

1922

Extension of Probation to Adult Cases Including Divorce

Charles W. Hoffman

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Charles W. Hoffman, Extension of Probation to Adult Cases Including Divorce, 12 J. Am. Inst. Crim. L. & Criminology 566 (May 1921 to February 1922)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

THE EXTENSION OF PROBATION TO ADULT CASES, INCLUDING DIVORCE¹

CHARLES W. HOFFMAN²

It is shown by the reports of the Federal Government that there has been a definite increase in the divorce rate every year from 1867 to 1916 and that the increase since 1916 is greater than that of any previous period.

The opinion generally prevails, too, that during the three years last past there has been a decided increase in the crime rate. While some criminologists are not inclined to deny the existence of a so-called crime wave, yet they doubt that it is so great and significant as that which might be inferred from the reports of criminal offenses in the daily press.

Whatever the increase in the crime rate may be, it is certain that both the crime rate and the divorce rate are practically the same in communities having like social and economic conditions and that it is not controlled wholly by legislation.

Alleged crime waves have occurred in states having the most restrictive and repressive laws; states having the determinate sentence; states having the indeterminate sentence with liberal provisions for parole; states having probation laws with efficient administration, and states having probation laws with inefficient administration or lack of any attempt at administration.

The divorce rate has increased in states in which the causes for divorce are limited by restrictive legislation and states in which the causes of divorce, especially in the administration of the law, are practically unlimited.

It is becoming apparent to scientific criminologists that in our complex civilization there will always be a certain amount of anti-social behavior or crime, varying from time to time from causes that in many instances are not definitely known. If there be a crime wave it affords a matter for reflection that the increase in so-called anti-social conduct has been not only in major offenses or felonies but in misdemeanors and in conduct that has disrupted the home and led to divorce.

¹Read at the thirteenth annual meeting of the Institute, in Cincinnati, Ohio, November 19, 1921.

²Judge of the Court of Domestic Relations, Cincinnati, Ohio.

The law, both as to divorce and crime, has not changed materially for five years last past; if there has been any change it has been toward restriction, therefore the increase in crime and divorce cannot be attributed to legislation. This fact itself should convince us that, while law is a method of social control, it is not the only method or the most efficient method. It lacks the power to mediate social justice and just in proportion that it is unable to accomplish this purpose, the individual and society is injured.

The theory of repression and retribution still inheres in our criminal law and procedure, notwithstanding that from the earliest day of English jurisprudence it has failed in practice to reduce crime, protect personal and property rights, or lessen the tremendous financial burden incurred in the care of criminals in reformatories, penitentiaries, and other penal and semi-penal institutions. If, until science is somewhat further advanced in sociology, physchiatry, psychology, and kindred studies, to suggest remedies for certain conduct disorders, there must necessarily be a certain number of lawbreakers charged with greater or less offenses annually appearing in our criminal courts, it is evident that some means must be employed other than that of repressive legislation to meet this situation; otherwise in the future, as in the past, society must suffer social and financial loss.

This is a matter of urgent importance to the people of the State of Ohio at this time. The report of the Board of Administration, recently published, a document which it is said is the best statement in respect to the penal, correctional, and charitable institutions of the state that has been issued within the past ten years, is convincing that some far-reaching and effective policy in respect to the treatment of crime and criminals and all incidental thereto must be adopted in the immediate future to insure the lessening of the almost insupportable cost of maintaining and caring for offenders against the law in institutions and to prevent the human wastage incident to our present methods.

It would undoubtedly be the consensus of opinion of criminologists and penologists, among whom, of course, are the psychologists, neurologists and physicians who have specialized in conduct disorders, if the matter were presented to them, that an efficient system of adult probation would solve in a great measure the problem in Ohio, and provide the necessary machinery to effect the changes in our correctional system recommended by the Board of Administration.

We will not presume that the adoption of probation as a juridical policy in many cities and states relieves us of the necessity of defining

the term "probation" when suggesting that the principle be incorporated in the law of Ohio. Definitions are demanded at this particular time.

In the Manual for Probation Officers of the New York Probation Commission, Edwin Cooley, Chief Probation Officer of the Courts of New York City, says: "Probation is the method by which the community, through its courts, seeks to aid, supervise, discipline, and, if need be, reform offenders without imprisoning them."

Herbert C. Parsons, Secretary of the Massachusetts Commission on Probation, defines probation as "the exercise by the court of its power to place ascertained offenders in the hands of an officer responsible to the court with a view to their control and particularly to their reformation" without incarceration in a reformatory or penitentiary. "Its chief purpose," says Joseph F. Murphy, Chief Probation Officer of Erie County, Buffalo, N. Y., "is to effect improvement in the social life of delinquents and bring about, if possible, permanent reformation and rehabilitation."

"Probation does not carry the color of the old order of *clemency or leniency*; it is not properly employed as a grant or personal favor. It is not fantastic or sentimental or prejudiced by any considerations contrary to the public interest in the protection of life and property; it is an expression, to be sure, of a humane purpose as to offenders and the legal recognition of the desire to help, to restore, rather than to hurt and pull down. It is the legalized and organized expression of the accumulated opinion that the old primitive, retributive policy is injurious to the state just as it is injurious to the offender. It has its warrant in the belief that the kindlier attitude has possibilities of bringing about a familiar respect for law and order than is attained by a policy of unmitigated punishment. It is a part, and a major part, of a well ordered discriminating plan of correction."³

Judge Charles L. Brown, Chief Justice of the Municipal Court of Philadelphia, observes that "originally probation was a substitute for prison commitment, a method by which the first offender could be given another chance. It has grown into a system of court procedure and into a juridical policy that has worked marvelous change in our whole attitude to misdemeanants as well as the criminal courts."

Let us turn from these definitions to that which has been accomplished in probation where the principle has been applied.

³Development of a State System of Probation and Parole. Herbert C. Parsons, Secretary Massachusetts Probation Commission.

The possibilities of probation have been demonstrated in the juvenile courts. Multitudes of children under the ages of 16 and 18 have been saved for lives of usefulness and happiness. The old theory that to conserve law and order it is necessary to punish children by imprisonment is now practically obsolete. By means of thorough physical, mental and neurological examinations and careful supervision by a probation officer, it has become unnecessary to institutionalize any normal child.

By the same processes the abnormal or dangerous child is prevented from becoming a menace to society.

With the aid and co-operation of probation officers, the social organizations of Cincinnati, the psychological and psychopathic laboratory connected with the juvenile court, it has been possible to reduce the number of delinquent boys now in the Industrial School at Lancaster from Hamilton County to 14. The methods employed in accomplishing this are no more than the application of the principle of probation. If there are normal boys and girls in the Industrial Schools at Lancaster and Delaware, respectively, it is because of a misapprehension of the function of probation on the part of the courts or want of efficient administration, or the absence of local facilities for caring for them. It is the business of some social agency other than a reformatory or semi-penal institution to handle delinquent normal children. Every child saved from Lancaster also saves the state \$255 annually.

It is illogical and "false in theory" to grant outdoor reformation to all under the age of 18 years and deny it to adults. No age limit can be drawn and it is detrimental to public interest to do so. *In states having both juvenile and adult probation it is found that adult probation is far in excess of the juvenile, and that adult probation is as freely employed as the juvenile without injurious consequences to property or personal rights.*

In Massachusetts *eighty-five per cent* of those placed on probation are adults and in New York *sixty-eight and three-tenths per cent* are adults.

In states in which probation is most efficient it has become the conservative policy in the treatment of crime, and the suggestion of the imprisonment of all offenders and a return to the doctrine of retribution is considered both radical and reactionary.

Massachusetts, the pioneer in probation, passed the first probation law in 1878, and the experience of this state has been such as to so firmly establish the soundness of probation as a practical method of

handling lawbreakers that it can now be taken out of the realm of debate.

During the year ending September 1, 1919, Massachusetts placed 24,537 on probation, of whom 19,256 were adults.

New York passed its first probation law in 1901, and its success rivals that of Massachusetts. During the year ending June 30, 1920, the courts of New York placed 19,637 on probation, of whom 12,775 were adults.

In Buffalo 46 per cent of those who were convicted of felonies were placed on probation.

Acting under the provisions of a probation law of Pennsylvania, the courts of Pittsburgh in 1920 placed 957 adults on probation, and during the same year the number treated on probation in Chicago and Philadelphia is proportionately the same as that of Pittsburgh and Buffalo and other cities.

It may be observed that the number placed on probation during the year does not represent the number on probation at any particular time. The reports of both Massachusetts and New York show an average of about 15,000 on probation at all times.

* * *

AS TO CHARACTER OF OFFENDER

The best results of probation have been achieved in those states in which there is no limitation as to the nature of the offense, except as to murder, and no distinction drawn between the first offender and the recidivist.

"There is nothing in our general experience in New York State," says the Chief Probation Officer of Buffalo, "to justify hesitancy in the application of probation in its broadest sense." In Erie County adults are placed on probation for "offenses varying from manslaughter to the thefts of sums of money—as high as \$25,000—down to comparatively minor and technical crimes, and the results in the supervision of these offenders fully justify the policy of the courts.

In 1919 the State of Massachusetts supervised on probation 5,526 offenders who had been convicted of larceny, burglary and more serious offenses. In addition to these, 1,470 were supervised who had committed offenses against the person, such as assault and battery, assault with dangerous weapon, assault on officer, assault with intent to rob or kill. There was one case in which the probationer had been convicted of manslaughter.

The record of New York State in respect to the offense committed is similar to that of Massachusetts. In 1919 we find 1,335 supervised for the commission of such offenses as felonious assault, burglary, larceny and others not less serious.

Probation should not be limited to first offenders. In reference to this, permit me to again quote the Secretary of the Massachusetts Probation Commission: "Next we encounter the limitations as to the nature of the offense, the denial of its use except as to first offenders, and its refusal to persons convicted of certain offenses. First offense, in the sense of being the first appearance of the person, on a criminal charge is without value as a measure of criminality and positively worthless as an indication of exclusive reformability. The search for the elements of offending and the determination of how those elements may be removed is a lame undertaking if it stops with the question, "Is this the first time?" Statutory limitations are without warrant in the light of experience which undertake to draw a line between the reformable and the hopeless according to the nature of the offense. They ignore the implication of the whole undertaking, that it is dealing with a person according to his needs instead of according to a single event in his life. Again the mass of evidence goes to establish the wisdom of the courts being fully empowered by its showing of the greater success in dealing with those who are guilty of precisely those offenses which in another state are set up in the law as bars to consideration for probation. Previous prison confinement, in certain states a legal barrier, is another illogical consideration whose absurdity is demonstrated in the success of dealing with the repeated occupant of prison cells by the other method and his response to its effort."

The inquiry may well be made in the State of Ohio by those interested in correctional or criminal reform as to the results obtained in the states and cities that have placed so great a number of lawbreakers on probation, including not only misdemeanants but those who have committed felonies and others who are repeaters and have prison records.

The reports of the Massachusetts Commission show that probation was satisfactory in 81 per cent of the cases; of the 19 per cent, or 5,581 cases out of 29,202, in which probation was not satisfactory, 3,136 who absconded, Parsons says that very *probably* the greater number are not committing any depredations, but have simply disappeared.

The result on the prison population of Massachusetts has been as follows:

In 1900 the prison population was 9,000. In 1916 it was 5,657, since which time it has gradually decreased and in 1919 it was 2,896.

There has been a consistent decrease every year since 1900 and, furthermore, *Massachusetts has not built a prison cell in 20 years and half the cells she has are vacant.*

In New York State probation in 1920 was successful in 78.3% of the cases. In 6.1% of the cases the probationer was discharged as unimproved; 8.2% were re-arrested and committed, and 6.3% absconded. When we consider that of the number who absconded many have not committed further depredations and that 8.2% were re-arrested and committed, it is evident that in so far as the community is concerned, in the protection of life and property, there remains an exceedingly small percentage of cases in which probation did not conserve peace and security.

In Buffalo 75.3% were successful, and of 129 offenders outside Buffalo in Erie County placed on probation 82.1% made good.

The New York Commission points out that the number of persons committed to all public correctional institutions, including reformatories, training schools, jails, and prisons, has decreased since 1915. *The prison population on July 1, 1920, was the smallest in twenty years, viz.: 10,502. On the same date there were actually 4,888 more persons on probation than in all correctional institutions.*

The average cost in New York in maintaining one person for one year in the prisons and reformatories is \$396.56. The cost of supervising one person for one year on probation is \$22.64.

In Massachusetts the per capita cost of probation is \$20. In all the states and cities having probation the cost of probation is about one-tenth or less than that of maintaining a person in prison.

Notwithstanding the mass of accumulated experience and evidence in favor of probation and its incidents and the suspended and indeterminate sentence, the Legislature of Ohio at its last session provided that courts should have the power to fix the minimum sentence not to exceed the maximum provided by law, thus practically repealing the indeterminate sentence law, increasing the burden of taxation, and preventing the application of any *sound* principle in the classification of criminals of their treatment in general.

The abolition of the indeterminate sentence was the product of arbitrary institutions and opinions having no foundation in science or in fact.

The proponents of a determinate sentence and a return to the repressive measures that were current a hundred years cannot justify

their policy on any known fact sanctioned by scientific penology or on any inference drawn from statistics.

Repressive and retributory measures, such as the determinate sentence, have failed from the days of Romilly to the present time to reform the criminal or protect society; society is no less secure today than at that period when 200 or more offenses were punishable by death.

We deceive ourselves when we protest that the sole purpose of punishing the culprit is to reform him and to deter others from committing like offenses. The fundamental basis upon which the whole fabric of criminal jurisprudence, corrective and penal institutions, electric chairs and gallows have been constructed is the primitive instinct of hostility that exists in the minds of the people toward the enemy of the family, the group or society, and the satisfaction afforded in casting out the offender and working his utter destruction. Were this not true we would not witness the anomaly of refusing to consider a prisoner's mentality or responsibility except in cases of insanity; the filling of the penitentiaries with the feeble-minded and the pauperism of children and the destruction of homes that follows in the wake of the convict. The criminal codes of the past and in many instances of the present are essentially vindictive. Down through the centuries charity has found no place in their mandates; they have cherished the spirit of hate and have cultivated and kept alive the instincts of primitive man, which long since should have disappeared.

With a few notable exceptions found in our larger cities the prevailing doctrine of the criminal court is that *to reform* lawbreakers is to send them to the penitentiary or workhouse for a definite term of years or months; that *to prevent* crime on the part of the offender as well as others is to send to the penitentiary or workhouse for a definite term of years or months. The remedy in both instances is the same. In this connection we find, too, that imprisonment for a definite term of years was the practice when prevention and reformation had no place in criminology and retribution was the sole consideration. A comparison of the methods of dealing with lawbreakers by the courts of a century or more past and those of the present day will reveal that it is only the legal procedure and form of trial that has changed and that the fundamental concept of retribution and punishment to satisfy the outraged feelings of the people remains intact. We trifle with the integrity of our mental processes when we affirm that our treatment of criminals is based on prevention and reformation, and then proceed to act upon a principle that is wholly retributory.

The ideas of prevention and reformation are the products of an enlightened and humanizing sentiment that in Ohio and some other states has not yet brought forth fruit abundantly.

It was said by General George W. Wickersham at the meeting of the American Prison Congress at Columbus in October, 1920, that "there must come from these gatherings a better appreciation of all mankind and a recognition that men just as good as you and I have committed offenses that have landed them behind the bars, and that in the men who are there there are the germs of just as bright qualities and just as hopeful human qualities as there are here sitting around these tables. You remember the remark of John Wesley as he saw a prisoner led to the gaol: 'There but by the grace of God goes John Wesley.'"

If General Wickersham's statement is true the problem confronting us in Ohio is that of detecting those who ought not to have been imprisoned and also that of detaining in prison or some other institution those whose release would menace society.

The penal institutions of Ohio are crowded; the reformatory at Mansfield and the penitentiary have a greater number of inmates than at any time in their history. Mansfield has 1,900 and the penitentiary 2,500 or more, and the repeal of the indeterminate sentence will beyond doubt not only accelerate the increase in the number sentenced to these institutions, but increase the number of years the prisoners must be supported at the expense of the state.

Under the law of Ohio today the feeble-minded, the psychopathic and all either mentally or physically diseased (and these constitute 20 per cent or more of our prison population) are sentenced to definite terms without regard to their infirmities, and at the expiration of their terms of imprisonment released without supervision to further devastate society until perchance they are again incarcerated.

Under an efficient system of probation supervised by a State Commission and co-ordinated with the Parole Board or other correctional agencies, it would be possible to effect that classification of offenders so strongly and wisely recommended by the late Board of Administration in its report.

Those who are convicted and are not fit subjects for probation should be detained in some institution, not for a fixed term, but until, consistent with public safety, all that science, medicine or penology implies warrants their release.

The doctrine that a court can wisely determine who should be sent to a penitentiary and the number of years necessary for his reforma-

tion by mere observation of the offender and the information that the court has obtained under the strict rules of the current criminal procedure is as erroneous in principle as it is injurious to the individual and the state. The same may be said of the policy of parole boards releasing a prisoner on his record while under restraint in a penal institution.

Knowing nothing of the human material with which they are dealing, both courts and parole boards attempt to resist the relentless march of the methods of modern inductive science in the discovery of the sources of human behavior and dispose of offenders on the theory of absolute responsibility, a theory which in general application is so fallacious as to be apparent to the most superficial observer and rejected by all practical and scientific criminologists.

In both sentence and parole a thorough diagnosis is necessary. This under the determinate sentence law of Ohio is prevented, with the resultant effect that hundreds of men and women are in the penitentiary and correctional institutions whose reformation could have been accomplished by out-patient care, and other hundreds whose release will menace the order of the state.

When we reflect that it costs \$255 per capita for the maintenance of the inmates in our correctional institutions and that the cost per capita of probation is not more than one-tenth of this amount, we can conceive that probation would save Ohio millions of dollars and besides make it unnecessary to construct so elaborate and pretentious a penitentiary as to cost \$7,250,000.

Funds expended in the care and treatment of the insane, the feeble-minded, the psychopathic and those whose vicious tendencies require institutional care is a profitable investment.

Funds expended in the imprisonment of normal men and women and children amenable to probation is an absolute loss to the state.

To continue the present policy in Ohio is to scrap the report of the Board of Administration, all the experience and evidence of other states, the teachings of science and the declarations of all the organizations of this country that have made the treatment of crime a study.

We have mentioned but a few of the facts developed by probation; the evidence, however, in its favor is overwhelming and conclusive, and available to any interested investigator.

Permit me to add in conclusion that in the advocacy of probation we shall not be deterred by the charge of sentimentalism, a charge usually made by those who are so calloused to the suffering and the distress of unfortunate human beings that humanitarianism has no

place in their creed. Probation is a safe, sane and sound juridical policy with the elements of vindictiveness and hate which characterizes the present policy eliminated. It permits the consideration of social values; it has the power to save, and to redém numberless men, women and children. It rehabilitates homes and protects children from the shadows of crime; it shields them from the stigma that comes from being the child of a convict. It decreases the number of inmates in the monumental mansions of sorrow dedicated to vengeance and hate. Under its beneficent administration the building of reformatories and penitentiaries decreases. Paraphrasing the words of a great American patriot, "If this be sentimentalism, make the most of it."