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THE FUNCTION OF PUNISHMENT.

G. P. GARRETT.[1]

In England and in the United States, since time "whereof the memory of man runneth not to the contrary," the punishment of crime has been a semi-legislative, semi-judicial act. Yet, in principle, it belongs to the administrative arm of polity.

So long as the scheme of government under which England operated remained an apparently hapzard amalgam of political expedients and historical developments the anomaly was imperceptible. When, however, Montesquieu reduced the conglomeration to theory and principle, and separated the functions of government, as exercised in that country, into the co-ordinated departments denominated executive, legislative and judical, a vague conception of the difficulty became possible. Yet the practice of Government in England so imperfectly distinguished and demarcated the three divisional parts thereof that the misplacement of the power of punishment was not concretely and clearly observable.

The framers of the United States Constitution, however, hardy theorists that they were, deliberately delimited the bounds of the several functions of their new sovereignty, and divided the one from the other as, of old, the waters were divided from the dry land. And now the faults caused by imperfect divisions of the components of the system became obvious. And the function of punishment stood, like an island of administration, in the midst of the conflicting currents of the legislature and the judiciary, a forlorn outpost beset by the combers of the seas. Nevertheless, as the explanation of the identity of things geological has often followed long after the recognition of similarity, the fact that this little island belonged to the neighboring continent has not been consciously recognized until today.

Many years have now passed since movements in prison reform began, and progress has been remarkable. We have improved the surroundings of the prisoner, and the influences that play upon him from within the penal institutions. We have added to his economic value. We have braced his self-respect. We are assuming a respon-

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sibility for his forsaken family. We are turning his labor to the advantage of the State. We are becoming respectful of the reformative purpose of punishment, and scornful of the vindictive purposes thereof. That we advance may be seen by the mile posts behind us.

Yet, where lies the goal?

Surely, as we mount ever upward, out of the murk and mist of barbarism, surely we are faced towards the uplands where "faith is lost in sight!"

Yes, but, alas, by what a devious road! We have taken our direction from the past, and the past is misleading us. The mistake lies in the fact that punishment is administrative and not legislative nor judicial. The effect of the difference is infinite.

And, first, let us establish our premise that punishment is administrative.

The legislature, within its prerogative, deals properly with broad principle and policy. It considers the weal of the social whole. Having formulated a policy, it may enact such general laws as conduce to the welfare of that policy. If it remains within its true sphere, it will not deal with an individual as a separate entity. It will act upon him merely in the mass. It should not treat the individual as an individual; but as a cell in the social organism. Such exceptions to this principle as exist are faults in the structure of government. Therefore, when the legislature designates an act as criminal, it is performing a proper office, for, in naming and defining crime, it creates a general rule to govern all individuals. When, however, it prescribes the sanction, it ceases to act upon the mass, and affects the individual as a separate entity. And therein it transgresses a law of its nature.

And, so of the judiciary. Its appropriate duty (in relation to crime) is to perform one function, the determination of the guilt or innocence of the accused. An act has been made unlawful. Has the defendant done that act? That is all that appertains to the province of the courts of law. Consequently, the trial should end with the verdict. Sentence is not merely superfluous (aside from its mere formal aspect as approval of the verdict), it is extra-judicial.

That the power of sentence does not belong to the *nisi prius* judge may appear an unjustified didactic conclusion. It is, however, rested upon sound argument. The object of a criminal trial is to adjudicate guilt or innocence of one act. On the other hand, the object of sentence is according to notions now becoming current, to reform the person convicted of having done that one act. All the evidence adduced at the trial goes to one issue-did the man burgle, or murder, or forge? Evidence of his past life, of his past associations, or of his character are not relevant or competent except as enlightening

that issue (and much that would illuminate that narrow issue is excluded by precedent). Therefore, after the jury has returned into court, and their verdict has been read and recorded, how stands the judge prepared to sentence this prisoner? The condemned man is, doubtless, a stranger to him. He is informed as to his antecendents only by the testimony offered in the case just ended. Though the fellow were a rogue of inveterate rascality, if he sat silent, nor put his character in to scales of justice, the judge is ignorant of his record. The length of the term must be arbitrarily determined. Whim or caprice or distemper allot the years of the man's servitude. With the information before him, though his will be merciful, and his heart upright, and his mind learned, the judge can do naught but pull straws. The veriest corner loafer—save for eduction, temperament and judical experience—is the peer of the judge in awarding penalties. In knowledge of the individual case, he may be the bencher's superior. System and science are absent, for system is based upon order, and science upon knowledge, and here is neither. Such Justice is a phantasy of ignorant disorder rather than a "triumph of principle."

We will assume, then, that, as the legislature acts only on the mass, and as the courts, without another trial of each prisoner convicted, are not sufficiently informed to give sentence, the function of punishment lies outside the purview of the legislature and the judiciary. As a consequence, if all government is "divided into three parts," the administrative department is the proper organ to perform the function. What results flow from this readjustment?

The reformation of a particular person is an individual matter. As we develop psychology, and its kindred studies (such as psychoanalysis) we begin to see the roots of crime embedded in the soil of heredity and environment. The effects of the sins of the fathers become manifest. And, in accounting for the fact of crime, we perceive the remedy. A careful investigation of the lives of those who have transgressed, and an accumulation of the data that the investigation gathers, will reduce the difficulty of restoration of character. It is accepted doctrine that all crime is traceable to conditions of heredity and environment. The cause of crime is pathological or psychological. The correction of the conditions giving rise to the crime (and the methods of correction are growing to be understood) is the cure of the criminal. Authenticated knowledge of these conditions, is, therefore, an essential preliminary to corrective action. When we have acquired this information, the treatment, is, simply, an application of known laws and principles to the individual case.

Pragmatically, the method is easy. We create an administrative Board of Punishment for each State. This board has a salaried and

competent worker (quite as often as not, a woman) in every county. Each prisoner convicted is delivered over to the Board of Punishment for disposition. This Board receives a detailed report, from its County representative, upon all the facts of heredity and environment connected with every prisoner sent up from that County. Based upon that report, and such tests as the Board makes of its own initiative, or through designated officers, a course of action is taken with regard to that prisoner. When he shows the required improvement and a reliable independence of character he is discharged. The length of time that he is under discipline depends upon the growth of his character. The nature of his crime is indifferent. Yet prison is no "fool's paradise." The prisoner is set to work. He labors on the roads or in the fields or in the work-shops.

Under this scheme all the advance methods of penology find natural growth. Parole may flourish under it. The wages of the prisoner may be returned to his family. The numbering of convicts may be abolished. Instruction in industrial pursuits may be given. The State will profit by road-building. Any of the systems that climate and local conditions favor, whether state farm, or penitentiary industries, or road-building may be adopted. The indeterminate sentence will reign unchallenged. And the essential descipline that constitutes the punishment may be maintained.

It is undoubted, of course, that these things, may be brought without so radical a reconstruction; but done in any other way it will be patch work. Done after the suggested manner, it will be correcting the symmetry of government. For, as they are now distributed, to sentence is a judicial duty, to imprison is the duty of a limited administrative board, and to pardon is a supreme power of the executive. The reformative purpose of punishment is hampered by conflicting powers of three conflicting authorities. And, after all, are not sentence, imprisonment and pardon parts of a single administrative function?