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Probation

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PROBATION*

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Six years ago, in the city of Asheville, at the first Federal Judicial Conference of the Judges of the Fourth Circuit, I read a paper on the subject of "Probation," and the federal probation law.

I have been again requested by the Senior Circuit Judge to read another paper on the same subject.

On looking over my former paper, I find that there is very little to be said that was not set out therein. There have been some amendments to the law, but none except to make it more workable. The sum and substance of the law is the same as it was when it was enacted on the 4th of March, 1925.

Possibly the most important amendment since 1931 was passed on the 16th of June, 1933, and and affected Section No. 3 of the Probation Law (Section 725 of U. S. C. A. Title 18). This amendment is as follows:

> "At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest, which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued."

It will be observed that this enlarges the powers of the court which granted the probation, and gives it power to issue a warrant for the arrest of the probationer, which could be executed by either the probation officer or the United States marshal in any district in which the probationer could be found, and if the probationer shall be so arrested in a district other than that in which he had been put on probation, any of said officers could return him to the district out of which such warrant shall have been issued. Otherwise, the law is the same as it was when I read my former paper.

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The Congress has been more liberal in its appropriations, and the Directors of Prisons and the Supervisor of Probation have been able to find the money with which to pay more probation officers.

While, under the law, the judge of each district had the authority to appoint one or more probation officers, necessarily the paid probation officers cannot be appointed unless the funds are provided by the Department of Prisons for the purpose of paying, not only their salaries, but also the necessary expenses of travel and subsistence when away from their official residences.

In a district like mine in West Virginia, they have to be away from their official residences a very large part of the time.

I am happy to note that all the judicial districts of the United States now have one or more paid probation officers therein, with the exception of five.

Unquestionably the general interest in the subject of probation has grown, and is getting stronger and more active all the time. I hardly think it necessary to repeat the arguments in favor of probation further than to state them succinctly, as follows:

(1) The saving of the defendant from the prison mark.
(2) The saving of the family from the same.
(3) The protection of the family by keeping the wage earner at home.
(4) The great saving of money.

These points have been so much discussed that I do not think it essential, for this meeting, that they be elaborated upon. There is no dispute as to such facts.

I hope it will be of interest for me to recite more or less of my own experience, and also to state the methods which I pursue in my own district.

In my opinion, it has been proven beyond question, so far as the individual is concerned, that the fear of prison, the fear of the name of having been in prison, the fear of the stigma upon the family of the person charged with a crime, is the greatest force that makes defendants want probation, and makes them keep the promises made when they are put on probation.

It is also proven beyond question that probation without supervision is impossible. It is also proven beyond question that no idle man will keep probation. It is also proven that probation cannot be given to all defendants. There must be a proper selection, and there can be no selection without a complete investigation before any defendant is placed on probation.

When a defendant pleads guilty in my court, and, from my knowledge of the person and from the information received from the officers and other witnesses, I think it possible to save him and put him on probation, I take time for consideration until the last day of that particular term of court, which is six months distant. Then I require the probation officers to take charge of the person and to take from him, at that very time, a complete statement of his life's history. Our experience has been that a very large majority of those persons will tell us the truth at that moment.

This statement is taken down and written out. It is a complete record of his personal history.

On Probation Form No. 1 there are eighty-two questions to be asked and answered — some not so important, but most of then really important. They include family history, school history, associates' history, habits history, physical history, marital history, home history, economic or money history, business history, employment history, religious history, crime history, and a great many details of each of those, and such other matters as apply to the person as an individual, and not as a member of a class.

After the defendant's statement is made, and before the day on which he is to return, the probation officer has to investigate each and every item of such statement, and such other matters and things as may apply to the individual in the community in which he lived, and when the report is made it must include the best judgment of the trained probation officer on the question, "Should the particular person be put on probation or sentenced to prison"?

I give the benefit of the doubt to the defendant, and place him on probation if I think there is any real chance of rehabilitating him.

Now, this investigation must be absolutely thorough, and for this purpose you must have trained probation officers, and they must be so reliable that the judge can put absolute faith in their reports.

In my opinion, it is necessary for the judge to give sufficient time to thoroughly study these reports, and if necessary, in addition thereto, to question the prisoner, as well as the probation officer, as to the meaning of many things set out therein.

At the last term of court, at Huntington on the 10th of May, 1937, I had forty defendants returned. These had all been investigated within the few weeks preceding this date. By the process of selection I was enabled to put twenty-five of this number on pro-

bation. I continued two cases for further investigation, and I sentenced thirteen to prison for greater or less terms.

I have found from experience that there are quite a number of defendants who cannot remain decent for the period of six months, and their acts during that period of six months totally eliminate them from the possibility of being placed upon probation.

When this examination is made by the probation officer at the beginning of the six-months period, he instructs the persons as to what probation will mean, and what their conduct must be for the next six months if they have any expectation of reaching their goal of being put on probation. Most of them appreciate what this means, but some of them do not take it seriously, and the result thereof is a prison sentence.

One of the conditions is that during this period alcoholic liquors must not, under any circumstance, be touched.

Some time ago a man whom I had thought I would be able to put on probation, and who had strongly begged for it, came back at the end of the six-months period, and the report showed that he had been in a drunken condition in public more than once, and he had the audacity to tell me, in open court, that while the state of West Virginia legally sold liquor, he had the absolute right to buy it and drink it, and that his conduct in that respect was none of my business. Necessarily, he received a rather lengthy sentence.

It is the duty of probation officers, while traveling over the district and making these investigations, also to keep in touch with all those whom I had previously placed on probation. It is one of the rules of probation that a report in writing must be made by each probationer at such time as the probation officer may designate. In some cases I, myself, require that reports shall be made weekly, others monthly, and still others, under special circumstances, might be required to be made at longer periods, but, practically speaking, each probationer has to make a report at least once a month, and if that report is not made it is then the duty of the probation officer to immediately investigate any such case, and they usually find there is a special reason for this report not being made.

This string, so to speak, around the neck of each probationer is quite galling to a great many of them, and some have a so-called "feeling of pride" that tends to make them break this rule. However, it is one rule that has to be strictly enforced, and to which there can be no exceptions.

After having made these searching investigations of the persons proposed to be placed upon probation, and after having carefully studied the reports and the whole situation of the individual, and the order is entered placing the particular person upon probation, it is necessary for him to sign Probation Form No. 7, entitled "Conditions of Probation."

These general conditions, as set out therein, require the probationer:

(a) To refrain from the violation of any state or federal penal laws.
(b) To live a clean, honest and temperate life.
(c) To keep away from all undesirable persons.
(d) To keep away from undesirable places.
(e) To work regularly. When out of work, notify the probation officer at once.
(f) To not leave or remain away from the city or town where he resided without permission of the probation officer, and notify him if he intended to change his address.
(g) To contribute regularly to the support of those for whose support he is legally responsible.
(h) To follow the probation officer's instructions and advice.
(i) To report promptly on the dates required.

In addition to these general conditions, I usually enact the special conditions that no probationer will be permitted to hold any office under the state, county or district; that the probationer is not permitted to take any part in politics; that he is not permitted to enlist in the army, navy or marines without special permission from the chief probation officer, and that he is not to have any connection with liquor, beer or wine in any way, shape, form or manner.

Under the Constitution of West Virginia no person convicted of a felony has the right to vote in any election, and no person, who has not the right to vote, can legally hold any office.

A large majority of those placed on probation in my district have been violators, in some form or manner, of the liquor laws, and necessarily such person has to be divorced, wholly and completely, from any connection with alcohol, if he is to be expected to keep his probation.

I want to reiterate the absolute necessity for supervision of all probationers. They all need aid and help. Twelve years ago, when the probation law was passed, it was very difficult, in my district, and probably the same in all other districts, to get any

aid or help from the public for the probationer. Apparently there were many people in each district where a probationer lived who were willing to try to make him break the terms of his probation. Often probationers needed the help of the court for their protection.

Oftentimes federal and state officers, whose duty it was to enforce the liquor laws, tried to use the probationer as a helper in finding illicit stills and in reporting violations of the liquor laws. In my opinion, it is absolutely necessary to keep the probationers entirely away from any criminal acts of others and in no way allow them to make alleged detectives of themselves. I was forced to hold that the action of these officers in virtually keeping the probationers connected with the liquor business was contempt of my court.

After twelve years, I really believe I can state truthfully that in most of the places in my district, probationers are not now looked down upon, and many kind persons give each of them a helping hand.

There are some classes of defendants who, according to my view, simply cannot be placed upon probation. An example of these are the madams of the houses of ill-fame, who are convicted of commercial vice under the Mann Act.

I have long ago learned that there are many persons, who can be put on probation successfully, who are not first offenders. I have long ago gotten away from any hard and fast rule in dealing with a great many defendants. When I commenced the probation system I made a rule that no person who had taken money from the United States could be placed on probation. I later found that I could do better work without that rule, and I have often, of late years, placed on probation postmasters, clerks of post offices, and other persons of that class, with real success in rehabilitating them.

I have also broken the rule I first started with in reference to persons who had broken the banking laws. I realize that one has to be particularly careful in this class of crime, but under the old adage, "There are exceptions to all rules," I have been right successful in a number of cases. This is especially true where the men were young, and where, under the particular circumstances, they were not what I term, "awfully guilty."

I have in mind one young man in my district whom I twice sentenced to prison for illegallly making liquor. Some years ago, when he came up for the third time, he made the flat statement to

me that he, himself, had reached the conclusion that the liquor business did not pay, and if I would give him a chance it would end his connection therewith. In other respects he stood well in his community, and for several years past his standing as a citizen seems to be excellent, and his connection with crime has wholly ceased.

I simply recite these facts to show that you should not hamper yourself with too many fixed rules, because I am firmly convinced that each case should be looked upon as an individual one and not as one of a class.

There is one rule, however, to which I think there are no exceptions, *to-wit,* that when a person has been convicted of a crime and has been placed on probation, and has deliberately broken the terms of his probation, he must be sentenced. You cannot give him a third or fourth or fifth chance. It will kill your whole system if you do.

I have always noticed how remarkable it is that the information as to all that sort of thing is passed from one to another of those dealing in crime. Jail grapevine information travels from one jail to another rapidly.

It must be impressed upon each probationer that he has had two chances, one not to commit the original crime, and the other not to break the conditions of his probation, and it must be further impressed upon him that if he does the latter, his punishment is sure.

Each probationer signs the paper spoken of above as "Conditions of Probation." A copy thereof is given to him, and the original is retained in the office of the probation officer. The probationer knows what the conditions are. The law requires this.

I am a firm believer in giving probation before the imposition of the sentence. I do not believe in imposing the sentence and then granting probation. If the poor probationer is brought before you under the first clause, as set out in the Act, then you have an opportunity to decide what is best to do. If you impose the sentence at the beginning you are almost compelled to impose a long sentence. It might be such a case where a long sentence would be improper — in fact, cruel, when the probationer comes up for sentence.

The length of time upon which a defendant is to be placed upon probation is fixed by the Act not to exceed five years. I first thought it best to put each probationer upon probation for the

term of five years. I then found that I was overloaded, as I could not keep in touch with the large number on probation. I then reduced the general term from five years to three years. In rare cases I still put them on for the longer period, but there must be some special reason therefor.

If you can get a defendant to keep the terms of his probation for three years, his habits become, as a rule, reasonably fixed, and the courts will not be harassed with his case again. Of course, this is not wholly true. I have had persons indicted in my court, shortly after their probation expired, for committing another crime, and have had them brag that they stayed good through the period of their probation. However, there are not many of these.

The illuminating decision by the Supreme Court of the United States in the case of *Burns v. United States*[1] (opinion by Mr. Chief Justice Hughes), has shown the way clearly to all district judges how to proceed when the probationer is brought before them. I have always maintained that the judge who, in the first instance, puts a man on probation, should be allowed a wide discretion in dealing with the case, and it is evident that such was the intent of Congress in passing the Probation Act.

When a defendant is convicted in the manner required by law, then all his constitutional rights to a mantle of innocence are gone, and it is a matter of the grace and favor of the sovereign what shall be done with him or her from thence forward. I am of opinion that a judge who puts a defendant upon probation, in an attempt to rehabilitate him, can be trusted to treat him fairly and decently thereafter if the conditions of his probation are broken.

I appreciate the fact that he must follow the letter of the law, as set out in the Act of Congress, but, as said in the opinion, the revocation of a probation is a matter within the discretion of the district judge.

In the case of *Escoe v. Zerbst, Warden,*[2] the Supreme Court clearly insists upon the terms of the Act of Congress for probation being complied with before the probation can be revoked and a sentence imposed.

For the twelve years from April 20th, 1925, until April 20th, 1937, there have been put on probation in my district thirty-nine hundred and twenty-two men and five hudred and forty-two women, making a total of forty-four hundred and sixty-four. Of

1 287 U. S. 216, 53 S. Ct. 154 (1932).
2 295 U. S. 490, 55 S. Ct. 818 (1935).

these there have been committed to prison seven hundred and fifty-six men and sixty-five women, making a total of eight hundred and twenty-one. However, the greater part of these eight hundred and twenty-one persons were put on probation prior to June 30th, 1931. It was then that the method of pre-investigation was really commenced. There were on probation in this district, on the 20th of April, 1937, seven hundred and five persons. The number committed to prison in the last five years has not been over two and one-half per cent of those on probation for the particular year.

The statistics, since the pre-sentence investigations have been in effect, show that approximately twenty-five per cent of all persons appearing before the United States District Court have been placed on probation. They also show that approximately forty per cent of all cases continued for pre-sentence investigation are found not suitable subjects for probation treatment.

The cost of the operation of the United States Probation and Parole System in the Southern District of West Virginia is approximately $2.00 a year for each probationer and parolee, while, on the other hand, it costs approximately (government figures) $264.00 per year to maintain a prisoner in an institution.

It makes me sad to think that approximately fifty-five per cent of all those appearing in my court in the past four years have been under the age of thirty years, and about thirty per cent of all those appearing before the court were under the age of twenty years.

The probation officers of my district have also been assigned to the duty of parole service, and have to supervise all the parolees in the Southern and Northern Districts of West Virginia. This has added greatly to their labors, and more probation officers are really needed.

Before leaving the subject of probation I want to reiterate, and impress as strongly as I can upon all my hearers, that, first, there should always be complete pre-probation investigation. Second, there must be adequate home supervision of probationers. In my opinion, this will make a very notable decrease in the percentages of violation of probation. There must be neither haphazard nor sympathetic placing of defendants upon probation.

Again, I want to repeat that when the probationer fails to keep the rules and regulations which he has promised to keep, punishment must be certain.

Parole

The next subject which I want to discuss for a moment is that of parole. A great majority of the people do not distinguish between probation and parole, and want to charge up the sins of the parole system to the policy of probation.

Personally, I have told the Parole Board that where my officers have investigated a defendant, and I either sentenced him at the first hearing, or later, because he failed to keep his probation vows, that unless something occurred after he was sent to prison, there was very little, if any, ground for parole. That Board has not the system nor the opportunity of investigating persons applying for parole that a judge and his officers in his own district have.

While I recognize the fact that it would be a considerable burden on the district judges to look into parole cases in advance, yet I, for one, would be very glad to do so, if I were given an opportunity. I feel that the Parole Board is improving in its technique, but I also notice many cases where I think they did not have the proper information as to the character of the person paroled.

I appreciate their purpose, and I believe that they are honestly trying to do what they believe is right. I appreciate especially the policy of returning a prisoner to his *bona fide* residence, and also the policy of rigidly defining parole limits, which is followed not only by the prisoners who are paroled, but also by all of those conditionally released.

It is a sad thing for towns and cities where prisons are located that there grows up therein and thereabouts a population of those who have served terms in such prisons. This is a very undesirable addition to the population of those places.

However, under the law as set out in the statutes, judges have nothing to do with paroles, and the same statutes give to the Parole Board absolute authority, and they claim and have the legal right to perform their duties as they think best, and do not care for the advice of the judges.

Punishment

It was suggested that I also, in addition to probation and parole, discuss in a short way the question of punishment. In the course of my term as judge, and in the performance of what I believe to be my official duties, I have discussed this question quite a bit with the wardens of two reformatories, one for men being

located at Chillicothe, Ohio, and the other for women being located at Alderson, West Virginia.

I have been thoroughly convinced, not only by such discussion, but by my own study of the question, that if you expect any results from reformatories, send the subject there for sufficient time so as to give the officers there a chance to do something real, and this also applies to the National Training School at Washington. If you expect any person to be taught any useful vocation in life, stop and think and you will realize that it cannot be done in a year and a day, especially when you realize that there is always some good time off, and the subject requires time to become acclimated. A sentence of two years and six months is the minimum, and it is better to make it three years, if you hope to gain any real results. Oftentimes, if your conscience will let you, make it four years, and the results will be better.

The institutions at Chillicothe and Alderson are both training schools, and I have had some splendid results from many of the people whom I have committed there after they came out into the big world. Of course I realize that some people cannot be reformed, but there are a great many before the courts who never had a chance, and it is astonishing what these excellent officers at these two institutions have done with the material sent to them.

Each one is a beautiful place, in a splendid location, and with adequate equipment for its purposes.

Sentences for one subject in particular, *to-wit,* addiction to the use of opium and its derivatives, should be for a minimum of three years. It is impossible to really effect any arresting of the disease (it is a disease, whatever it might be called), unless there is sufficient time to take them off the drug and to build up sufficient resistance to make it reasonably sure that there will not be a return to the addiction.

You can depend upon the splendid doctors furnished by the Public Health Service to these institutions to have the subject paroled, or even pardoned, when, in their opinion, the arresting of the trouble is reasonably complete. I do not use the word "cure" because I do not believe that there ever is an absolute "cure." I use the word "arresting" in the same sense that it is used in cases of tuberculosis.

I am informed that more than fifty per cent of those sent to the institution at Alderson are addicted to the use of opium, or some of its derivatives. I am also informed that more than eighty

per cent of those sent to Alderson are afflicted with the social disease. Likewise, more than twenty-two per cent of those sent to Chillicothe are also afflicted, and time should be given in all such cases to eradicate, as far as possible, this sad condition of these prisoners.

The broad question of punishment is within the discretion of each district judge, and in the various districts there is a great variation in the size of the sentences. It is a subject that deserves real study. A judge has not only to consider the individual before him, and his connections, his habits and his record, but he has also to consider what is best for society as a whole.

I think it is admitted, with practically no exceptions, that if a person is not a criminal when sent to prison, he is almost certain to become one while there.

One of the cases that came before me years ago was old Charlie Kline, a counterfeiter. He was sentenced to jail when sixteen years old for some small offense (which I have forgotten) and there met, while in jail, a counterfeiter who told him his story and his experiences and interested him in the subject matter. He, a denizen of the Atlanta Penitentiary, was sent to Alderson to aid in the erection of the buildings at that place. He escaped from the prison camp, and in a very few weeks he was scattering counterfeit half-dollars and quarters at many points in my district.

He was indicted in my district and brought before me, and he did me the honor to say that if there had been a probation system at the time when he was first sentenced, considering his family and his connections, he never would have been in jail and he never would have become enamored of the counterfeiter's life.

He also made the statement that while he was nearly seventy years of age at that time, he had spent nearly forty of those years in prison.

Each person to be sentenced has to be studied as best you can, but I still maintain the best proposition to be, "never put a person in prison (or even in a county jail) if it can be avoided." They are never the same afterwards.

While I do not presume to instruct brother judges on the question of sentence, I do insist that it is a most serious matter, and requires the most serious consideration.