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Determination of the Penalty - By Judge or Jury

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DETERMINATION OF THE PENALTY— BY JUDGE OR JURY?

ANY determination as to the person or persons who should have the power and the duty to assess the penalty against a violator of the penal law can be made only after a consideration of the objects and methods of punishment. These are inextricably involved in any discussion of the practicability of placing this duty on one group of men or on another. It may be accepted as basic that a particular group lacking the ability to select a punishment which will accomplish the purposes for which the punishment is assessed should not be permitted to continue in the responsibility if some other agency of the state exists or could be created which would be better qualified to discharge the responsibility. Therefore, the initial inquiry must be with regard to the objects of punishment and the knowledge requisite for an intelligent determination of the penalty by whatever group or agency may be designated.

The Legislature of Texas has declared concisely that the objects of punishment in this State shall be "to suppress crime and to reform the offender."[1] In other words, the primary good to be attained by means of punishment inflicted by the State is that society will be protected from similar invasions of its peace and order by either the person convicted or by others who might be tempted to commit the same crime but for the fear of punishment similar to that inflicted upon the prior offender. To be attained simultaneously with the suppression of crime is the reform of the offender, the secondary object, *if possible*.[2] Numerous other theo-

[1] TEX. PEN. CODE (1925) art. 2.

[2] This interpretation was stated by the chairman of the Committee on Criminal Law and Procedure of the Texas Bar Association in his annual report in 1940. (1940) 3 TEX. BAR J. 328, 329. The same view, though not an interpretation of the Texas statute, was expressed in an editorial, *A Proposed Sentencing Commission* (1927) OUTLOOK 484.

ries of punishment formulated by penologists and sociologists[3] need not be discussed here in view of the unambiguous statement by the Texas Legislature. Such a legislative declaration of public policy does, however, raise a further question as to what factors must be considered by this group designated to determine the punishment in order to insure the effectuation of the policy. The variety of factors to which reference should be made in the assessment of punishment was well stated by Edward Livingston, a foremost penologist of an earlier day, from whose works much of the Texas Code of Criminal Procedure was taken, when he said in his Code of Procedure:

> "In selecting the particular kind of punishment . . . attention should be paid to the sex, the constitution, the fortune, the education, and the habits of life of the offender. It is apparent that hard labor is not the same punishment, when applied in the same degree, to one used all his life to bodily exertion, and to another brought up in literary pursuits; to a robust man, and to a delicate woman. That incapacity to be elected to public office will be a greater penalty to one used to public life, than to one whose pursuits and education have fitted only to his own affairs; and that the possessor of a large fortune will consider a moderate fine as no punishment."[4]

It is apparent that to achieve the purpose for which the punishment is inflicted, the agency which assesses the punishment must know, in addition to the circumstances surrounding the commission of the crime, the character of the offender, his educational back-

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[3] Materials relating to the various theories of punishment are limitless and conflicting. The sharp contrast in the opinions on the subject is clearly shown by a comparison of the article by Lewis, *Punishment* (1901) PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION 147, with the article by Bernard, *Crime and Punishment* (1923) 239 QUART. REV. 58, 70. The former cites the famous statement of the British judge when he sentenced a horse thief to be hanged, "I hang you not for stealing a horse, but that horses may not be stolen," but the article concludes that it is seldom that men are deterred from committing crime by the thought of legal punishment. Bernard, in the latter article, states, "The study of parental discipline in a well-ordered nursery would be a useful training for some of the sentimental philanthropists. The law of love punishes a naughty child, not only for his own good, but in order that his good little brothers and sisters may not be seduced into naughty ways by his bad example. To say that nursery discipline does not recognize punishment as a deterrent is nonsense, and yet the law of love is nowhere more tenderly and happily observed."

[4] Livingston, *Code of Procedure* (1825) art. 436, reprinted in THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE (1873) 185, 298.

ground, the motivation of his criminal behavior, and the social significance of the commission of the crime.

Among the several possible persons or groups which might be designated to assess the penalty and whose competence to punish the offender must be discussed is the jury. Texas, together with perhaps five or six other states,[5] provides that the jury shall assess the penalty in all cases where it is not absolutely fixed by law;[6] this is true even though the accused pleads guilty,[7] unless he exercises the right to waive jury trial, in which case the judge must exercise the power of fixing the penalty.[8] But in all cases in which the offender pleads "not guilty" to a felony charge, the jury alone has power to determine the punishment, there being no right of waiver by the accused.[9] In all cases in which the jury has this duty, the judge has no power to fix the penalty when the jury fails to assess one or is unable to agree upon one, or when the punishment fixed by the jury is not authorized by law.[10] In each of these cases the judge must return the jury to the juryroom for further deliberations.[11]

In the great majority of other jurisdictions the law- or rule-making bodies have made the judge responsible for selecting the punishment, leaving to the jury only the question of whether the accused is guilty or innocent, and if guilty, of what crime. This is also true in the federal courts[12] and in England. Of course, the discretion of the judge is in almost every case restricted by the

[5] Arkansas, Illinois, Kentucky, Oklahoma, and Virginia.

[6] TEX. CODE CRIM. PROC. (1925) art. 693.

[7] *Id.*, art. 502.

[8] *Id.*, art. 10a.

[9] There are variations of this method of determining the punishment in cases in which the sentence is suspended, the accused is placed on probation, or the convicted person is a juvenile.

[10] Williams v. State, 11 Tex. App. 63 (1881); Tiger v. State, 81 Tex. Crim. Rep. 614, 197 S. W. 716 (1917).

[11] ARK. STAT. (Pope, 1937) § 4070: "*Court to fix punishment.* When a jury find a verdict of guilty and fail to agree on the punishment to be inflicted, or do not declare such punishment in their verdict, or if they assess a punishment not authorized by law, and in all cases of judgment on confession, the court shall assess and declare the punishment and render judgment accordingly."

[12] FED. RULES CRIM. PROC. (1946) Rules 31 and 32.

maximum and minimum punishments prescribed by the state legislatures.

In California the penalty is fixed by neither the judge nor the jury, this duty being delegated to the Board of Prison Directors in cases where the punishment to be fixed is imprisonment in the state prisons.[13] The members of the Board, appointed by the Governor, have the power to reconsider any sentence imposed and increase or diminish it.

I

In spite of the reaction against the Harshness of the old English criminal law which was manifested in the early ninteenth century movement toward technical procedure for the protection of the accused, this tendency did not result in the conferring upon the jury, rather than upon the judge, the power to fix the penalty.[14] The continuation of such power in the judges is perhaps attributable to the leadership of the judges themselves in bringing about the reaction; under the influence of the humanitarian spirit of the times, they surrounded the accused with protective technicalities

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[13] Because the California law in the manner of determining punishment seems to be more progressive than that of any of the other jurisdictions, it is deemed advisable to reprint herein the pertinent sections of the CALIFORNIA PENAL CODE (Deering, 1941):

Section 1168: "Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment."

Section 3020: "In the case of all persons heretofore or hereafter sentenced under the provisions of Section 1168 of this Code, the board may determine and redetermine, after the expiration of six months, from and after the actual commencement of the imprisonment, what length of time, if any, such person should be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State."

Section 3023: "The term of the imprisonment shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was sentenced."

Section 3000: "There is, and shall continue to be, in the State Department of Penology, a division known as the Division of Prison Terms and Paroles. This division is and shall be under the control of a governing board which is known as the Board of Prison Terms and Paroles, consisting of a chairman and two other members, each of whom shall be appointed by the Governor."

[14] See Scoville, *Evolution of Criminal Procedure* (1914) 52 ANNALS ACAD. OF POL. AND SOC. SCI. 93.

while retaining for themselves the power to fix the penalty. The change from the judge to the jury in Texas is difficult to explain. Under the Spanish civil law there was no jury in criminal cases, the judge being empowered to determine the guilt of the accused as well as his punishment. However, in November, 1835, while Texas was yet under Mexican rule, the Consultation at San Felipe de Austin adopted this provision:

> "Art. VII. All trials shall be by jury; and in criminal cases, the proceedings shall be regulated and conducted upon the principles of the common law of England. . . ."[15]

Inasmuch as the common law permitted the judge to determine the punishment, such thereupon became for a time the procedure in Texas. Following the formation of the Republic of Texas, the First Congress in 1836 enacted legislation which made no appreciable change in the existing practice.[16] For the ten years of the Republic the power of the judge to fix the penalty was not disturbed. The change to jury determination of the penalty was effected by one of the first laws passed by the First Legislature of the State of Texas in 1846, which provided as follows:

> "Be it enacted by the legislature of the State of Texas that in the trial of all criminal cases, the jury trying the same, shall find and assess the amount of the punishment to be inflicted, or the fine to be imposed, except in capital cases and where the punishment or fine imposed shall be specifically imposed by law."[17]

The reasons for the adoption of such a provision are still obscure. Perhaps the democratic trend of the times caused the change; or abuses of discretion by the judges may have led the Legislature to prefer an agency for fixing the penalty which presumably would better represent the ideas of all the people as to the purposes of punishment. But whatever the basis for the change, the reasons

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[15] 1 LAWS OF TEXAS (Gammel, 1898) 540.

[16] "Sec. 53. All fines and penalties in prosecution for criminal offense, or for the violation of any penal statute, shall be assessed by the court before whom the offender may be tried on the return of the verdict of guilty by the jury empanelled in such prosecutions." 1 LAWS OF TEXAS (Gammel, 1898) 1255.

[17] Tex. Laws 1846, p. 161, 2 LAWS OF TEXAS (Gammel, 1898) 1467.

must have remained persuasive to the Legislature at the time of the first codification of criminal procedure in 1856. Although the committee appointed at that time to frame a code borrowed freely from the draft code for Louisiana proposed by Edward Livingston, his suggested procedure for the assessment of the penalty was not adopted. Livingston had written in his Code of Procedure, that

> "Certain circumstances . . . attending the commission of the same kind of offense, may render it more or less immoral, injurious, or difficult to repress. No legislation can be sufficiently minute to provide for all the gradations. The deficiency can only be supplied by vesting in the judge, who applies the law, a discretionary power, within certain limits, to select the kind of punishment adapted to the case, and to increase or diminish its degree. The exercise of this discretion forms one of the most important and difficult functions of the judiciary power; in practice, it must of necessity be irregular. . . ."[18]

Notwithstanding this advice, no change was made in the manner of assessing the punishment, the Texas procedure begun in 1846 remaining substantially unaffected by the numerous subsequent codifications.

If abuses of discretion by the trial judges afforded the reason for the change in 1846, certainly apprehension of such abuses is no longer justified. After one hundred years judges are not only better trained in the law but are also equipped with some knowledge of the social sciences, especially criminology and psychology; moreover, they are more amenable to public criticism than was their pioneer counterpart. On the other hand, the jury arguably has become a less appropriate body for this function in view of the significant increase in the available knowledge which should be within the reference of those assessing penalties. While it may be conceded that the education and experience of the average juror has increased since the days of the Republic, his knowledge of the relevant social sciences, of the effects of imprisonment, and of the purposes of punishment remains, perhaps, as meager as it ever was.

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[18] Livingston, *Code of Procedure* (1825) art. 431, reprinted in THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE (1873) 185, 294.

Moreover, prospective jurors have such infrequent opportunity to utilize information of this sort in the performance of the juror's function, sitting upon one or two cases only once in a period of two or three years, that there is little incentive for them to acquire knowledge on the subject of punishment, assuming a desire and an opportunity for such learning exist. And it is well known that professional persons and often those who have had the greater educational opportunity and are likely to possess the required knowledge are either exempted from or tend to avoid jury duty.

Even if such specialized information were at the disposal of the average juror, rules of evidence strictly prohibit the prosecution from introducing testimony not relevant to the issue of guilt of the crime charged;[19] the jury, therefore, never hears of the factors in the experience of the accused relevant to an enlightened assessment of punishment, *e.g.*, his education, socio-economic position, character, past environment, and previous criminal behavior and punishment. And the rule allowing the prosecution to introduce evidence of the reputation of the accused for truth and veracity is of little assistance, since such evidence can be admitted only after the defendant has attempted to establish his good character, and this he is unlikely to do when his reputation can be shown to be particularly reprehensible. As a result the penalty assessed by the jury can only accidentally accomplish the prescribed purpose of determining crime inasmuch as none of the factors necessary for a prediction of further criminal behavior by the accused are likely to be considered by the jury. And if the statute contemplates that the penalty shall be assessed for the purpose of deterring the particular crime in the community as well as by the defendant in the future, then the jury is less fitted to perform this duty than is the judge who not only may conduct his own investigation into the accused's past record, education, and environment but who is also in a better position to know whether a particular type of crime is,

[19] See 1 WIGMORE, EVIDENCE (3d ed. 1940) § 196; MCCORMICK & RAY, TEXAS LAW OF EVIDENCE (1937) § 681.

or is likely to be, prevalent in the community. Investigation by the judge for this purpose was recommended by Livingston in his Code, and such power has come to be conferred upon judges in the federal courts[20] and a number of other jurisdictions.[21]

Assuming that the jury would have access to evidence of the background, character, and past record of the accused, and that it could be shown to the jury that the crime in question has been committed with increasing frequency so as to emphasize the need for a penalty of deterrent value, it is questionable whether a jury of ordinary laymen would have the requisite knowledge and experience to interpret the material presented and to determine a punishment which would have the desired effect. For example, the jurors in all probability would not be equal to the complex task of fixing a punishment which would be adequate to deter the commission of the crime by others and at the same time adjusted to the circumstances of an occasional offender who could presumably be corrected with a slight penalty. Although it is arguable that these dual objectives of punishment are inconsistent, it would seem that the judge and not the jury could determine a punishment which would more accurately fulfill the objects for which it is assessed.

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[20] FED. RULES CRIM. PROC. (1946) Rule 32.

[21] N. Y. CRIM. CODE (1945) § 432: "Before rendering judgment or pronouncing sentence, the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of the person and may seek any information that will aid the court in determining the proper treatment of the defendant."

CAL. PEN. CODE (Deering, 1941) § 1192a: "Before judgment is pronounced upon any person convicted of an offense punishable by imprisonment in the State prison, it shall be the duty of the court, assisted by the district attorney, to ascertain in a summary manner, and by such evidence as is obtainable, whether such person has learned and practiced any mechanical or other trade, and also such other fact to indicate the causes of the criminal character of such convicted person, or calculated to be of assistance to the court in determining the proper punishment of such person, or to the State Board of Prison Directors in the performance of the duties imposed upon it by law, as the court shall deem proper. It shall be the duty of the judge before whom the convicted person was tried, and of the district attorney conducting the prosecution, to obtain, and with the commitment, furnish to the State Board of Prison Directors, in writing, all the information that can be given in regard to the career, habits, degree of education, age, nativity, parentage, and previous occupation of such convicted person, together with a statement to the best of their knowledge, as to whether such person was industrious or not, of good character or not, the nature of his associates and his disposition."

Moreover, if the jurors are unable to agree upon the proper punishment that should be given, the judge has no discretionary power under the law in Texas to supply a penalty but can only order the jury to deliberate further. And if the jury is never able to come to an agreement, then a new trial must be granted just as in a case in which the jury is never able to agree on the guilt of the accused.[22] Therefore, an accused who has been found guilty by the unanimous vote of the twelve jurors has an undeserved opportunity to escape conviction and punishment altogether as a result of the several factors which make a later effective prosecution more difficult.

Finally the argument may be made against allowing the jury to select the punishment that its determination by the jury is subject, to a greater extent than would be that by the judge, to the nonrational factors of emotion and prejudice. The importance of these factors has been set forth convincingly by Judge Fisher of Illinois thus:

> "Each penalty imposed by the jury is the result of the momentary whims, sympathies, or prejudices of its members. More often it is a compromise arrived at by twelve men while in a state of mental confusion induced by a new and unique experience. Their judgment is influenced by such irrelevant matters as the appearance, demeanor, and mental operations of the lawyer or of some of the witnesses for or against the defendant. Race, color and creed not infrequently become the determining factor in the case."[23]

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[22] Brooks v. State, 4 Tex. App. 567 (1878); Doran v. State, 7 Tex. App. 385 (1879); Williams v. State, 11 Tex. App. 63 (1881); Tiger v. State, 81 Tex. Crim. Rep. 614, 197 S. W. 716 (1917).

[23] Fisher, *A Proposal for a Penal Code — With Procedure to be Governed by Rules of Court* (1944) 39 ILL. L. REV. 97,111. Inasmuch as the conclusion reached by Judge Fisher in this article is that neither the judge nor the jury should be empowered to determine the penalty, but that it should be determined by some board of specialists, he cannot be held prejudiced in favor of determination by the judge.

Three recent cases, State v. Young, State v. Riddle, and State v. Jett, tried in the District Criminal Court of Dallas County, afford an excellent example of the incongruous results often reached by the jury in assessing penalties. All of the defendants in these cases were involved together in an escapade of rape and robbery. Severance having been granted, Young, 27 years old, was the first to be tried. The jury found him guilty of the crime of rape and imposed the death penalty (Dallas Morning News, June 29, 1946, § 2, p. 1, col. 8). Riddle, 19 years of age, was also found guilty of rape and his penalty was assessed at life imprisonment (Dallas Morning News, Nov. 2, 1946, § 2, p. 1, col. 4). Jett, 18 years old, upon being found guilty of rape was given a five-year suspended

Although a trial judge can be expected to share the attitude prevailing in his community toward any minority group, nevertheless his experience in the courtroom and his long acquaintance with the law should enable him more readily to detect appeals to prejudice or emotion and to be more aware of the effect of such factors upon the administration of justice.

If it were deemed desirable that legislation be enacted in Texas transfering the power to determine the punishment from the jury to the judge, there might be some question as to the constitutionality of such a statute. In the cases in which the point has been discussed, the Court of Criminal Appeals has declared by way of dictum that the Legislature has the power to place the responsibility upon the judge.[24] In the case of *Ex parte Marshall*,[25] an attack was made upon the constitutionality of an act of the Legislature[26] providing that the judge should assess the penalty and that the term of imprisonment imposed upon the convicted person should correspond exactly to the minimum and maximum limits set by the Legislature to that particular offense of which the accused was convicted. The accused complained that the Texas Constitution in providing that the right of trial by jury should remain inviolate[27] made the determination of the punishment by the jury a matter of right accruing to the offender and that the Legislature had no power to allow any other agency to exercise that power. The Court held the

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sentence (Dallas Morning News, March 2, 1947, § 2, p. 1, col. 6). Although all three of the juries impanelled in these cases agreed that the defendants were guilty of the crime charged, they reached three entirely different results in assessing the penalty for each. It is not contended that all the penalties should have been the same in type and length, but the wide variation found in these cases demonstrates vividly the truth of the above quoted paragraph from Judge Fisher's article, and the general inability of the jury to select a penalty, except by accident, that is just and impartial.

[24] *Ex parte* Marshall, 72 Tex. Crim. Rep. 83, 161 S. W. 112, 114 (1913). But see Davis v. State, 81 Tex. Crim. Rep. 450, 455, 196 S. W. 520, 523 (1917), to the effect that the fact that the jury might have rendered a more merciful verdict would not bring the case within the province of the Court to set aside the verdict of *the body which under the Constitution is authorized to fix the punishment.*

[25] 72 Tex. Crim. Rep. 83, 161 S. W. 112 (1913).

[26] Tex. Laws 1913, c. 132, p. 262.

[27] Tex. Const. (1876) Art. I, § 15.

statute to be invalid but on the ground that it violated Article 6 of the Penal Code which provides "that a provision of the penal law . . . so indefinitely framed or of such doubtful construction that it cannot be understood, either from the language in which it is expressed, or from some other written law of the State, . . . shall be regarded as wholly inoperative." Undoubtedly, the statute as framed was indefinite for there was no understandable provision for its application to a penal statute which imposed a fine and imprisonment. There was, therefore, no need for the Court to determine the constitutionality of the statute,[28] but it nevertheless stated that the right of jury trial which was to be held inviolate is the same right which existed at common law, and there was no such right at common law to have the jury determine the punishment. It seems that if the statute had provided merely that the penalty should be fixed by the judge, without the provision as to the upper and lower limits of the sentence which had to conform exactly with the punishment in the penal statute under which the offender was charged, it would have been held not to violate the statutory provision against indefiniteness.[29] That a transfer of the power to select the penalty can be made has been accepted by the Court since the decision in *Ex parte Marshall* in the case of *Bolton v. State*[30] in which the Court held that the statute, allowing the defendant accused of a felony offense less than capital, who pleads guilty to waive trial by jury, empowered the judge to assess the penalty.

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[28] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 346 (1936). Mr. Justice Brandeis in a concurring opinion said: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."

[29] There was no need for the Court of Criminal Appeals to hold the act of the Legislature invalid in this case inasmuch as the defendant was convicted under a penal statute which imposed only the punishment of imprisonment and not a fine; therefore, the indeterminate sentence law could have been applied without being held indefinite. There is no doubt that it was indefinite and would have been so held in a later appropriate case.

[30] 123 Tex. Crim. Rep. 543, 59 S. W. (2d) 833, 834 (1933).

II

An alternative to the proposal for placing the power of selecting the penalty in the judge is the suggestion that the punishment should be determined by a board composed of psychiatrists, psychologists, and sociologists or others especially equipped to supervise the reform of the offender. There has been a tendency, however, for proponents of this plan to emphasize, as the only purpose of punishment, the reform of the criminal, which is the secondary purpose of punishment in Texas in the light of Article 2 of the Penal Code and the interpretation which has been given it. Therefore, it may be impossible to reconcile such suggestions with the primary purpose of punishment in Texas, *i.e.*, deterrence. While Professor Sheldon Glueck has urged that the legislature impose no penalties for the various crimes,[31] leaving the length of detention and treatment of the offender entirely within the discretion of the board, California has set up a similar system which incorporates the proposal for the board, yet retaining the statutory limitations as to the maximum and minimum period for detention. The board, according to Glueck, would detain the offender for whatever length of time is required to effect the rehabilitation necessary to insure desirable social behavior following his release. Under such a system no definite term would be set at any time, the correction of the condition leading to criminal behavior being the only prerequisite to release. Although the effectiveness of such a procedure does not yet seem certain, there is undoubtedly a place for such a board of doctors and social scientists in the process in which the term and the type of punishment are determined, whatever the purpose of the punishment may be. It seems probable in view of the necessary lag of public opinion behind developments in medical learning and the social sciences, that any tendency toward further employment of such a board would first be in connection with the revising of punishments after assessment by the court and after

[31] See Glueck, *Principles of a Rational Penal Code* (1928) 41 HARV. L. REV. 453, 473.

sentence has begun. The power to assess the penalty can be expected in the long run, however, to be left in the unspecialized agency of the court, whether judge or jury, only until public confidence in the knowledge of psychiatry and criminology has been established and the accepted theory of punishment has been modified. It is arguable that such a group would be considerably better qualified even in the present state of the psychiatric and the psychological sciences to pronounce a determinate sentence, even for the primary purpose of suppressing crime, than either the judge or the jury.

Assuming that such a board would come to be regarded as an appropriate agency for fixing a determinate sentence, the question would arise whether it should be hampered by legislative restrictions as to minimum and maximum periods of detention. It seems that such legislation would be inconsistent with the theory justifying the board and would unnecessarily restrict it in its function.

If the considerations which reflect upon the disqualifications of the jury as a body to assess sentence are found to be persuasive, the duty of fixing the punishment should devolve upon the judge until the state is prepared to adopt the innovation of a board of specialists for the performance of this function. Once the duty is imposed by statute upon the judge rather than the jury, the formulation of general principles for the guidance of judges in the assessment of the sentence could well be undertaken by the Conference of District Judges in Texas or some similar group which might be formed in the future.[32]

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[32] For further criticism of jury determination of the penalty see Note (1938) 24 VA. L. REV. 462.