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Unconsidered Element in the Probation of First Offenders

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AN UNCONSIDERED ELEMENT IN THE PROBATION OF FIRST OFFENDERS.

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The statutes instituting the system of probation are a type of legal phenomena entirely in accord with the spirit of the age. They are inspired by a high-minded humanitarianism which sees in the offender not a savage brute who is to be disabled. or in the last resort, exterminated, but primarily a product of evil social conditions for which society is largely to blame combined with the personal element of enfeebled volition, or distorted motivation.

Punishment is a difficult operation to justify either philosophically or practically. On purely speculative ground it must find refuge in something as abstract as retribution; on the practical side it seeks a foundation usually in the theories of prevention, deterrence, or reformation, or a combination of these. The philosophical theory of expiation unfortunately yields only dead fruit, while the practical theories in turn have failed to develop any solution which has the present promise of any considerable accomplishment. Perhaps these unhappy results, even in the face of the great learning and effort which have been devoted to the problem of crime, may be due to the fact that there are forces moving in society which the instrument of legislation is incompetent to deal with effectively; since the realization of law requires a great deal more than the fiat of the law-maker.

The political side of legal questions has been amply though not exhaustively treated, but the social side of these questions has hardly begun to be officially noticed. It may be predicted with considerable confidence that the next important development of legal science will be, not in the direction of formal and systematic knowledge of the law, the necessity of which cannot properly be minimized, but rather in the field of the social necessities, possibilities, and effects of law. The sociologist has already pointed the way, and if the jurist has been slow to supplement his technical learning, by looking out into the world from his battlements, it is due no doubt to the official tradition

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which has placed law in the center of all social activities as the final mediator and standard of their appraisal.

Nevertheless, a mere inspection of external life without an effort to discover its internal forces will yield nothing more useful than the legistical sociology created for the use of mankind in the seclusion of the judges' conference room. This method of testing legislative policy has the weakness of being subjective, and therefore of being entirely too narrow in scope to afford any real information of what may reasonably be expected of legal rules. Its procedure is logical, rationalistic, and a priori, and it fails because the world obstinately refuses to submit to a geometrical operation based on a preconceived plan of the fitness of things, the consciousness of a class which is unable to appreciate the hidden springs of crime, and a philosophy of conduct which contains more of illusion than of facts or even useful hypotheses. A great advance is encountered when the statistical method is brought into action; but this method has limitations which very often given too narrow a point of view; and it has also the vice of being adaptable for the demonstration of almost anything that is sought to be proved.

This is not the occasion to discuss the methodology of criminal science or any other science, and it may be sufficient to state at once that the important instrument for the investigation of legislative policy offered by the history of the evolution of the social mind as expressed in legal and social institutions has been heretofore and is now entirely neglected. The purpose of this discussion will be to show the value of this historical method in connection with the probation principle, and to suggest that the failure to employ it will necessarily produce consequences of considerable interest and importance.

It is assumed that a probation system is one which results in the establishment of the principle that a first offender, that is to say a person who is not officially known to have been convicted of any previous offense, shall be relieved of punishment, under conditions which aim to shape his conduct during a definite period.

The modern state has taken out of the hands of groups and individuals the function of punishment of all wrongs, whether public or private. In that definite class of wrongs called crimes, the state has also undertaken to provide an independent administrative procedure in which private individuals are entirely eliminated except at the initial stage of instituting complaints charging the commission of crimes. This preponderance of official activity, and exclusion of private persons has developed, as is well known, with the growth of

the state idea which has absorbed in addition to the military powers of the chieftain the function of administration of such negative social interests as promote peace and order within the state.

Crimes are always a definite category of subjective wrongs involving a characteristic element of social turpitude. The entire field of objective wrongs, and a large section of subjective wrongs are still left to the prosecution of individuals in modern states under procedural methods provided by the state. But where the state has assumed the active rôle in the repression of many private wrongs, it has not succeeded in changing the essential character of these injuries. If A steals from B the wrong is still primarily a concrete private wrong, and the secondary social interest protected by the activity of the state in comparison, can only be in any case a colorless and abstract counterpart. In all open and notorious crimes and especially those of physical violence the state may sometimes initiate action against the offender independently of private co-operation; but, it is no doubt true, that in the large bulk of crimes, the vindication of private interests is a necessary prop for the maintenance of public prosecution. The official tradition here, as elsewhere, in its effort to round out a sovereign autonomy of legal concepts has distorted the facts with inevitable consequences. We have only to think for example of the horror of public prosecuting officers and judges of the use of the processes of state criminal justice in the aid of the collection of private claims. This virtuous and ideal indignation is expressed by some such formula as that "this court is not a collection agency." This attitude would depress private interests to the plane of mere abstract interests, and while an outward effort is made in all such cases to observe the fiction, no reason can be perceived why the private interest should not be frankly acknowledged and furthered.

The probation idea goes to the limit of excluding the concrete private interest. The person against whom a subjective wrong has been committed is entirely ignored, and the sole effort of the state is to make of the offender a better citizen no matter what becomes of the person whose rights have been trodden under foot. That the person ignored should be sacrificed for the doubtful improvement of the offender is a concept too ideal, truly, for the age in which we live. This ideality, however, is soiled by the materialistic element that restitution may be made, in discretion, one of the conditions of release.

Without resort to historical proofs it may be readily supposed that when it is generally known that a specified class of first offenders are immune from punishment that it will become increasingly diffi-

cult to find persons who will take the trouble to prosecute cases with such empty results; and it is also, from the same point of view, easy to see that the time will come when there cannot be even a first offender, much less a second offender, for lack of initiative on the part of private persons to discover them. Such a process will have its effect in reducing the alarming situation shown by criminal statistics, but the statistics will not reflect the true social situation. If crimes embraced by the probation statute still continue to flourish the fact may be explained on either of two grounds; that those private persons who initiate prosecutions are ignorant of the probation idea; or that it is not consistently employed by the courts. There can be little doubt, however, that when society understands the principle and when it is consistently carried out that the number of prosecutions will appreciably diminish. The exceptional cases will largely be those where the person initiating the prosecution can and does resolve the element of gain and loss arising out of the element of restitution in favor of prosecution. If he can gain more by successful prosecution (with restitution) than by passiveness he will act. In a word the probation system eventually must become in large centers of population a mere collection agency.

Perhaps some part of the objection to the probation principle would be removed if it were applicable only to those cases where the accused assists the course of justice and acknowledges his guilt at the earliest opportunity. As the statute now is written (e. g. in Illinois) the offender may resist to the utmost and employ every defense and privilege which is accorded to the accused, and if he happens to be convicted (under conditions which favor rather than disfavor him) he may still petition to be released on probation.

The probation system is a difficult field of thought now still ruled by confused theories of the proper function of criminal justice, is inspired no doubt by a laudable thought, but historically it is entirely at variance with the legal evolution of all developed societies. The blood-feud and private revenge are the immediate ancestors of the state establishment of criminal jurisdiction. This evolutionary relation is not simply one of form, or of terms, or of mere historical propinquity, but it embodies a psychological content which legislation cannot successfully ignore. The infringement of one's rights arouses resentment within the individual. This irritation cannot be legislated away, and it will have its expression either in the normal course of satisfaction through the pain of the offender, or otherwise it will react against itself and make of the person injured not an assistant in the ends of the state, but a dissatisfied member of society.

He may not become a Kohlhaas who now takes arms against society, but he cannot any longer be content with the kind of administration of justice under which he lives.[2]

It is true that there was a stage of legal evolution anterior to that of the blood-feud when the concept of punishment in the modern sense of physical coercion, was unknown either in theory or practice, but legal evolution cannot make the leap back to this primitive substitute for criminal justice, nor can it develop a modern counterpart until society has also developed the proper background. Absence of physical coercion implies a homogeneity of group-life. Modern society is not a homogeneous group but rather a collection of classes based on a variety of interests unknown to ancient society. The state is still necessary as a mediator for the expression of the interests of these classes and of the individuals within them. A priori theories and speculations ignore the vital and substantial factors which underlie and condition all legal institutions, and it is precisely the fault of the probation system as now conceived that it is based on such a priori notions of the efficacy of legislation regardless of the psychological history of the social mind which may only be fully understood by a study of the evolution of legal ideas.

The probation system tends to make a victim of the person injured in favor of the wrong-doer. The injured person can in no event gain more by a criminal prosecution than he could get by a civil prosecution except a better method of collection when restitution is made a condition of release. But this method of collection is subject to two disadvantages: that a conviction is more difficult to obtain in a criminal case than in a civil suit; and that there is no assurance that restitution will be ordered since this condition rests in the discretion of the court. The injured party even in a criminal case (if he has any financial responsibility) will feel the need of a private attorney to avoid the snares of an always possible suit for malicious prosecution; and in many cases he will prefer the easier course of a civil prosecution with a tort judgment, a proceeding which he may to some extent control, to the difficult process of a criminal case where he enters an abstract atmosphere which is likely to be indifferent to his injuries. As a means of collection it frequently offers inducements to avoid it. As an outlet for injured feelings, of the spirit of retribution, which actuates the human mind, and which has in a large measure been the life of the law, it fails utterly, since the wrongdoer may privately scorn and defy the object of his injury in the confident

[2] *Cf. Grasserie*, "De la Vengeance privée au point de vue sociologique," Ann. de l'Inst. Int. de Soc., V (1899), 359-429.

belief that the injured person is expending his emotions in a fruitless effort to satisfy his wounded feelings.

From the standpoint of the offender also the probation principle may be seriously questioned, since it advertises to the world that a first offense brings no reproof from the State except some well-intentioned counsels from the trial judge and the possible inconvenience of restoring what has been illegally taken or destroyed; if it happens that a resentful victim of the crime is willing to sacrifice his time and his effort and sometimes considerable outlays of money for such a barren result.

A typical case has come under the writer's personal observation. Four men, two being employes of a merchandise jobber, and two being employed as teamsters employed by an independent contractor, entered into a conspiracy to appropriate goods belonging to the jobber, and to dispose of them to outside persons. Each separate stealing amounted to less than $200, the largest single amount discovered being $125. At a certain point in the conspiracy the plot was discovered by the jobber who immediately employed detectives who brought to light about $700 of stolen property covering a short period of the activities of the conspirators in their dealings with two out of probably many other "fences." All of the conspirators, including the two "fences" made written confessions admitting only what could be proved by extrinsic evidence. The six criminals were arrested and afterwards indicted for larceny. After the arrest, the jobber with his witnesses was obliged to dance attendance periodically for a number of months on the courts, to present the case to the Grand Jury, on repeated continuances, and in conferences with the State's Attorney. When the case at last was ready to be tried, the defendants entered a plea of guilt. Only the evidence of the defendants was heard; each of the defendants being called on to tell his story which in each instance was a rambling narrative which only lightly touched the facts. The defendants had conceived the judicious plan of making a countercharge of fraudulent conduct against the jobber in an entirely different matter, and it became necessary for him in the same case under the direction of the trial judge to submit his books to the inspection of the thieves and their attorney, and suffer the humiliation of defending himself against what turned out to be an entirely unfounded charge based only, as it would seem, in the imagination of the defendants. The party injured was not permitted to introduce any evidence, and the case was closed on the mere statements of the accused persons themselves. The defendants were found guilty, and at once applied to the court to be released on probation. The case was continued for

an investigation to be reported to the trial judge, and on the appointed day the two "fences" stated that they would make restitution of an amount which they themselves fixed, and thereupon all the defendants were released under the probation statute. When one of the "fences" paid over the amount which he had determined as proper to pay, it was stated privately by his attorney that the money *would not buy the paper with which to enter the goods which had in fact been stolen.*

The injured party was left in this situation. His actual loss of merchandise mounted probably into thousands of dollars; he had expended in furnishing proof about one thousand dollars; he got back about $700 from the two "fences"; he had succeeded in defending himself from a maliciously founded charge of fraud; he had participated in a proceeding growing out of an injury to himself where he was not permitted to be anything more than a mere spectator; and he saw the authors of his injury go quit of all punishment. (All the defendants had been at liberty on bail, and the two employes of the jobber were permitted to keep what they had derived from their operations.) It is to be hoped that the defendants with this experience which has cost them only a certain amount of inconvenience will be so deeply impressed with the majesty of the law that they will never again trespass against a criminal statute. The case of the injured party is less promising; he is likely to generalize his experience with the probation statute into a principle, and attempt to save himself from the efforts of criminal action by other means than the defenses of criminal prosecution. Another later instance in the same jobber's business has come to the writer's attention. An employe (whether encouraged by the other case or not does not appear) was stealing merchandise and disposing of it for money. The dishonest employe was simply discharged without having to suffer the stain of conviction for crime. The employer thus avoided the expense and inconvenience of an abortive prosecution, and the employe enjoys the widest latitude for reformation.

The deterrent effect of criminal punishment is largely eliminated in such cases as the above, and perhaps persons will be discovered who are actually stimulated by the promising situation which threatens nothing more serious than the restoration of the gains of a criminal enterprise. The great bulk of the members of any civilized society will remain unaffected by any such inducements, and for them a criminal code is entirely unnecessary except as a shield of defense. It seems hard to take away from this part of society this armor of protection not for any delinquency on their part but in order to perform an experiment on their enemies.

The affective forces of individual and social life cannot be obliterated at one stroke by legislative decree. They are like steam under pressure. An outlet must be found either in the expenditure of productive energy, a safety-valve, or in the last resort under extreme conditions, an explosion. Jhering, who turned in his grave when the probation principle was declared (since he was more an individualist than a social utilitarian), brilliantly portrayed the psychological reaction against subjective injustice,[2] and the legal, social and moral

With all that may be argued against the probation system (and doubtless much may be said not only as to the principle, but also as to its present administration the many glaring defects of which time and experience will find a way to remove) it can hardly be doubted that it responds to a new point of view in the treatment of crimes which has been gathering increased momentum for several decades; and it may be expected that the principle will gradually extend itself. The probation idea has already been anticipated by another idea—the insurance principle—which on first inspection appears to have with it nothing in common. Before the advent of probation legislation there already existed various forms of insurance against economic losses due to criminal acts. The injured person, which is usually a corporation, or a trading partnership, does not feel the sense of irritation of which an individual is capable when a criminal act has been committed. By one the injury is regarded objectively; by the other subjectively. A corporation thinks of an embezzlement as so much money taken out of its treasury, and is satisfied with the discharge from its service of the embezzler and the payment of the loss by the insurer. A physical person thinks of a similar act as an attack on his personality and he demands revenge at the hands of the law. The insurance idea, however, is being more and more employed by private individuals. They insure their jewels, their silver plate, and their automobiles against burglary or theft in the same way that they insure their homes against damage by fire. A loss in either case under such conditions is likely to be regarded in a somewhat impersonal way. The insurer pays the loss and then there is little occasion for the expenditure of any emotions of resentment. In this way and in many others pointing in the same direction the problem of crime is becoming objectified and the economic losses which result from criminal acts reduced to a system of statistics, efficiencies, and premiums for protection. This tendency may have the fortunate result

[2] "The Struggle for Law," 2d ed. (1915), Callaghan & Co., Chicago.
effects of a denial by the State of the power of combating infringements of one's rights.

eventually of making it possible to regard crime not as something standing apart, as a hypostasis, but as itself a result of social conditions, just as in the same way that fire losses are due to antecedent physical conditions which can be in a large degree controlled, thereby reducing the possibility of such casualties.

The insurance idea has certain practical limitations beyond which initiative in the prosecution of crimes must still be left to the individual directly injured, and the State will grieviously err if it takes his complaint less seriously into consideration than the problematical reformation of the offender. To the extent that the interest of the person injured is disregarded for contingent benefits to the wrongdoer, to that extent the criminal code becomes nullified.

We may therefore conclude that the probation principle as a visitorial expedient which leaves the offender in his normal surroundings as a productive unit of society under the direct tutelage of the State is a valuable invention provided that the probation system does not for the purpose of reforming the offender inflict an evil on the person injured, and does not by its leniency encourage the commission of crimes.