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THE ESTABLISHMENT OF UNIFORMITY IN DETERMINING PUNISHMENTS IN DIFFERENT COURTS AND DIFFERENT JURISDICTIONS[1]

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There is little use in developing elaborate theories of criminal causation, of pondering the relative claims of the anthropologist or the sociologists, of weighing the comparative influence of heredity, or economic conditions, or of considering the mental, moral or physical state of the offender, unless we find an adequate remedy for the disorder and, having found it, apply it with intelligence. There is small benefit to be derived from the intricate and expensive systems of police investigations, court examinations and judicial procedure unless, having determined upon a method of suppression and correction, it is administered not only wisely but equitably.

Crime, broadly speaking, is the anti-social act of isolated members of the community and punishment is the social reaction against crime. Under the term punishment we ordinarily group all of the agencies which society commonly employs in its effort to protect itself from the acts of its recalcitrant members, from the death penalty in capital cases to the paternalistic efforts of those extreme penologists who consider crime in its every aspect as a disease and who would treat it as such.

But whatever theory of crime and punishment one holds, it must be apparent that the punishment should be administered with the same celerity, certainty and uniformity as characterizes the admistration of the law up to that point. As the primary purpose of punishment is to prevent a repetition of crime, the failure to apply it understandingly necessarily indicates a failure of the remedy to accomplish its purpose.

I have no doubt that the weakest point in the whole range of our correctional system is in the administration of the punishment, in other words, in the application of the social remedy.

In order to appreciate more fully the importance of this aspect of the matter, let me direct your attention for a moment to the agencies society has had constituted for its protection; to that great army of police which seems to be necessary to maintain peace and order and

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protect the many from the unruly few; to the vast number of police magistrates and minor officials necessary to conduct the preliminary investigations; to the number of grand juries with their officers and attendants; then to the jails and houses of detention with their jailers and under keepers, and lastly to the trial courts with their vast machinery of petty jurors, clerks, process servers, detectives, court officers and judges.

The individual who is not able to maintain that standard of conduct prescribed by society sifts through this cordon of police, magistrates, grand and petit juries to the judge for sentence. All this, running into thousands upon thousands of dollars and employing in the aggregate an untold number of men throughout the length and breadth of the land, to determine the simple fact of the commission of crime and identity of the criminal. All this merely to bring the offender to the bar of justice. And once there, observe again the elaborate processes which society has evolved to prevent a repetition of the crime and to deter others. Jails, penitentiaries, prisons and reformatories, probation and parole officers, parole and pardon boards, involving the investment of an enormous capital and engaging the attention of an immense number of men and women.

Picture it as a great social hopper or funnel into which are constantly being drawn those unfortunate members of society who for one reason or another have violated the law. Their guilt having been judicially determined they appear before the judge for the imposition of such penalty, within the limits of the law, as he may prescribe. Upon him now rests the final responsibility. How important his decision; what infinite care should be exercised by him that the punishment shall be adjusted accurately to the crime and to the needs of the prisoner. The consequences are momentous. The prisoner may have, probably has, a family dependent upon him for support; consider what it means to them. He may be a man of good purpose and high ideals, subjected to too great a temptation; he may be youthful and led astray by vicious companions; he may be a first offender, or perhaps a victim of circumstances; possibly he is mentally irresponsible, or depraved, or vicious, or an old offender. Each case presents a separate field of study, in no two are circumstances exactly alike, and each must be handled as a distinct social problem and with a realization on the part of the judge of the importance of his decision. Failure at this point means failure of the whole elaborate system society has built up at such trouble and expense for its protection.

Punishment, in order to satisfy public opinion, should be as nearly uniform as the circumstances of the case permit. Justice must in fact be just, and to this end the judge must apply himself. The prisoner and the public should be made to understand that in determining punishments the judgment of the Court is adapted to each individual case; that it is beneficial, upright and impartial.

When other offenders or the public see that A is released on a suspended sentence or is placed on probation upon a conviction for assault and battery, while B, for the same offense, is sent to prison for a term of years, they cannot understand why these distinctions are made. They still think, unconsciously, of the old idea of a given punishment for a given crime.

They do not realize that the judge, in determining sentence, has been at great pains to take into consideration every possible factor bearing upon the offender, as well as the consideration of the offense itself. His age, his previous record, his environment, all are or should be considered. What would be reformatory punishment for one might not be adapted to the case of another. These things society should be made to understand.

That this desirable uniformity of judgment is difficult to accomplish I am well aware. Its necessity and its difficulty should impel us to strive the harder for its accomplishment.

The whole solution of the matter, however, does not lie in the hands of the judge, for the law generally fixes a maximum penalty beyond which the judge cannot go, and in capital cases indicates definitely the punishment, some jurisdictions permitting the jury to modify the extreme penalty, in which case the judge has no discretion.

Except for the most serious offenses the law now usually makes no attempt to settle in advance the precise degree of punishment to be imposed. At one time such was the case and there was a well defined group of penologists who advocated a fixed penalty for every crime, upon the theory that every wrongdoer, being presumably in full possession of his faculties and exercising free control over his will, made a deliberate choice when he violated the law and that he should therefore be required to pay the exact penalty fixed by the law. This system of determining the punishment on the basis of the offense rather than in view of the responsibility of the offender undoubtedly has its advantages. It is precise and uniform and relieves the sentence of that uncertainty due to the variability of human judgment. The

judge becomes a mere administrative auxiliary imposing the pre-determined legal punishment with a disregard for consequences characteristic of such a system. The punishment inflicted represented the penalty imposed by society upon the wrongdoer; the vengeance of the community visited upon his head for his voluntary transgression; prevention was stimulated by the severity of the sentence and the question of the habitual offender was in a measure solved by hanging the culprit.

It being impossible for the law to anticipate with exactness the punishment best suited to each individual offense, legislatures have in consequence given more and more latitude to the judge for the employment of that necessary discretion, the exercise of which is so important to the proper administration of the criminal law. And it is because of the latitude given to the individual judges presiding in different courts and different jurisdictions, that some effort should be made towards uniformity in determining responsibility and punishments.

Under our modern system this power of determining the duration and character of punishment is more or less restricted by legislative enactment, generally by fixing certain limits within which the sentence must be kept, usually with the right, however, of suspension altogether or, in some jurisdictions, where the proper facilities have been provided, of the use of the probation system. The maximum limit of a prison sentence is sometimes further modified by various forms of indeterminate sentence in use in some jurisdictions and in some institutions. Again in other jurisdictions, the penalty may be imposed by the jury in certain cases when rendering its verdict, the judge being a mere arbiter upon the presentation and admissibility of evidence and the disputes of opposing counsel.

The reformatory idea of punishment is undoubtedly much hampered by the conflicting powers of conflicting authorities. We had last night, in the address of Governor Whitman, a striking example of the conflicting ideas and inconsistencies of some minds in the application of practical penology; he advocated a penology that takes no account of the prisoner—the old penology of severity and repression—yet claiming to believe in the possibility of the reform of the prisoner. You cannot reform by the old repressive measures without taking into acount the personality of the offender.

The elements, then, entering into this system of the individualization of punishment are legislative, which applies to cases rather than to persons, judicial, the jury and parole and pardon boards.

As the law cannot in advance take into consideration the punishment best suited to a particular offender, and as a jury is in no position to weigh carefully and dispassionately the circumstances which may have influenced him, and the measures necessary for his reformation, it may be conceded that, at least until the practical working out and demonstration of the efficiency of the pure indeterminate sentence, the determination by the judge of the extent and duration of punishment, within the limits prescribed by the legislature, is the only practical plan available.

This conclusion having been reached, the next step is to increase to the greatest possible extent the efficiency of the system, which must necessarily be done through the agency administering it,—the judges themselves.

We have in this country in the different states, and sometimes in the various political sub-divisions of the same state, judges holding office by election or by appointment. It is possible that under the appointive system the peculiar fitness of the judge for the administration of the criminal law may have been considered, but by no possibility can I conceive of an intelligent choice being made by election of a candidate for the criminal bench, except by chance in the case of a candidate for re-election who may have demonstrated his peculiar fitness while in office. It is usually thought quite sufficient if the candidate for appointment or election to the bench of a court having criminal jurisdiction, is of respectable legal attainments and of reputable standing at the bar. Little or no consideration is given to the question whether he has any special qualifications, or has any training for, or has made any study of, the problems he is called upon to solve. I think it must be quite apparent to those who have given this aspect of the study of criminology any consideration that a large proportion of the judges admimistering the criminal law have little comprehension of the problems they are constantly attempting to solve. They may have opinions, they undoubtedly have prejudices, but that they have any real conception of the vital questions they are called upon to answer or their importance to the community, is hard to believe when one reviews the circumstances surrounding some of the cases and the penalties imposed.

I have seen it stated, and I have no doubt that it is frequently assumed, that the judge has no knowledge upon which to base his sentence other than the facts and circumstances which he ascertains at the trial of an offender. This, of course, we know is not the real situation, but not being trained in the science of penology, the decisions

reached are almost of necessity the result of offhand impressions rather than deliberate conclusions based on an enlightened proceeding and scientific investigation. With part of our judiciary adhering to the old idea of freedom of will and punishment for social vengeance, while others accept and apply the modern theory of prevention and reformation, it is difficult to reconcile the application of punishment in different courts and different jurisdictions. Judges administering the criminal law should have some knowledge of scientific penology, sociology and psychology, of criminal anthropology and statistics. They sheuld have an intimate familiarity with penal institutions and a keen insight into human nature. They should have at hand the facilities for probing into the past life of the prisoner, for determining his heredity and environment; they should have available the means to determine with reasonable accuracy his mental and physical condition. Uniformity must be attained under our present system by reaching a common understanding, and the acceptance of corresponding methods.

Until the importance of a correct knowledge of the problem is realized and an earnest effort is made by judges of the criminal courts generally to meet the situation by suitable preparation, little progress will be made, and unless this can be accomplished, it may well be advisable to adopt the pure indeterminate sentence and leave the whole question of punishment to a properly constituted tribunal upon which the student of criminology, the sociologist, the psychologist, the physchiatrist and the physician may be represented.

I do not view the situation in an altogether pessimistic light. It is gratifying to note the increasingly large number of judges who are making an intensive study of this most interesting and absorbing subject. We are much indebted to the valuable research work that is being done by scientific investigators without which it would be impossible for the courts or the administrators of correctional and penal institutions to attain that degree of efficiency for which we are striving. With science doing so much there is small reason for the failure of the courts taking advantage of the results of these efforts. It is by these efforts, stimulating public and professional interest, that the wonderful results now being accomplished in some jurisdictions are possible.

From the accumulated knowledge which we have acquired and the great mass of material at hand, we must intelligently, honestly and without prejudice, reject that which is useless and accept that which is good.

We must face our responsibilities fearlessly, discuss our problems frankly and, admitting our faults when we find them, apply ourselves to a better solution of the problem than we have yet accomplished.