving him alone may not be better, better for him and better for society.

1. S. RUBIN, CRIME AND JUVENILE DELINQUENCY, A RATIONAL APPROACH TO PENAL PROBLEMS 24 (2d ed. 1961).

It may seem strange, and possibly disquieting, for a person who considers himself humanitarian to be uttering this statement, when only now is the concept of a right to treatment receiving any recognition.[2] I agree it is an important right, and it must become a protection for individuals. But it must *not* become a cover for depriving people of their liberty.

On reviewing recently what I had written in that book, I see that I was led into the use of the word "treatment," not in isolation, but as contrasted to "punishment." In general, in sentencing a criminal, the preference would be for probation, which we like to call treatment, as opposed to imprisonment, which we call punishment, although recognizing that therapeutic efforts should be made in prison.

Again, what especially troubles me is that we freely commit people, and call it treatment. But even probation as treatment must be examined. There are many instances when I would say —this defendant should be left alone, not placed on probation.

II. UNDER THE GUISE OF TREATMENT

My first experience with the concept of "treatment" in correction being distorted, with destructive effect on individuals and correctional systems, came in my encountering the so-called indeterminate sentence.[3] For many years, and it is still so, people dealing with this field, including legislators, judges, and experts of various kinds, talk about the indeterminate sentence as though it was the answer to the main problems in sentencing, including the problem of disparity in sentences, and proudly rationalize the whole thing under the guise of treatment.

The indeterminate sentence is said to be the sentence under which treatment can take place, since it incorporates the idea that release is dependent on the success of the prisoner's readjustment and rehabilitation.

But it does not work out that way at all. In practice, the indeterminate sentence has usually meant establishing minimum terms of parole eligibility and lengthening maximum terms of imprisonment. In many jurisdictions the concept of the indeterminate sentence means that every offender committed is commit-

2. *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967).
3. Rubin, *The Indeterminate Sentence—Success or Failure?*, FOCUS, March 1949, at 42. This article is brought up to date in S. RUBIN, note 1 *supra* at ch. 8.

ted for the maximum term. All of this has resulted in both terms of commitment and terms of actual incarceration becoming longer. The length of sentences and terms of incarceration have steadily lengthened in this country. The detrimental effect of long sentences, on correctional systems as well as on prisoners, is generally accepted, and I believe I do not have to elaborate that here.[4]

It must come as a surprise to many, as it did to me when I first encountered it, that the severity of criminal penalties has steadily increased over the years in this country.[5] Whereas in the middle of the nineteenth century the ratio of state prisoners to the general population was 1 to 2,436, in the middle of the twentieth it was 1 to 1000. By contrast, the number of prisoners in custody in England in 1930 was less than half what it was 100 years before, although the population of England had doubled.[6]

There were a number of factors, but one was surely the introduction of the indeterminate sentence. The detrimental impact of the spread of the indeterminate sentence came not only in the longer maximum terms, but in the establishment of minimum terms of parole eligibility. By this time in most states a defendant who is committed to prison must serve a term before even being considered for parole. Many times the minimum term is so high that in effect it completely defeats the theory of parole. A sentence of 19 to 20 years, 19 being the minimum term that must be served, is an obviously outrageous instance, but such sentences are handed down, and they are upheld by the courts.

Far more common are sentences of 7 to 10 years, or 5 to 10. But even quite common sentences, 3 to 10 years, for example, establish minimum terms of parole eligibility that are so long that a parole board, if it fulfills its function, must release upon the expiration of the minimum term, since in many instances release earlier would have been indicated, and would have been used except for the minimum term.

In brief, this "treatment" idea, indeterminate sentences, has had as its principal effect increasing terms of imprisonment.

4. *See* S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 137-42 (1963) [hereinafter cited CRIMINAL CORRECTION].
5. S. RUBIN, *supra* note 1, at 132.
6. CRIMINAL CORRECTION, *supra* note 4, at 41.

Paradoxically, it has deterred flexible and—most important—early releases.

There is another instance of a treatment concept that boomerrangs. The youth authorities were introduced as a solution to the youth crime problem, or at least a solution to the way convicted youths should be sentenced. But there is evidence that the result has simply been to increase the percentage of commitments for youthful offenders, and to increase the terms of commitment. In part it is the attraction of the idea that a youth authority represents "treatment" that induces some liberal minded judges to commit to youth authorities in cases in which they might have used probation.[7]

A good instance of this development is what has happened under the youth correction act in the federal system. It is very clear that those sentenced under the federal youth correction act serve longer terms than those sentenced under the ordinary penal statute. In 1959-60—the latest statistics I have—the average time served prior to release by all offenders—youth, delinquents, adults—was 16.4 months. Youth Correction Act offenders served an average of 19.7 months; juvenile delinquents served 18 months; the average time served was smallest for adults. The actual disparity is even greater than these figures show, since the high figures for juveniles and youths are included in reaching the average for *all* offenders.[8]

Has there been an improvement in treatment for these offenders? Is the extra term used for some treatment purpose that would not have been available under the shorter term? There is none that I can discover. Their treatment is the same as for prisoners committed under the regular penal laws.

III. PRISONS

Well, what about commitments to prison under the regular penal law? Are those related to treatment? Recently I was asked to speak at a conference whose theme was "Reducing Opportunities for Crime." My instructions were to discuss "the need for various levels of *confinement* to reduce opportunity for crime." The theme of my own remarks was different from that suggestion. I said that it was a delusion to look for ways of reducing opportunities for crime by treatment in prison, that

7. S. RUBIN, *supra* note 1, at ch. 7.
8. *Id.*

the wiser effort on the part of the entire criminal justice system is to avoid commitments to institutions when that can be done with safety to the community.[9]

The theme suggested to me, however, is a common one; otherwise, we would not have the big prison system that we have in this country. With all the attacks on imprisonment, the correctional field is still far from an abolish-prisons movement. What has happened is that, as in other fields, the "treatment" rationale has been placed over the ancient system of locking people up. It is true that there is less brutality in prisons—although it is still far from gone, even in some reputedly modern systems.[10] It is true that some of the harsher forms of discipline—striped uniforms, lockstep, silence—are pretty much gone.

But it is also true that the essence of imprisonment, which is the loss of liberty, the loss of contact with the world of work, family, freedom of movement, is still in operation. More than that, there has been a steady *worsening* in the use of imprisonment, once one sees it as loss of liberty with all its consequences, and here again I cite the lengthened terms of imprisonment.

The gloss of "treatment" is put on modern imprisonment, and I for one do not accept it; that is, I do not accept rationalizing imprisonment by the uses of treatment. A good illustration is a very broad study[11] made of imprisonment in the federal system. It is a study of the measure of effectiveness of different forms of treatment in prison, measured by recidivism rates, exactly the same test as was proposed to me in the conference just mentioned.

The study came up with a number of findings, concluding that some things done with prisoners were better or worse than others, but much good was being done. For example, one part of the study deals with relationships among inmates. Interviews were had with 250 successful releasees. They were asked: "When would you say you changed most permanently from being interested in committing crime?" Four percent said they had changed before sentencing, 13 percent placed the change at the time of sentencing or between sentencing and imprisonment.

But the bulk of prisoners thought their prison experience was pretty good. Fifty-two percent said that they changed their

9. Indiana Conference on Crime and Prevention Proceedings, Indiana University, Jan. 18, 1968.

10. *See* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (horrible conditions in a disciplinary cell at the California Correctional Training Facility at Soledad).

11. D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM (1964).

attitudes during imprisonment, and 16 percent said they changed after release. Only 10 percent denied that they had ever changed, and they were mainly people who claimed they were either innocent or were only unwittingly involved in their offense.

Other similar findings seemingly favorable to imprisonment were reported. Why was imprisonment so good? Wouldn't it be nice if it were mainly because of staff work? The author writes:

> Of the 131 who reported that they changed during imprisonment, 65, or about half, credited a staff member with being influential in their reformation. Only 11, or 8 percent, credited the influence of fellow inmates as a factor in their change. The others who reported that their shift from criminal interests occurred in prison credited their own maturation, the deterrent effects of imprisonment, or the influence of persons outside the prison who wrote or visited them.[12]

I do not buy that. The author suggests that these data "all suggest that much reformation of criminals does occur with imprisonment, even though prisons certainly have deficiencies and may make some of their inmates more criminal."[13] It does not necessarily suggest this at all. What if many of these people succeeded *despite* imprisonment? Certainly comparative statistics with people of exactly the same kind demonstrate that their success rate would be at least as good if they had been placed on probation. Does inmate interpretation of their change validate the proposition that imprisonment and the forces connected with it effected the change? I doubt that the author would contend that. The impulse to credit imprisonment with a change would be attractive especially to those determined never to commit crime again. Their imprisonment would at most be interpreted by them as a reinforcement of a life orientation they would have even without imprisonment. There is also the possibility of a conscious or subconscious wish to cooperate with the prison authorities, or prison researchers.

Other prison experiences are interpreted in the same fashion. These inferences are not warranted. They all stem from an initial assumption—that these people were in prison because they needed imprisonment to change their attitudes. This basic

12. *Id.* at 141.
13. *Id.* at 89.

proposition is not at all examined in the study. The implication of the study is that (more or less) persons sentenced to prison are those who ought to be there. But that is hardly the situation.

In fact, what if one examined prisoners on the presumption that most should not have been committed? What if one tested this hypothesis: if only one of ten convicted felony defendants had been committed, what would the success and failure rate be? I believe the success rate would be at least as good as it was, without any loss in public protection, deterrence, or rehabilitation, and with a saving in money and people. There is nothing in this study, or any study I know of, that negates such an assumption.[14]

There are a number of things that support this contention. James V. Bennett, then director of the Federal Bureau of Prisons, analyzed the nature of the offenders annually committed to state prisons as follows:

> The largest number of these men by far are those who have been convicted of acquisitive crimes—burglary, larceny, forgery, automobile theft, and the like. In this category fall about 65 percent of the major offenders who are committed to state prisons during a typical year. The next largest number are robberies, 11.7 percent, and then come the aggravated assault cases and the drug violators, with 10.7 percent. Homicides, rapes and kidnappings together account for about 9 percent. The remainder are for miscellaneous crimes like arson, gun-law violations, and I suppose adultery. These figures are in rather startling contrast with generally held views. The general public has the notion that most criminals and convicts are rapists, robbers, or murderers. This is not the case.[15]

Specific data also point to the potential of a much increased rate of probation. Surveys always show a great disparity in the use of probation from judge to judge, sometimes with a spread as great as from 5 to 80 percent, and the success record of the latter group is as great as the former.[16] Rhode Island for many

14. *See* Letter from Sol Rubin to Daniel Glaser, Feb. 9, 1965, in 29 FED. PROB. 56-59 (1965); Letter from Daniel Glaser to Sol Rubin, Feb. 25, 1965, in *id.* at 59 (reply).

15. Address by J. Bennett, Sterling Lecture Series, Yale University Law School, Feb. 15, 1960.

16. CRIMINAL CORRECTIONS, *supra* note 4, at ch. 6, § 28.

years has used probation in approximately 75 percent or more of its convictions. A three-year demonstration project in Saginaw, Michigan, resulted in cutting state prison commitments in half, to 17 percent. The reduction was achieved by increasing the use of probation, to 68 percent, and the use of suspended sentences, fines, and local institutions—all with an improved success rate.[17] It does not take any great improvement over the Rhode Island, Saginaw, and the individual judge's rates to reach 90 percent.

An improvement of only 7 percentage points in the Saginaw rate would achieve our suggested goal of a 10 percent limit on prison commitments. There is no doubt this could be achieved. It must be remembered that 17 percent was for the 3 years of the project, not its highest rate. Also, in this project, a demonstration project in the public eye—one that was looked on with suspicion in some quarters—presumably an excess of caution was exercised, a wider safety margin than would be suitable in ordinary situations. And it is known that in a number of cases of atrocious acts—including rape—where success on probation seemed likely, it was not granted as a concession to community pressure, actual or surmised. As a result of greater use of probation in Hawaii, prison commitments dropped from 28.3 percent in 1959 to 9.2 percent in 1963.[18]

The author of the federal study concedes that imprisonment has destructive effects, and that some of the failures may well be attributed to imprisonment. The fact is that the worsening of the condition of prisoners may also be true of the successes. They succeeded on release, and hence it is assumed that prison helped them; but they may well have been hurt by imprisonment, either in impairments of personality that did not lead to crime, or adverse effects on their families.

But it is commonplace also to speak of prisons as training schools for criminals. Crime is learned there. I will cite one report that substantiates such a process. William L. Jacks, statistician for the Pennsylvania Board of Parole, reported on convicted parole violators returned to prison over a 10-year period. He examined the crime for which the parolee was returned as compared with his previous criminal experience. During this period 3,424 parolees were returned to prison for new

17. Martin, *The Saginaw Project*, 6 CRIME & DELINQUENCY 357 (1960).
18. Letter from William G. Among, Director, Department of Social Services, Hawaii, to Sol Rubin, May 17, 1965.

crimes. Eighteen of them had been originally committed as drug and narcotic offenders; 11 of the 18 were returned to prison for new drug crimes—plus 103 others returned for drug offenses. Had prison experience helped them to learn the new crime? Another example: Thirteen had been originally convicted for carrying weapons—but 101 of those returned were returned for this crime. "Where did the parolees acquire this habit of carrying weapons, or were they smarter in that they 'beat the rap' for a more serious crime?" asks Mr. Jacks.[19]

The same question may be asked for the 9 parolees who had originally been sentenced for receiving goods who did not repeat this crime on parole—but 51 others of the parolees did. And the same question may be asked of the recidivists in the Glaser study.

IV. CIVIL COMMITMENTS

Even more than in prison commitments, the concept of "treatment" is greatly relied on in "civil" commitments in cases in which the criminal law might be used, that is, civil commitments, as a substitute for criminal procedure. Juvenile delinquents are one group dealt with in a so-called civil procedure. Delinquents are people who violate the law,[20] but because of their youth are dealt with in what is called a non-criminal proceding. The principal characteristic of the juvenile court procedure, under which young law violators are dealt with as delinquents, is that the procedure is called non-criminal, and the statutes say—although it is not so in practice[21]—that the adjudication, which shall not be deemed a conviction of crime, shall not be used against the child.

At long last the Supreme Court of the United States, anticipated by some state courts[22] and legislatures [23] has said that

19. Jacks, *Why are Parolees Returned to Prison as Parole Violators?*, 19 AM. J. CORRECTION 23 (1957).

20. However, children who do not violate the law are also processed as delinquents, when they fall within the category of incorrigible, wayward, or beyond the control of their parents. This common type of jurisdiction is condemned in Rubin, *Legal Definition of Offenses by Children and Youths*, 1960 U. ILL. L. FORUM 512.

21. Rubin, *The Juvenile Court in Evolution*, 2 VAL. U.L. REV. 3, 14-18 (1967).

22. ADVISORY COUNCIL OF JUDGES, PROCEDURE AND EVIDENCE IN THE JUVENILE COURT (1962).

23. STANDARD JUVENILE COURT ACT (1959). This act is drawn heavily upon by various state legislatures. *E.g.*, Ch. 443, [1967] Colo. Stats. 993; ch. 215, Iowa Stats. 338 (1965); ch. 165, [1965] Utah Stats. 595.

the juvenile court procedure, which theoretically should provide greater protection for the child, in reality often does not. In one case it said:

> There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[24]

Accordingly, said the Supreme Court in the next case, many of the protections of criminal procedure must be accorded to the juvenile in juvenile court.[25]

In other quasi-criminal commitment procedures the Supreme Court has been less able to see through the fiction. A notable instance is the sexual psychopath statute under which a person who commits a sexual crime—or sometimes even when he does not—may be dealt with civilly and may be committed, often for life. The fiction in these cases has been recognized by many. The errors are principally that the pretext of treatment is not carried out in practice; persons under civil commitment for sexual psychopathy receive no more therapy than they would in prison.[26] But the difference between these civil commitments and criminal procedure is that, like the juvenile delinquent, they receive the worst of both worlds—they do not receive the procedural protections, and their loss of liberty is much worse. In most jurisdictions they are committed for life terms, often where the underlying offense is very minor, and might well have resulted in probation if sentenced under the penal law.

In these cases there is a little progress procedurally; that is, procedural protections are being required before a man may be committed as a sexual psychopath.[27] But there is a big question as to the validity of the statutes altogether. They have been sustained by a Supreme Court decision that goes back to 1939, *Minnesota ex rel. Pearson v. Probate Court*,[28] upholding a Minnesota statute for civil commitments of sexual psychopaths, so-called. Here the court accepted the "fiction" of a treatment procedure. The decision notes that the statute four times calls the defendant a "patient." It is clearly implied that a statute

24. Kent v. United States, 383 U.S. 541 (1966).
25. *In re* Gault, 387 U.S. 1 (1967).
26. 12 VILL. L. REV. 183 (1966).
27. Specht v. Patterson, 386 U.S. 605 (1967).
28. 309 U.S. 270 (1940).

that calls a man a "patient" will deal with him as such, will "treat" him, and hence is valid. There is no more in the decision than that.[29]

In my opinion the decision is wrong, and if reread today, its weakness is not hard to discover. Not only is there no examination in the case of what was done with the defendant, the kind of examination of "treatment" that the Supreme Court made in the recent juvenile court cases, but there is not even a real requirement of sexual misbehavior. There is not one word in the Supreme Court's decision, nor in the state Supreme Court decision,[30] as to what the defendant is charged with having done, except that it was said to be sexual misconduct.

A recent reminder of the acceptance of this illusion is the Supreme Court case upholding deportation of an alien who was a homosexual under a statute applying to "psychopathic personalities." Is a homosexual a "psychopathic personality?" Yes, said the Supreme Court, if Congress says so, and it inferred from the legislative history of the Act that Congress had said so.[31] Several judges dissented.

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29. On the use of magical words in the correctional field, Mencken provides an interesting background:

> Some time ago, in the *Survey,* the trade journal of the American uplifters, Dr. Thomas Dawes Eliot, associate professor of sociology in Northwestern University, printed a solemn argument in favor of abandoning all such harsh terms as *reformatory, house of refuge, reform school,* and *jail.* "Each time a new phrase is developed," he said, "it seems to bring with it, or at least to be accompanied by, some measure of permanent gain, in standards of viewpoint, even though much of the old may continue to masquerade as the new. The series, *alms, philanthropy, relief, rehabilitation, case work, family welfare,* shows such a progression from cruder to more refined levels of charity." Among the substitutions proposed by the learned professor were *habit-disease* for *vice, psychoneurosis* for *sin, failure to compensate* for *disease, treatment* for *punishment, delinquent* for *criminal, unmarried mother* for *illegitimate mother, out of wedlock* for *bastard, behavior problem* for *prostitute, colony* for *penetentiary, school* for *reformatory, psychopathic hospital* for *insane asylum,* and *house of detention* for *jail.* Many of these terms (or others like them) have been actually adopted. Practically all American insane asylums are now simple *hospitals,* many reformatories and houses of correction have been converted into *homes* or *schools,* all *almshouses* are now *infirmaries, county-farms,* or *county-homes,* and most of the more advanced American penologists now speak of criminals as *psychopatic personalties.*

H.MENCKEN, THE AMERICAN LANGUAGE 292-93 (4th ed. 1937).

30. Minnesota *ex rel.* Pearson v. Probate Court, 205 Minn. 545, 287 N.W. 297 (1939).

31. Boutilier v. Immigration & Naturalization Service, 387 U.S. 118 (1967).

The Court is very shaky on civil commitment of drug addicts, which it approved in dictum in the much cited case of *Robinson v. California.*[32] I share with others the view that the dictum is not well thought out, that it justifies civil commitments based on a fiction of treatment that is contradicted by reality.[33] In the principal jurisdictions using civil commitment of drug addicts (California and New York), realistically what they have is no different from prison systems.

The doubts about the *Robinson* dictum greatly increase with the Supreme Court decision in *Powell v. Texas.*[34] Again the Court indulged in quite non-legal dictum, this time on the treatability of chronic alcoholics, concluding that civil commitments for treatment are not really better than short jail terms for chronic alcoholics. So it holds—contrary to much medical opinion—that chronic alcoholism, unlike drug addiction, is not an illness, and that a man can be imprisoned for public drunkenness although to some degree he is compelled to drink. *Robinson v. California* and *Powell v. Texas* are both unsatisfactory. Proper concepts still have to be worked out.

As is shown by this brief discussion of the cases, the courts are torn by the concept of treatment. Does it justify commitment? Recognition of a "right to treatment" is not enough. Even if there is going to be treatment, and even if there is a need for treatment, it does not justify commitment. I have ailments, and I am one who if possible avoids medical treatment that others turn to. May I be committed and treatment imposed upon me if my ailment is not contagious? Certainly not. If I am dying and refuse a blood transfusion that might save me, a court has no power to order it. There is a right *not* to be treated.

I have implied that treatment may be punitive. Indeed it often is. I have elaborated this in considering the *Durham* rule in the District of Columbia, the decision in 1954 that replaced the *M'Naghten* rule of criminal responsibility. I have pointed out elsewhere that committing a criminal to a mental hospital does not insure him better treatment than he would receive in a prison; that the prison environment is a more normal one than the mental hospital, and usually has better activity and training programs; that the term of commitment in a mental hospital,

32. 370 U.S. 660 (1962).
33. *Id.* at 679. (dissenting opinion). *See generally* S. RUBIN, PSYCHIATRY AND CRIMINAL LAW, ILLUSIONS, FICTIONS, AND MYTHS 139-70 (1965).
34. 88 S. Ct. 2145 (1968).

being indefinite, that is, potentially for life, is longer than a prison sentence; that the release procedure is demoralizing for its lack of due process; and finally, that the defendant committed as mentally ill is automatically committed, whereas if convicted in a criminal court, he may well be placed on probation.[35]

The greater punitiveness of the "treatment" oriented people is not an accident of law, or an unfortunate by-product of the struggle for treatment. It is a product of their view that institutionalization, if used for treatment, is good.

The philosophy is well represented by Judge Bazelon, not only in his decisions, but in his other writings. Last year, on the occasion of the 50th Anniversary of the Judge Baker Guidance Center in Boston, he gave a paper entitled "The Promise of Treatment."[36] In it he cites the case of a severely disturbed 17 year old who sought a judicial hearing on his claim that he was being illegally held in the receiving home without receiving any psychiatric assistance.

> He had been at the home for eight months awaiting disposition of a pending charge in the juvenile court. The judge did not hold a hearing to learn what the facts were—because, in his opinion, whether or not the child was receiving psychiatric assistance 'was not germane to the lawfulness of [the juvenile's] confinement.'[37]

Judge Bazelon says that he can "scarcely imagine anything more 'germane' than the fact that the boy was receiving no treatment."[38]

To me it is striking that Judge Bazelon does not say anything at all about the fact that the boy having been held for eight months without treatment should be freed. He does not say that he deserves to be freed, but only complains that psychiatry should be involved. Presumably, if this boy was seen once a month by a psychiatrist, the detention would be justified.

Judge Bazelon says: "The central justification for assuming jurisdiction over a child in any informal, non-adversary proceeding is the promise to treat him according to his needs."[39]

35. S. RUBIN, *supra* note 30, at 23-51.
36. Address by Judge Bazelon, Judge Baker Guidance Center 50th Anniversary, Apr. 14, 1967, in THE NEW REPUBLIC, Apr. 22, 1967, at 13.
37. *Id.* at 16.
38. *Id.*
39. *Id.* at 14.

Not exactly. Rather, the juvenile court proceeding must be described as "non-criminal," because the essential purpose is to avoid a criminal court prosecution and a conviction, but without the sacrifice of due process of law.

Further along Judge Bazelon says: "I do not find it objectionable to deprive the child of some procedural safeguards if the individualized treatment he is supposed to get requires the sacrifice and if the new procedures are reasonably fair."[40] No, I know of no situations in the juvenile court where a child's actual treatment is enhanced by depriving him of procedural safeguards.

V. IF NOT TREATMENT, WHAT?

Well, where does all this leave me? Do I reject commitments altogether? I would reject commitments for purposes of treatment. Even in the prisons best served by therapeutic services, when one balances whatever positiveness they achieve against the destructiveness of the prison environment, it is difficult to contend that *except for the person whose incarceration is called for in the interest of public safety*, the balance favors commitment.[41]

Account must also be taken of the damage to the family. A federal judge released a prisoner from an 18-month prison sentence because of what was happening to his family. His 7-year-old son had refused to receive first communion since his father was imprisoned; his 8-year-old daughter fell to the bottom of her class; his 9-year-old daughter began suffering from insomnia; his wife had become a "disorganized woman;" three of his six children were seeing a psychiatrist.[42]

I see commitments justified only for the purposes of public safety, and I would not be extravagant in defining public safety. I do not mean that people who are incarcerated should not be treated, whatever the word means. No, in fact, most people who might justifiably be committed would be people who are not only violent offenders but people whose violence is attributable to serious mental illness. Yes, they should be treated, but the decision to incarcerate should be based upon security needs.[43]

40. *Id.* at 15.
41. NATIONAL CONFERENCE OF STATE TRIAL JUDGES, RECOGNIZING AND SENTENCING THE DANGEROUS OFFENDER 35, 45-49 (1966) (Proceedings, 9th annual meeting).
42. Chicago Daily News, Dec. 2, 1966 (unreported case).
43. MODEL SENTENCING ACT (1963) embodies this concept.

That means that far fewer people would be incarcerated than are incarcerated today, and it would mean that institutions could be closed down.

Earlier I mentioned the demonstration project in Saginaw, Michigan. The project was directed by Paul Kalin, a valued colleague of mine, now director of the midwestern office of the National Council on Crime and Delinquency. I discussed with him the theme of the paper I am now presenting. Among other things he wrote me as follows:

> Toward the end of the Saginaw experience I proposed we go beyond the project expectations and use some cases to illustrate the direction. One judge supported the idea, but all the citizens to whom I presented the idea were cautious because the "public won't accept it."
>
> We worked with an offender who had done time at prison on two or three occasions and had other arrests—virtually all (if not all) for assault with a knife in which the victim was seriously hurt. There was serious consideration given to trying him as a habitual criminal. We recommended probation. He completed it without any violation, and I suspect is still a free citizen in the community. The investigation revealed the victims had "provoked" his reaction by remarks about his promiscuous common law wife. Basically, the treatment plan suggested divorce, placement of the children with his mother, and acceptance of the fact that his wife was in fact "a whore."
>
> In another situation, a first offender charged with assault with intent to do serious bodily harm (with a gun), we recommended divorce, remarriage, and getting rid of the gun. Also worked out.
>
> However, we recommended commitment for a young (19-20) first offender charged with purse-snatching. The boy had no court record, but a careful presentence investigation revealed that his pattern of response to anxiety-provoking situations was assaultive. The judge, who had told me he could not accept our recommendation, interviewed the boy himself and then committed him for a longer term than he might otherwise have done, because the boy responded in the way we had predicted he would.

> I would not defend the latter disposition in theory—knowing what could happen to him in prison—but do believe it was a sound disposition in view of the alternatives available. Obviously, there may be some rationalization here—due to my anxiety not to risk a serious violation which might create problems for the project.[44]

By and large what I have said may appear to be an attack on the prison system, which it is. But please note that the test of public security (rather than treatment) may lead to a proper preference for commitment of a 19-year-old first offender rather than probation.

Is it simply a matter of finding new ways of attacking prisons as against probation? No, if probation is treatment, probation is also an invasion of one's autonomy, and should be used only if necessary. Does that mean I advocate less probation? The answer is that a lot of people on probation should receive an outright discharge, or be fined, if that is appropriate in their case, or a suspended sentence, but that probation is for many a burden rather than an aid, and a burden on probation services. Before I go into some detail about that, let me add that probation has to be used in more effective ways and for people who are now being committed.

This is not as far out as it may appear. If there is a lesson for an offender in the criminal law process, a deterrent to his future violation, and that of others, and there certainly are both of these, much of it comes in the very process of being arrested—or even receiving a ticket, and going through a process that leads to conviction. Conviction of crime is a very serious stigma that people want to avoid if possible.

For example, on the question of suspended sentence without probation, may I quote from Judge Bolitha J. Laws:

> Probation is fairly well developed in many communities and states, but even there the trend to greater use of imprisonment continues. Why? One answer may be that increases in probation grants are made up largely of the obviously safe cases, those for whom fines and suspended sentences were previously used. If that is so, the increased incidence of probation would not reduce the number of prison commitments. In any event, as I see it, we can reduce the prison population only by

44. Letter from Paul Kalin to Sol Rubin, Mar. 8, 1968.

> (a) checking carefully to determine whether we judges should grant probation to many persons now being committed to prison, and (b) increasing the use not only of probation, but of the other forms of community treatment—fines and suspended sentences—as well.
>
> Extensive use of the fine in England has demonstrated its value in a remarkable reduction of institutional commitments . . . .
>
> More frequent use of suspension of sentence without probation, like the fine, is part of the answer to the prison problem. The national average use of probation is probably about one-third of felony convictions. Many of our informed students of crime tell us it can safely be two-thirds, and that public security would not be damaged with that percentage of usage.
>
> We achieve success even now with many probationers who receive little or no actual help or guidance from their overworked probation officers. Can we not assume that these offenders would have been equally successful if they had received suspended sentences, without probation? When we speak of trying to achieve greatly increased use of probation, we are really referring to both probation and suspended sentence.[45]

Probation has to be refined if it is to be used properly. There is a lot more knowledge that we have to acquire about the effective use of probation. I will cite a few instances of such searching.

It is thought that the intensive use of supervision will be more therapeutic than very occasional contacts between officer and probationer. The following is a summary of a parole research study, but I believe it would be just as applicable to probation.

> In order to evaluate the effects of a special selection and training program of parole officers on recidivism reduction of male delinquents, two control groups of 157 . . . and 152 . . . parolees, all of whom were supervised by regular parole officers, were compared with 95 Experimental Group parolees, who were supervised by 12 specially trained counselors. The three groups were initially matched for background and offense variables.

45. Laws, *Criminal Courts and Adult Probation,* 3 NAT'L PROB. & PAROLE ASS'N J. 357 (1957).

> However, when comparison was made for delinquent acts committed during the six-month postparole period of this study, no significant differences were found in the percent of type of recidivism among the groups. Results should be cautiously interpreted because of the relatively short observation period, factors contributing to the selection of the Experimental Group parolees, and the increased opportunity for the counselors of these parolees to observe maladaptive behavior.[46]

Another study: The San Diego Municipal Court conducted a study of different ways of dealing with chronic alcoholics. It found that probation with supervision by Alcoholics Anonymous, or probation with clinic supervision, produced no better results than no treatment at all.[47]

A similar study of traffic law violators was conducted by the Anaheim-Fullerton (California) Municipal Court. The judge of the court, Judge Claude M. Owens, writes:

> Until about four years ago, the judges of this court were satisfied that our drivers improvement school was effective, because California's Department of Motor Vehicles records showed about 44% of the students had no record of any moving violation convictions in California in the year following completion of school, whereas in the year before attending the school they had at least three such convictions. Then along came an iconoclast who suggested that chance could account for that result; that perhaps the students would have had the same change if they had been placed on probation instead of having to attend the school, or had neither been placed on probation nor sent to school.[48]

So they researched it. By now the reader will not be surprised at the results. Very roughly, among those who were fined only —no traffic school and no probation—about 25 percent had a single violation, and a smaller number had more than one. In the first year following court appearances, drivers school defen-

46. Schwitzgebel & Baer, *Intensive Supervision by Parole Officers as a Factor in Recidivism Reduction of Male Delinquents,* 67 J. PSYCHOLOGY 75 (1967).

47. Ditman, Crawford, Forgy, Moskowitz & Macandrew, *A Controlled Experiment on the Use of Court Probation for Drunk Arrests,* 124 AM. J PSYCHIATRY 2 (1967).

48. Owens, *Report on a Three Year Controlled Study of the Effectiveness of the Anaheim-Fullerton Municipal Court Driver's Improvement School,* VII MUN. CT. REV. 7 (1967).

dants without probation, had about one-third fewer convictions than those who were only fined; probationed defendants—no traffic school—about the same. Defendants receiving *both* drivers school and probation did not do as well as either of these, although still a bit better than those only fined.

That was within the first year. Within the second year, it was different. Drivers school continued to reduce convictions more than just a fine, but probation did not. Instead, once probation's one year term expired, its previously good effect disappeared, and the results were not significantly different from a fine.[49]

The federal probation service in 1932 consisted of 63 officers, having under supervision 23,200 probationers and 2,013 parolees, for an average caseload of 400 per officer. They had a very low violation rate, better than probation departments with much lower caseloads.[50] That was, of course, an archaic, primitive period, and with caseloads like that, how much casework could be done?

Today the U. S. Probation Office is conducting a project in one of their offices with a caseload of 350 men to one officer. During the first six months not one violation was reported.

I could go on and on like this but there is no need to. I do not want to give the impression that probation is a failure. I do not by any means think it is, but I do share the opinion of others—one of them being the federal probation service—that probation is not being properly used. One poor use is in cases where a fine or suspended sentence would be either just as good, or better. We have to find out which cases they are.

The other thing we have to find out—by trying it—is which serious cases are better off under probation than in prison. On this I have already quoted Paul Kalin. I will quote one more passage from his memo:

> Recently in North Dakota, in talking about regional jails and knowing the prison warden was there, I suggested that in their planning they should consider eliminating the state prison. With a prison population of less than 200 and the lowest "crime rate" in the country, they might find that a few regional detention centers

49. *Id.*
50. Chappell, *The Federal Probation System Today*, 14 FED. PROB. 30 (1950)

> might be more effective in helping offenders and would encourage development of better "out-patient" services. The very few truly dangerous offenders might be confined on a purchase-of-care basis in a federal or another state institution. When the warden spoke that afternoon, he said to the group that he was initially shocked and resentful of my suggestion. As he had thought about it, he believed it had merit and should be explored.[51]

It is fine that the warden got over his initial shock. The fact is that the system of dealing with offenders needs changes, not shocking new changes, but the old goal of releasing people from institutions, whether prisons or mental hospitals, and not putting them there in the first place, and the perhaps newer goal of confining people for shorter periods.

What I have tried to do is explain why in my judgment that effort is being deterred by the new concept of treatment. Yes, people have a right to treatment. But commitment of criminals is seldom useful for treatment; probation must be used selectively; and it, and other forms of dealing with criminals in the community, namely fines and suspended sentences, are the preferred form of "treatment." Committing them is the last. But whatever we do with law violators—including mentally ill law violators—let us not sacrifice due process of law to illusions of treatment.

51. Letter, *supra* note 44.