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THE COMMON LAW HISTORY OF PROBATION

An Illustration of the "Equitable" Growth of Criminal Law

Frank W. Grinnell¹

The practical importance of continued study of probation in different states, as well as in the federal system under the Director of the new "Administrative Office of the United States Courts," suggests that some useful purpose may be served by the following condensation of a study published² twenty-four years ago. It deals with forgotten but very practical history, and, like an arrow shot into the air, it may land somewhere to stir the imagination of some judges and prosecutors, in unexpected ways, as to current and future development of the criminal "adjective" law in accordance with the orthodox common law tradition. The approaching formulation of rules of criminal procedure by the Supreme Court of the United States under the recent act of congress³ furnishes an additional reason for retelling the story to revive professional recollection. It may help to modify the contempt sometimes expressed for early legal history and practices.

In December, 1917, in the case of "Ex parte United States, Petitioner,"⁴ for a writ of mandamus to Judge Killits of the Federal District for Northern Ohio, the Supreme Court decided to issue the writ directing Judge Killits to revoke an order suspending execution

of a sentence in the case before the Court and held that all probationary powers which had been exercised by Federal judges during the past fifty or sixty years without specific directions in acts of Congress were mistaken and illegal. In view of the fact that the Court knew that there were several thousands of convicted persons who were out on probation by the acts of Federal judges in different parts of the country, and had been living reputable lives, the Court suggested that, so far as any injustice to them was concerned, "a complete remedy may be afforded by the exertion of the pardoning power," and "that the exceptional conditions . . . require that we exercise that reasonable discretion with which we are vested to temporarily suspend the issue of the writ (of mandamus), so as to afford ample time for executive clemency, or such other action as may be required to meet the situation." Thereafter about 5,000 persons were pardoned by the president—one of the largest wholesale acts of clemency in our history.

While the case arose in Ohio where the practice in the Federal Court had been to impose sentence and then suspend its operation, yet the argument in the opinion dealt with the practice in

¹ 60 State St., Boston, Mass.

² Mass. Law Quart., No. 6 (August, 1917), pp. 591-639.

³ See Mr. Dean's article in 24 Am. Jud. Soc. Journal (Oct., 1940), 81-83.

⁴ 242 U. S.

the First Circuit of "placing on file," or placing on probation *after verdict or plea of guilty, but before sentence*. During the argument of this case R. W. Hale, Esq., of the Boston bar, and the writer, were requested by one of the federal judges of the First Circuit, to prepare and file a brief, as *amici curiae*, in support of this Massachusetts practice, as it had been followed in this circuit for, at least, sixty years, and in the state courts for a much longer time, as part of the judicial function without express statutory authority. It was in the course of the preparation of that brief that parts of this article were compiled.

*The Practice in the First Circuit
Which was Held Illegal.*

The description of the practice from the brief referred to was as follows:

"In this Court cases often occur in which the judge believes that neither an immediate prison sentence nor an immediate fine—which often amounts to a short prison sentence—is in the best interest of the United States. In these cases a plea or verdict of guilty is taken and recorded, but no entry is made accepting or adopting that plea or verdict in any way, and the case is continued without any judgment; that is to say, without sentence. The case being continued, the defendant is admitted to bail. In suitable cases he is required to furnish sureties, but generally the bail are not persons whose pecuniary responsibility is important. They are chosen for their fitness to have that custody of the offender which common-law bail always have, and they are chosen as persons who are likely to be able, in consequence of such custody or supervision, to give intelligent information about the offender. It is hoped that their influence will cause some amelioration to his behavior.

"Until the actual sentence the Court never makes any final decision as to whether it will sentence at all; and if so, as to whether the punishment shall be fine or imprisonment, minimum or maximum. . . .

"The Assistant United States Attorneys for the District, and other persons connected with prosecutions, have been generous in giving their time in such cases. Helpful reports are secured from them. Voluntary service is also received from the probation officers of the Superior Court of Suffolk County, Massachusetts, and from other people with similar training. There have been cases of unusually young defendants, and, in these, persons connected with the Juvenile Court of the City of Boston have also freely given important and voluntary service. In every case which arose before the present case began, the proceedings have had the assent of the United States Attorney.

"This has been the practice of the United States District Judge and his predecessors in office for at least sixty years; and, until the present discussion, no question has ever been raised as to its legality. In the case of *United States v. Margaret Mulhall*, on June 2, 1914, the United States Attorney for the District stated in open court that the Attorney General of the United States requested the exercise of the power to suspend judgment and sentence." . . .

*The Massachusetts Story and Its
Juristic Significance*

"Massachusetts has been called the 'home of probation.' . . . The practice antedates the statutes. . . . The statutes have indeed been chiefly the record of an accomplished idea."—*Mass. Probation Manual*.

The particular reason for recording the Massachusetts story, aside from purely historical interest, is to avoid any inference from the opinion in the Killits case that the Supreme Court of the United States intended to draw a

line between the recognition of the judicial development of principles in their application to administrative problems in civil causes and similar development of principles in their application to criminal administration. It is common knowledge that equity jurisdiction developed, not by legislation, but through the application of principles by courts in providing a more flexible system of remedies as life became more complex, in order to alleviate the strictness of the common law rules which, unless so alleviated, would have resulted in much injustice. It is also common knowledge that not only were these equitable principles applied in the chancery courts, but that many of them found their way into the structure of the common law system through the gradual recognition by common law courts of some of these principles which found expression through the development of remedies, as most law ultimately finds expression, in the varied growth of the action of assumpsit, in the introduction of equitable defenses, and otherwise.

Now let us turn to the history of criminal administration and see what happened. Prior to the adoption of the American Constitutions there were various methods by which in some cases the strict legal punishment of crime was alleviated, at times when theft was punished by death—the bloody period of criminal administration which stirred the soul of Samuel Romilly.

“Benefit of Clergy”

These methods were, first, in some of the capital crimes, the exemp-

tion from punishment, which was described as “benefit of clergy.” This exemption, which originated in the claims of ecclesiastics to be exempt from criminal process before the secular courts, was subsequently extended by various English statutes to include also peers, who were presumed to be able to read, and to commoners who could establish themselves as “clerks” by proving that they could read. (See 4 Blackstone, Chap. 28.)

It did not operate even-handedly for all classes of men, as indicated by the foregoing statement, but it made the world somewhat less bloody for the following reasons, as stated by Bishop in the eighth edition of his “Criminal Law,” Sect. 936, page 565:

“Since felonies comprehend a large part of the crimes, the uniform infliction of death would be too bloody. To which evil the wisdom of our forefathers found a remedy in the plea of clergy or benefit of clergy. . . . A word explanatory of this . . . by way of memento of departed piety, humanity and genius will not be inappropriate.”

“Sect. 938. *In this country (America), the benefit of clergy is ordinarily acknowledged as belonging to our common law.*”

And so also in Foster’s “Crown Law” (second edition, 1791) appears the following passage:

“But light and sound sense have at length, though by very slow degrees, made their way to us; we now consider the benefit of clergy, or rather the benefit of the statute, as a relaxation of the rigour of the law, a condescension to the infirmities of the human frame; and therefore in the case of all clergyable felonies we now measure the degree of punishment by the real enormity of the offense; not as the ignorance and superstition of former times suggested by a senseless dream of sacred persons or sacred functions.”

For an account of the history of "benefit of clergy" from a different angle, see Bentham, "Principles of the Penal Law," Part II, Book V, Chap. IV, Bentham's works, Bowrings ed., Vol. I, 505.

As an instance of the practical discretion in regard to the mitigation of punishment exercised by the courts in the seventeenth century and the bishop's clerks who performed the function of the modern probation officer in advising the Court as to the right of prisoners to claim the benefit of clergy, the following passage, printed as "Note L," at page 103 in the third edition of Romilly's speech of 1810. hereinafter referred to, is illuminating:

"Before the reign of Queen Anne, when the benefit of clergy was allowed to such only as could read, and when consequently the ignorant were doomed to die for offences for which a slight punishment only was inflicted on those who had received some education, and who were therefore less excusable, the gross absurdity and injustice of the law was in a considerable degree corrected by the falsehood of the clerk who was to report of the convict's learning, and by the connivance of the court. But this connivance was not universal, the judge exercised his discretion whether to connive or not. In common cases he received the false certificate without inquiry, but where he thought that he discerned circumstances of aggravation, he scrutinized strictly into the prisoner's ability to read. Such at least was the practice of Lord Chief Justice Kelyng, as he himself informs us, 'As the Lent Assizes at Winchester, 18 Car. 2, the clerk,' he says, 'appointed by the bishop to give clergy to the prisoners, being to give it to an old thief; I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked upon the book at all, and yet the

Bishop's clerk, upon the demand of *legit* or *non legit*, answered *legit*; and thereupon I wished him to consider, and told him I doubted he was mistaken, and bid the clerk of the assizes ask him again, *legit* or *non legit*, and he answered again somewhat angrily, *legit*: then I bid the clerk of the assizes not to record it: and I told the parson he was not the judge whether he read or no, but a ministerial officer to make a true report to the court. And so I caused the prisoner to be brought near and delivered him the book, and then the prisoner confessed he could not read; whereupon I told the parson he had reproached his function, and unpreached more that day than he could preach up again in many days; and because it was his personal offence and misdemeanor, I fined him five 'marks' (Kel. Rep. 51). Instances of this kind afforded no just cause of complaint. The convict it is true suffered the greater punishment for his offence because his parents had neglected his education, but such was the law, and though the judge in his discretion connived at a departure from it in nineteen cases out of twenty, he could hardly be said to deserve censure when in the twentieth he only took care that the law should not be evaded." (Romilly's "Observations on the Criminal Law of England," etc., third edition, pp. 103, 104.)

The British soldiers who were convicted after the Boston Massacre escaped the penalty by claiming the benefit of clergy.

This appears on page 120 of the pamphlet report of "The Trial of the British Soldiers of the 29th Regiment of Foot For the Murder of Crispus Attucks et al on Monday evening, March 5, 1770, printed and published by Belcher and Armstrong, No. 70 State St. 1807," as follows:

(Six found not guilty)

"Matthew Kilroy and Hugh Montgomery, not guilty of murder but guilty of manslaughter. . . . Kilroy and Montgomery prayed the Benefit of Clergy

which was allowed them, and thereupon they were each of them burnt in the hand in open court, and discharged."

Emory Washburn, writing in 1840, in his "Judicial History of Massachusetts," says (at p. 194):

"In criminal matters . . . the common law was in a great measure retained, even to the benefit of clergy. The last instance of this, that I have discovered, was the case of James Bell in March, 1773. He was convicted of manslaughter in the Superior Court in Boston, where he pleaded the benefit of clergy and was accordingly burned in the hand and discharged."

"Many other instances might be cited where prisoners were admitted to the benefit of clergy. Thus in 1770, George White and Patrick Freeman having been convicted of burglary were burnt in the hand, having claimed the benefit of clergy."⁵

After the adoption of the constitution, however, the uneven application of the law of benefit of clergy resulted in its abolition in Massachusetts by the following statute:

1784—CHAPTER 56

(January Session, Ch. 23)

Chap. 56. AN ACT FOR TAKING AWAY THE BENEFIT OF CLERGY IN ALL CASES WHATSOEVER, AND DIRECTING ADEQUATE PUNISHMENT FOR THE CRIMES WHERE THE SAME USED TO BE ALLOWED.

Preamble. Whereas, the plea of benefit of clergy, though it was originally founded in superstition and injustice, yet by long usage and the humanity of criminal law, is so interwoven with it as to become very essential in its present system: but forasmuch as the operation of it consists only in the mitigation of the punishment for those crimes where it is allowed, which in most cases operates very inadequately and disproportionately, and for which

more adequate remedy may be provided:

Be it therefore enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That from and after the publication of this law, the plea of benefit of clergy shall not be used or allowed in any cause whatsoever, unless in the prosecution for crimes committed before the passing of this act, for which the said plea of benefit of clergy would have then been allowed.

And be it further enacted by the authority aforesaid, That if any person shall be convicted of any crime wherein by law the plea of benefit of clergy was heretofore allowed, and for which, without such benefit of clergy, he must have been adjudged to suffer the pains of death, such person shall be set upon the gallows for the space of one hour, with a rope about his neck, and the other end cast over the gallows, pay a fine, not exceeding five hundred pounds, be whipped, not exceeding thirty-nine stripes, and be bound to the good behaviour, or suffer one or more of the above punishments, according to the aggravation of the offence; and so often as he shall be convicted of the same crime, shall suffer the punishments above mentioned, or any one or more of them, unless some other punishment shall be, or may have been by the laws of this Commonwealth assigned for such crime, in which case the offender shall suffer as by such law is or shall be directed. March 11, 1785.

See Revised Statutes of 1836, c. 133, §15.

Security for "Good Behavior"

A second method of alleviating strict punishment was in lesser crimes by the process of holding to security for good behavior or "good abearance." This jurisdiction was described in early American cases as follows:

Benefit of Clergy shall not be used or allowed upon conviction of any crime, for which, by any statute of the United States, punishment is, or shall be, declared to be death."

⁵ An interesting passage in Dane's Abridgment, chapter 193, article 40, quotes from the Act of Congress of April 30, 1790, as follows: "That the

In *Com. v. Duane*, 1 Binney, 98, note, Tilghman, C. J., said:

"Surety for good behavior may be considered in two points of view. It is either required after conviction of some indictable offense, in which case it forms part of the judgment of the Court, and is founded on a power incident to courts of record by the common law, or it is demanded by judges or justices of the peace out of court, before the trial . . . in pursuance of authority derived from a Statute made in the 34th year of Edward 3."

The report of this case in "Hall's American Law Journal and Miscellaneous Repertory," 168, must have given it wide currency. Hall's was the first American law journal, and this the second number.

In *Estes v. State*, 2 Humphreys (Tenn.), 496, 498, it is said:

"Binding to the good behavior was a discretionary judgment, at the common law, after a conviction for a gross misdemeanor, before the passage of the statute of 34 Edward 3,"

and it was held that that was the early law of Tennessee.

It was a proceeding which was well known throughout the New England States. For instance, Burns, Justice, in the Dover, N. H., abridgment by Eliphalet Ladd, of 1792 (pp. 400, 412), contains a reference to the following passage in Dalton's "Country Justice," edition of 1746, page 288, where Dalton says:

"I lately granted the good behavior against one for that he had bought Ratsbane and mingled the same with Corn and then wilfully and maliciously did cast the same among his Neighbors Fowls, whereby most of them died. . . .

And since I have known it allowed as a good Cause by the Judges of Assise."⁶

The jurisdiction to grant the good behavior continued, as it was not confined to any class of persons and it is still part of the jurisdiction of Massachusetts courts. (Cf. also U. S., R. S., §727 and New Fed. Code, §270.)

Technical Defenses

In addition to the other methods of mitigating the extreme severity of the earlier criminal penalties, we should not forget the practice of subjecting the indictment to the keenest technical scrutiny and granting motions to quash after verdict, with the result of freeing the prisoner. This practice of extreme strictness in dealing with criminal indictments has been the cause of much ridicule in modern times, but its origin was humane and was one of the methods by which the courts "administered" practical justice at a time when the inertia of the community was such that it still allowed excessive penalties to remain upon the statute books. The necessity and the consequent practice of such strict requirements in criminal pleading have disappeared as the more humane attitude toward criminals has developed in Massachusetts. Accordingly, this early strictness of criminal pleading may fairly be added to the "benefit of clergy," to "good behavior," and to suspension of sentence, combined with a judicial recommendation of pardon as a further evidence of the central idea or principle which modern analysis finds to be part of the essential

⁶ The same passage occurs in the folio edition of Dalton of 1691. Cf. Chitty Crim. Law, 2d ed., Vol. I, chap. 15, 16, *Rex v. Draper*, and *Rex v.*

Hart, 30 How. State trials, pp. 1129 and 1344, and *Reg. v. Dunn*, 10 Ad. & El. 1026, at 1041; *Queen v. Richardson*, 8 Dow. Pr. 511.

meaning of the phrase "to administer justice."

Compassionate Verdicts

The other indirect methods of mitigating the severity of penalties are shown in the following passage from the great speech of Romilly in the House of Commons on February 9, 1810, on a motion for leave to bring in bills to repeal the Acts of 10 and 11 William III, 12 Ann and 24 George II, which made the crimes of privately stealing in a shop goods to the value of five shillings and of stealing in a dwelling house property of the value of forty shillings, capital felonies.

"In how many instances such crimes have been committed, and the persons robbed have not proceeded so far against the offenders as even to have them committed to prison; how many of the 1,872 thus committed were discharged, because those who had suffered by their crimes would not appear to give evidence upon their trial: in how many cases the witnesses who did appear withheld the evidence that they could have given; and how numerous were the instances in which juries found a compassionate verdict, in direct contradiction to the plain facts clearly established before them, we do not know; but that these evils must all have existed to a considerable degree, no man can doubt." (Romilly's "Observations on the Criminal Law of England," etc., pp. 10, 11.)

Judge Thacher

The next recorded step in the development of the policy of fitting the punish-

ment to the crime in the light of the circumstances appears about 1830, in the beginning of the recorded history of the probation system in Massachusetts. That probation system appears to be simply a modern scientific application of the underlying principle in the older and cruder methods already referred to. It was all a part of the gradual and more humane study of criminal administration, to which the Marquis of Beccaria had given so strong an impetus by his little book published in the middle of the eighteenth century. It is quite probable that some form of probation practice was followed when possible in cases where the circumstances warranted it, before the recorded story begins.

The beginning of the recorded story in Massachusetts appears to be the case of *Commonwealth v. Chase*, Thacher's Criminal Cases, page 267, which arose in the old Municipal Court of Boston in which Judge Peter Oxenbridge Thacher sat for twenty years from 1823 to 1843. As stated in the preface to the volume of his criminal cases published after his death, he "was distinguished for his earnest study and thorough knowledge of the criminal law and its practical application."

This case is recorded in Volume XIX of the Records of the old Municipal Court of Boston, at page 199. As this opinion by Judge Thacher is the earliest recorded judicial discussion of the subject of probation in its modern sense known to the writer, and as the volume of the "Law Reporter" in which it was first published, and the subsequent publication of "Thacher's Crim-



PETER OXENBRIDGE THACHER

inal Cases" are not always within convenient reach, the entire opinion is here reprinted:

MAY TERM, 1831

COMMONWEALTH v. JERUSHA CHASE

The defendant was indicted at the January term of the court, 1830, for stealing from a dwelling house, and upon her arraignment, pleaded guilty. The prosecuting officer did not move for sentence, and the indictment was laid on file, the defendant entering into recognizance with sureties to appear before the court when sent for. At the present term of the court, the defendant was indicted for a larceny, and upon her trial, was acquitted. The county attorney then moved for sentence upon the first mentioned indictment.

S. D. Parker, for the defendant, contended, 1. That the proceedings in the court at the January term were full and complete; and that they amounted to a sentence. 2. That the matter having been acted upon and finished, could not be brought forward *per saltum*, but should have been continued from term to term.

THACHER, J. The indictment against Jerusha Chase was found at the January

term of this court, 1830. She pleaded guilty to the same, and sentence would have been pronounced at that time, but upon the application of her friends, and with the consent of the attorney of the commonwealth, she was permitted, upon her recognizance for her appearance in this court whenever she should be called for, to go at large. It has sometimes been practised in this court, in cases of peculiar interest, and in the hope that the party would avoid the commission of any offense afterwards, to discharge him on a recognizance of this description. The effect is, that no sentence will ever be pronounced against him, if he shall behave himself well afterwards, and avoid any further violation of the law. But I cannot doubt the court may, on motion, have the party brought in and sentenced at any subsequent period. For what was the duty of the court to do at any one time, cannot cease to be its duty by delay. The judgment is postponed only, and it is in the discretion of the attorney for the commonwealth, to move at any time afterwards for the appearance of the party, according to the condition of the recognizance.

In the case of Jerusha Chase, the defendant, the question is not on the validity of the recognizance; but whether the former proceedings have discharged her, so that no further judgment can be produced on the record. What are the rights of a party called into court under such circumstances? He may admit the conviction, and plead a pardon for the offense; or, he may deny that he is the same person who is named in the indictment; in which case, the government must prove his identity, like any other material fact, by verdict of the jury. Or, he may move in arrest of judgment for the insufficiency of the record. But this woman, upon being brought into court, by another name, on being asked why she should not be sentenced on this indictment, admitted her identity. It appears, therefore, by the record, that public justice has not been satisfied; and that no punishment has been inflicted for her violation of the law, in the matter whereof she stands convicted.

But it is asked by her counsel, where an indictment has been suffered to sleep upon the files of the court for several terms, and no notice has been taken of it on the record or docket to keep it alive, whether it is competent to call it up at a future period, and to proceed upon it as on a living process? But I do not understand that a prosecution like this can ever be said to be dead in law. If it should be said, however, to be hard measure to pronounce judgment after it has been suspended for years, I answer, that the party might at any time have appeared in court, and demanded the judgment of law. It has been delayed from tenderness and humanity, and not because it had ceased to be the right of the government to claim the judgment. By mutual consent, therefore, the judgment has been delayed till this time, and this consent takes away all error in the proceedings.⁷ Sir Walter Raleigh was executed on a sentence which had been passed upon him fifteen years before. But he did not claim to be relieved from his fate on the ground of the lapse of time between his judgment and the final demand of the warrant of execution, but on the ground of an implied pardon, arising from a commission which had been issued to him by the king, to command an expedition to a foreign country, and in which was contained an authority over the lives of others. It was argued, that such a commission could not have issued to one dead in law, and that the grant of such a commission must have operated to restore the party to the privileges of a free subject. Undoubtedly Sir Walter had hard measure dealt out to him by his vain and weak sovereign.

By the record in this case, the defendant stands convicted of a crime, and *no sufficient reason is shown* why the sentence should not follow the conviction. It is as much the duty of the court to render judgment against a person convicted of a crime, and within its power, as to secure to such person a fair trial. It would be against reason and justice to do otherwise.

The defendant was sentenced to five days' solitary confinement and six months in the house of correction.

The importance of this case is increased by a footnote on page 270 which records that a petition for certiorari was brought to reverse Judge Thacher's decision; that upon a hearing of this appeal Chief Justice Lemuel Shaw delivered an opinion sustaining Judge Thacher, in which the other judges of the Court were understood to concur. These other judges were Samuel Putnam, Samuel S. Wilde, and Marcus Morton.

A diligent search for any record of this opinion was unsuccessful, for curiously enough, although the docket of the case with the entry "petition dismissed" is in the files of the clerk of the Supreme Judicial Court for Suffolk County, all the papers in the case are missing.

The petition for certiorari is noted in the docket of the Supreme Judicial Court for Suffolk County at the November term, 1831, where it appears, on page 101, that S. D. Parker was for the petitioner, and the Solicitor General for the Commonwealth. The entry "Petn dismissed" is in handwriting resembling that of Chief Justice Shaw.

The original indictment against Jerusha Chase was found at the January term, 1830, and is endorsed:

"Feb. 8. Defendant retracts her plea and pleads guilty and recognized in the sum of two hundred dollars with Benjamin Salmon, trader, and Daniel Chase, Cordwainer of Marblehead, to come when sent for and in the meantime to keep the peace," etc.

The case was also reported in 1839 in *I. Law Reporter*, 163 (Peleg W.

⁷ 3 Co. 40, Dormer's Case.

Chandler, editor), with a note that "*the principles of the above decision have often been recognized in Boston.*"



JOHN AUGUSTUS

This note was undoubtedly written by Chandler, as this was the first number of the "Law Reporter" and he was its first editor, and his statement is reliable, for there were few members of the bar of his day who knew better what they were talking about than Peleg W. Chandler.

From the report of *Com. v. Miller Snell*, reported in "Columbian Centinel," published in Boston, January 14, 1832, it appears that, when passing

⁸The House of Refuge instituted by the Society for the Reformation of Juvenile Delinquents in the City of New York in 1824 was "the first of the kind in the United States by which the experiment of juvenile reformation was fairly attempted." The documents relating to its early history were published together in a volume for general information in 1832, a copy of which may

be found in the Boston Athenaeum. Following this experiment, the House of Reformation for Juvenile Offenders was established (St. 1825-26, ch. 182). This was the institution referred to in the quotation from Judge Thacher, quoted above, from the "Columbian Centinel." An account of this institution was published in pamphlet form in 1833. For earlier treatment of juveniles see St. 1787, c. 54; 1793, c. 59.

sentence on a boy for attempt to kill by poisoning, Thacher, J., said:

"The object of all punishment, by a human tribunal, is twofold—to act upon the offender and to bring him, if possible, to a better mind; and to deter others by his sufferings from committing a like offence. . . .

"I wish that I could impute it to accident, to want of discretion, to anything rather than to malice; but not only the verdict of the jury; but the circumstances of the case, convince me that the defendant perpetrated this deed with such deliberate malice that he is a suitable object of punishment.

"I have striven to find such circumstances of mitigation as would authorize me to suspend the sentence, and to consent to send the defendant to the House of Reformation for Juvenile Offenders. But that house was not prepared for such an offender as this.⁸

"If he should be sent to that place it would not, I fear, be regarded by the community, and especially by the young, as a punishment. To send him home to his friends, without punishment, would be a great reflection on the justice of the law."

The First Probation Officer

Today we know that the backbone of the probation system is a good probation officer and it is peculiarly fitting that the centennial anniversary of the appearance of the first of such men, as a public-spirited volunteer, in 1841, should be celebrated this year in connection with the annual conference of the National Probation Association in Boston on May 28-31. Judge Thacher's practice was in a jury court with jurisdiction of all criminal cases not capital.

be found in the Boston Athenaeum. Following this experiment, the House of Reformation for Juvenile Offenders was established (St. 1825-26, ch. 182). This was the institution referred to in the quotation from Judge Thacher, quoted above, from the "Columbian Centinel." An account of this institution was published in pamphlet form in 1833. For earlier treatment of juveniles see St. 1787, c. 54; 1793, c. 59.

The Boston Police Court was a separate tribunal. Obviously following up the precedents established by Judge Thacher,

"John Augustus, humble New England shoemaker, a spectator in the Boston Police Court in 1841, asked the judge to let him stand sponsor for a man whose conduct ordinarily would have consigned him to the House of Correction. According to authentic records, this little known social pioneer carried out continuously for the remaining eighteen years of his life a system of probation supervision for more than two thousand offenders, young and old. His pioneer work embodied all the essentials of modern probation service."

*The Sources of Judge Thacher's
Practice*

It is idle to imagine that Judge Thacher's practice was the accidental result of the benevolent impulses of a single judge and had no roots in the history of the law. Peter Oxenbridge Thacher was one of the thoughtful men of the profession in his day. He began his twenty years of service on the criminal bench in the old Municipal Court of Boston, in 1820, in the midst of the "Era of Good Feeling," when James Monroe was President of the United States. The nation was at peace, the general framework of its government had been tested by time and struggle, and men were able to read and think more widely and to consider the details of government. If any one will spend half an hour with the index to the first twenty-five volumes of the "North American Review" and look up the passages under the headings of "Crime," "Punishment," "Romilly," "Bentham," etc., he will see that the thoughtful and far-sighted men of that

day had followed the work of Beccaria, Bentham, and Romilly, and that problems of criminal administration were agitating men's minds on both sides of the Atlantic.

In this, as in many other matters relating to modern government, Montesquieu was in the background. He devotes a few short chapters in his "Spirit of Laws" to the subject of punishment. A copy of the sixth Edinburgh edition of an English translation published in 1772, was presented to the Boston Athenæum in January, 1810, and it may be safely assumed that this or some other edition was read by Thacher and all other careful students of government of that day in this neighborhood.

The following quotation is a sample of the views expressed by Montesquieu:

"Men must not be led by excess of violence; we ought to make a prudent use of the means which nature has given us to conduct them. If we enquire into the cause of all human corruptions, we shall find that they proceed from the impunity of crimes, and not from the moderation of punishments.

"Let us follow nature, who has given shame to man for his scourge, and let the heaviest part of the punishment be the infamy attending it." (Vol. 1, book 6, chap. 12.)

In reading and reflecting upon the work of these men, as in reflecting on the work of other men who were connected with the beginnings of the American nation, it is important to remember that they were inspired by practical and dramatic conditions of cruelty and injustice, of which the ordinary American citizens of today,

up to the beginning of the present European war, had no conception.*

The present war is bringing men back to the realization that we are living in the same old world, and that the barbarous tendencies of human nature are not so securely held back by the restraints of civilized character as many people suppose. This fact makes the sane and scientific humane study of criminal administration and the penal system of primary importance in a democracy as a matter of legal and equitable principle, in order that the encouragement of the best instincts of prisoners toward the restraints of character, as well as the importance of a firm and fair administration of punishment adapted to the circumstances, may receive due, but not excessive consideration. It is necessary to face the practical problem described by Montesquieu when he said:

"There are two sorts of corruption: one, when the people do not observe the laws; the other, when they are corrupted by the laws, an incurable evil, because it is in the very remedy itself." (Vol. 1, book 6, chap. 12.)

Beccaria, building, as he said in his introduction, on a foundation laid by Montesquieu, who "has but slightly touched on this subject," laid a basis for future development in his "Essay on Crimes and Punishments."

Beccaria's book was translated into French by Molleret, and widely distributed in France. It was later translated into English and three editions of it had been printed before 1775, when the fourth edition appeared. John

Adams quoted from it in his argument to the jury in defence of the British soldiers who were tried for murder after the Boston Massacre.

In Romilly's diary, under the date of August 20, 1808, appears the following passage relative to Bentham's treatise on punishments:

"Since the work of Beccaria, nothing has appeared on the subject of the Criminal Law which has made any impression on the public. This work will, I think, probably make a very deep impression." ("Life of Romilly," Vol. 2, p. 94.)

A casual reading of Romilly's speech in 1810, in favor of the repeal of statutes making minor thefts capital offences, will give a more vivid idea of the facts of practice during the previous century than such text-books as Blackstone and others, and it there appears that judges had and exercised the discretion to mitigate the death penalty in many of these cases. It was against the severity of the penalties and the irregularity in regard to the mitigation of them that Romilly fought in favor of saner principles. The reformatory idea had not taken definite shape in 1810, even for juvenile offenders, although it had been suggested by Sir John Fielding.* But that the minds of men were approaching the theory of probation as a judicial function is shown by passages scattered through Bentham's work on "Punishments" and by passages in a letter written to Romilly by Dr. Parr in 1811, and printed in a footnote in Romilly's Life, Vol. 2, pp. 180, 182. Romilly's own mind was ap-

* Cf. Journal of Criminal Law and Criminology for Sept.-Oct., pp. 259-269 and Nov.-Dec. 1940, pp. 410-416.

* See A. B. A. Journal for Sept. 1940, pp. 725-730.

proaching it, as shown by the entry in his diary for Sunday, May 21, 1811:

"Penal legislation hitherto has resembled what the science of physics must have been when physicians did not know the properties and effects of the medicines they administered." ("Life of Romilly," Vol. 2, p. 198.)

Judge Thacher was familiar with these ideas and when he went on the bench he began to apply them. That appears to be the beginning of probation in Massachusetts.

In 1874, forty-four years after Judge Thacher's opinion in the Chase case, the same question whether the laying of a case on file was the final disposition of it, or whether the defendant could be summoned into court subsequently for the imposition of sentence arose again in *Com. v. Dowdican's Bail*, 115 Mass. 133. Hon. Charles R. Train, a man of large experience, was then Attorney General, and appeared for the commonwealth in asking for sentence, and his brief contained the following statement:

"It has been a not uncommon practice in the Criminal Courts in this Commonwealth, after verdict, in minor offences, or where there were extenuating circumstances, or where questions of law upon similar questions were pending before this or some other court, to delay passing sentence, and order the case to be laid on file. It has always been considered that the effect of such an order was simply to suspend passing of sentence, leaving it in the power of the court at any time, when the reasons which induced the delay no longer existed, to take the case from the files and have it proceed to judgment. The defendant in all cases where sentence was thus delayed on account of extenuating circumstances was put on his good behavior and under bonds, as it were, to live honestly."

The unanimous opinion of the court was delivered by Chief Justice Gray on this point as follows:

*"It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the Court is satisfied that . . . public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the Court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute (Sts. 1865, c. 223; 1869, c. 415, §60). Such an order is not equivalent to a final judgment or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case . . . and leaves it within the power of the Court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein. Neither the order laying the indictment on file, nor the payment of costs, therefore, in any of the four cases, entitled the defendant to be finally discharged."*

The two statutes* referred to by Chief Justice Gray do not appear to have been considered as creating the power as to cases in general, but simply regulated the exercise of general power in specific cases.

The practice of placing defendants on probation, instead of sentencing them, continued to be followed in the various courts administering the criminal law, so far as it was practicable in the absence of any regular force of probation officers or available funds to meet the expenses of such a system. This practice was followed in the state courts down to the time when the statutory system was established in the Municipal Courts. It was thus through judicial experi-

ment, which was evidently believed to be within the common law powers of Massachusetts judges, that the principle of probation was applied experimentally in practice until, as a result of gradually forming public opinion, the practice became so generally approved that the legislature took it up and provided for its development on a broader scale than was otherwise possible and from Massachusetts the system spread all over the country.

The Beginning of the Statutory System

In 1878 the Massachusetts legislature passed an act (chapter 198 of that year) "relating to placing on probation persons accused or convicted of crimes or misdemeanors in the County of Suffolk." This act provided that the Mayor of Boston should annually appoint a probation officer as part of the police force, and is reputed to be the first act by any legislative body using the word "probation" in the sense of placing persons convicted of crime in the care of an official before being sent to an institution. It is the pioneer probation act in the modern sense, although, as already pointed out, there was also the earlier statute recommended by the commissioners on the Revised Statutes of 1835, which did not provide a special officer to supervise the prisoner. The next statute was chapter 129 of 1880, which extended the right to appoint probation officers to all the cities and towns in the state. Under this act some cities provided themselves with such officers, but the number was not large. The next statute

was chapter 356 of 1891, which carried the service to all the lower courts and changed the appointment from a municipal appointment to a judicial appointment, so that the probation officer was in every way an officer of the Court. In 1898, by chapter 511, the provisions of the act of 1891 were extended from the lower court by giving the Superior Court the power to appoint officers, although not compelling them to do so.

The important fact to bear in mind in regard to the acts of 1878 and other acts relating to the lower courts and the act of 1898 relative to the Superior Court is *that the obvious purpose of these acts was not the creation of a new judicial power, but the provision for the appointment and payment of special officers to assist the court in the exercise of a well-established and well-recognized and approved existing usage*, the nature of which was such that it could not be exercised to its full extent and with best results by the court without special assistance and appropriation of funds to aid the court by the investigation of facts.

It should be noticed also that these statutes were adjusted to the prior judicial usage of placing on probation before sentence.

The change in the practice, which is now general *under statutory systems* in the country, began in Massachusetts by chapter 449 of 1900, which provided that the lower courts might first impose sentence and then "direct that the execution of the sentence be suspended for such time and on such terms and conditions as it shall fix and may place

such person on probation in the custody of the probation officer of said court during such suspension." This power of suspending the *execution* of a sentence, however, has never been extended to the Superior Court, which acts only before sentence in probation cases.

It is true that the Supreme Court of the United States in the Killits case disposes of the long established practice in Massachusetts, as evidence of the common law, by the statement that the opinion in the case of Dowdican's Bail "treated the power as being brought by the state legislation, which was referred to within the domain of reasonable discretion, since by the effect of that legislation the right to exert such power, if not directly authorized, was at least, by essential implication sanctioned by the state law." It is also true that the power which was recognized as general in the statutes, referred to in the opinion in the case of Dowdican's Bail, was expressly recognized in the earlier statute already referred to, Section 9 of Chapter 143 of the Revised Statutes of 1836. But the fact remains that the probation practice of the courts does not appear to have been limited to the offences with which this Section 9 of 1836 was concerned, and it is clear that the power was considered by Judge Thacher, an experienced criminal judge, as an inherent power in the Court which he ought to exercise in the interests of justice when the circumstances warranted it, long before the Revised Statutes of 1836 were adopted, and that his view of the practice and function of the Court in this

respect was approved by Chief Justice Shaw and Judges Putnam, Wilde and Marcus Morton (the first), one of the strongest common law courts that ever sat in Massachusetts. Unfortunately there is no record of the grounds of the opinion, but the fact that they did not disturb Judge Thacher's practice is clear, and it also seems clear from papers in the possession of the writer that Mr. Justice Story, who certainly knew something about common law principles, received, on its publication in 1839, and read the first number of the "Law Reporter," containing the report of the Chase case, which had been decided eight years previous. If the practice thus reported and confirmed had appeared extraordinary or illegal to the bar at that time it seems inconceivable that there should not have been some discussion of the subject, for it was a time when lawyers were beginning to write freely, and the "North American Review," the "American Jurist," and the "Law Reporter" provided ample opportunity for such discussion.

Other Common Law Examples

It is a common law principle that the judicial function of the Court is not exhausted until the entry of judgment, which, in a criminal case, is the imposition of the sentence. In *Burgess v. Boetefeur*, 7 Man. & Gr. 481 (1844), the plaintiff had informed against one Mitchell and others for keeping a bad house, and sued the Overseers of the Poor for the statutory amount due him for securing conviction. It appeared that indictments were prepared against Mitchell and others and they severally pleaded guilty in October, 1842.

"The judgment was respited that the nuisances might in the meantime be abated; and this having been done, the parties were afterwards (in June, 1843) brought up for judgment, when they were each fined 1s. and discharged." (See page 484.)

Meanwhile the overseers were changed, and the question was: Which overseers were liable for the money?

Held, by Tindal, C. J., Coltman & Cresswell, JJ., that the conviction was not complete till judgment entered in June, 1843, so that the later overseers were held liable.

Until 14 Henry VI., c. 1, Justices of Assize could only receive the verdict. It was for the Court in Banc to give sentence.

Chitty, Cr. Law (2d ed.), Vol. I., 696, 697.

At one time an ingenious device for getting highways repaired seems to have depended on a discretionary power to suspend sentence, for after verdict of acquittal, and before judgment thereon, they used to try the issue again in another indictment.

Rex v. Wandsworth, 1 B. & Ald. 63.

The Old Law of "Approvement" and Its Modern Development as Illustrating the Probation Principle

Another illustration of the *Common Law Principle* from which probation practice developed is the practice in regard to prisoners who turn state's evidence.

The common law of "approvement" and its modern developments are not the result of legislative authority—they are the results of the application of a principle *in practice* and of executive acquiescence and of that force of gen-

eral approval suggested by Mr. Justice Lamar in *United States v. Midwest Oil Co.*, 236 U.S., at 472, when he said: "Government is a practical affair intended for practical men. Both officers, law makers, and citizens naturally adjust themselves to any long continued action . . . on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice," and "this principle is recognized in every jurisdiction." It illustrates in a very striking way the actual discretionary control of the application of mandatory criminal punishments, which has always been needed and exercised by the prosecuting officers and the courts, no matter how serious the crime or how mandatory the language of the statute imposing the punishment. The subject has not been very frequently discussed in the reports, but the law is clear. Space will not permit extended discussion here. The leading historical exposition of it is that of Lord Mansfield, in 1775, in *Rex v. Rudd*, 1 Cowper, 331, which forms the basis of the opinion of Judge Clifford in the "Whiskey Cases," 109 U. S., the leading American case. These cases are discussed at length in the earlier and more extended edition of this paper in 1917 referred to at the outset.

It is safe to say, therefore, that the modern humane practice of probation was developed in Massachusetts by judges as a natural part of the business of administering justice, in the same manner that the rules of evidence developed in the common law courts, and equitable remedies developed in the

English Chancery Courts by the gradual application of principles demanded by the interests of justice in a growing community. And if the courts had not shown this liberal spirit the legislative recognition and provision for the necessary officers and funds to extend and develop the probation system throughout the country would have been far behind its present stage.

Probably one reason for the mass of conflicting opinion in other jurisdictions was the failure of the courts in Ohio and elsewhere to recognize the logical point in procedure at which this discretionary power of the courts could be properly exercised without statutory authority. Instead of following the Massachusetts practice of acting before sentence these courts exhausted their power by imposing sentence, and then tried to suspend its execution, which was beyond the judicial function *until extended by statute*. This naturally caused a confusion of ideas and authorities from which the shortest avenue of escape was a decision which made an act of Congress necessary to secure uniform federal practice.

However that may be, the situation calls for reflection. The late John C. Gray, in his book on "The Nature and Sources of the Law," has pointed out that

"It is a matter of prime importance to observe that . . . the development of the law has been mainly due neither to the legislature on the one hand nor to the people on the other, but to learned men, whether occupying or not judicial positions."

The opinion in the Killits Case, of course, explained the law only for the

Federal Courts—it did not affect the common law powers of judges in those states in which these powers had been recognized, as in Massachusetts, for the greater part of a century. The situation emphasizes, in an interesting way, the fundamental importance of our dual system of government, which provides us with forty-eight state laboratories of the common law of America. It also suggests the importance of caution in regard to recurrent epidemics of the codification fever and tendencies to overdo the work of uniform legislation, particularly in the field of adjective law. Law cannot develop to meet all the needs of a community solely through legislation, whether uniform or not. Judicial advance by competent judges within the field of judicial principles is absolutely essential to gradual healthy improvement in the administration of justice. This is a fact which must be recognized. The whole history of the common law and of equity jurisdiction proves it. The ability to develop law through the grasp of principles and the translation of them into practical application has been the distinguishing mark of great judges.

The intellectual pioneer work of judges in the field of justice usually must precede (what may in time become desirable) legislative regulation and extension, as for example, in this matter of probation. In this country this judicial pioneer work must be mainly done by judges in the state courts with the constantly increasing assistance of the jurists whom our law schools are developing.

The broad perspective was expressed by Mr. Justice Matthews in *Hurtado v. California*, 110 U.S., at 531, as follows:

"As it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

The Punitive Theory of Justice.

It has been said that the power to require security for good behavior was a punitive measure mainly for the purpose of keeping peace because of continued dangerous impulses of the convicted person, while the probation practice "relieves of punishment . . . because of the alleged virtues of the defendant." A similar arbitrary explanation might plausibly be made of all the other expedients of harsher generations discussed in this article. But the idea that the common law principle of administration of criminal justice was exclusively a punitive principle does not seem tenable in view of the evidence to the contrary. Nor is the idea that probation is based upon "the alleged virtues" of the defendant tenable either. The real basis and justification of probation as a judicial question is that in many ways the common, absolute, punitive notion that justice can be successfully administered in advance by wholesale, by the mandatory imposition of arbitrary penalties to be applied without discrimination in every case falling within a certain defined class, has broken down, and experience

has shown that the filling up of jails indiscriminately under this arbitrary test is not now a protection to society, but has become a positive menace by making many prisons mere schools of crime. Accordingly the basis of the probation system is, not "to relieve from punishment because of alleged virtues," but in those cases where an examination of the facts of the case warrant sufficient hope for improvement, to deal with the individual in such a way as to make the best of that hope, *on the ground that he is more likely to be a future menace to society if he is punished than if he is given an opportunity under supervision to improve without being released from the jurisdiction of the Court and the possibility of punishment if the probation experiment does not succeed.*

It is always easy, and sometimes fair, to ridicule certain phases of the practical application of principles by the courts. In the earlier periods of the growth of equity jurisdiction it was common to ridicule it by saying that it varied with the length of the chancellor's foot. In the same way this or that variety of practice or occasional application of the probation principle may deserve ridicule and get it. It is not the intention in this article to minimize in any way the serious consequences which may result if the temptation to be excessively benevolent or good-natured or even to consider political circumstances is yielded to.

Probation as a judicial function is not a "capricious" or "arbitrary" jurisdiction and the fact that it may be administered occasionally by a judge who

may have "capricious" or "arbitrary," or excessively benevolent peculiarities does not alter the essential nature of the jurisdiction as one that is based upon equitable principles which will grow more distinct as time goes on.

*The Scope of the Opinion
in the Killits Case*

Did the opinion of Chief Justice White in the Killits case mean that the Supreme Court of the United States intended to suggest a line between the fields of civil and criminal administrative law, so far as the legal possibilities of judicial, as distinguished from legislative development, of principles are concerned? It is difficult to believe this. It seems that the opinion should be accepted rather as a mistaken but practical short cut out of an unfortunate confusion of authorities and that it should not be treated as having broader application.*

This may be worth demonstrating more fully by an examination of the extent of the judicial power of the Federal Courts in connection with any future rules of criminal procedure already referred to.

*The "Judicial Power" of the
Federal Courts*

A study of the nature of the "judicial power" provided for in the third article of the Federal Constitution and conferred by Acts of Congress, upon "the inferior federal courts established by Congress" must begin, not with law dictionaries or a mass of inconsistent authorities, but with a consideration of

the nature of the judicial power demanded by the changing conditions of life in a great republic. As Mr. Justice Holmes has said: "Law, being a practical thing, must found itself on actual forces."

We are not concerned with varying definitions of the word "jurisdiction." The three great divisions marked by Articles I., II., and III. of the Federal Constitution are "legislative powers," "the executive power," and "the judicial power." The word "jurisdiction" occurs in a different sense in later parts of Article III. It has no bearing upon the nature of the judicial power involved.

The fundamental purpose of the existence, as well as of the exercise, of "judicial power" is the administration of justice "by judges as free, impartial and independent as the lot of humanity will admit." (Mass. Const., Art. XXIX.)

This carefully expressed distinction between the words "judicial power" and "jurisdiction" is not only obvious, but was expressly pointed out by the Court in *Kendall v. U. S. 12 Pet.*

The distinction was respected in the judiciary act and in the new Judicial Code, which in Section 24 provides that—

"The district Courts shall have original jurisdiction as follows: . . .

Second, Of all crimes and offenses cognizable under the authority of the United States."

This language is substantially taken directly from the old judiciary act as to the district and circuit courts (see R.S., Sections 563, 1st, and 629, 20th). It has been in force for more than a century

* Cf. 24 American Judicature Society Journal at pp. 155-6 (Feb. 1941).

and it is very significant that there is no reference whatever to the words "judicial power" in these statutory grants of "jurisdiction." Why is this? Is it not because all the necessary "power" needed to exercise any specified jurisdiction was already expressly provided by the Constitution, and all that was needed was that Congress should give it direction by the brief sentences above quoted without unnecessary repetition?

There was no accident about this use of words. Some of our forefathers were more careful and more sparing in the use of words than modern legislative draftsmen, who consider it necessary to use seventeen words when one or two would suffice.

Accordingly, the Constitution and the code construed together give the district courts all the "judicial power" needed to perform completely the judicial function in the exercise of the "original jurisdiction . . . of all crimes and offenses cognizable," etc. There are no legislative limitations imposed. The judicial function should surely be construed in its broadest sense to meet the demands of criminal administration in a great nation. And the fundamental purpose, in the light of which this transfer of power is to be liberally construed, is specified in the *statutory*

oath provided for judges in the same Act, *i.e.*, "to administer justice."

This administrative feature of the judicial system was largely ignored in various directions in recent years as the result of a mechanical atmosphere in the profession, which Dean Pound and others have done so much to remove by the movement "for the adjustment of principles and doctrines to the human conditions they are to govern, rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument." (8 "Columbia Law Review," at pages 609 and 610.)

The three words, "to administer justice," when properly understood seem to include all the essential principles of the common law through which practice may be adapted to the changing conditions of modern life. There is room in those three words for all the imagination that the profession can put into them, and if the common law is studied sympathetically in the light of the human conditions out of which it grew, we may hope to hear more appreciative words spoken of its essential principles by some of our modern philosophers, who wish to reduce it all to the dead level of statutory mediocrity. (See note in this number at p. 92 f.—Ed.)