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PRISON OR PROBATION—WHICH AND WHY?

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Chief Judge Laws not only commissioned me for this part of your program, he selected my subject and admonished me to speak to it. And so, I appear by order of the court and under the auspices of the National Probation and Parole Association, which, with benevolent support of interested citizens, is probably contributing as much toward enlightened criminal justice as any other agency in this important field of social betterment. But I also come as a laborer in the vineyard, where the harvest is plentiful and the laborers are all too few.

Every responsible citizen, as well as every judge, is deeply concerned, indeed shocked, by the crime wave sweeping the country like a deadly plague to threaten the very life of our ordered society. From the pulpit to the Halls of Congress, from the fireside of the responsible parent to the local civic clubs; from the sociologists and welfare workers to the employer of labor, comes the cry for protection from the marauding criminal. Crime and criminals are denounced everywhere, but any attempted discussion of remedial measures leads inevitably to an irreconcilable conflict of opinion. With every atrocious crime, the affected community clamors for harsher punishment. And, unfortunately, most of those who clamor for more stringent penalties as a solution to criminality seldom have the responsibility for enforcing the law or imposing the sentence, and know nothing of the background or mental capacity of the offender. It is those in the main who today decry the use of probation or any other form of treatment outside of the prison wall as maudlin sentimentality of the social worker and psychic ruminations of the psychiatrist.

It is in this atmosphere of consternation and unenlightenment that judges and prosecutors undertake the task of administering criminal justice for the protection and well-being of an ordered society. In the discharge of those important functions of government they act as public servants and as instrumentalities of their constituency. As such they may not be insensible to the emotional reactions of the community. But they also have a higher duty to exercise an informed independent judgment for the public good. It is the discharge of this duty which we hope to inspire and encourage by exchange of ideas and experiences.

Since the inception of an ordered society, we have been busily engaged in the proc-

ess of making rules for the determination of guilt and innocence. The sentencing judge need only turn his hand for authoritative rules for the conduct of the trial of a criminal case. Yet, only recently have we given any consideration to the sentencing function of the judicial process. And with good reason, for when death or eye for an eye was the only penalty, the function of imposing the sentence involved no discretion—the offense determined the penalty without regard to responsibility or culpability. But, a more civilized appraisal of the offender as a part of his community and the recognition that after all, he is the product of ordered society, has led us gradually to the notion that humane treatment outside prison walls has a definite place in our criminal jurisprudence; that scientific analysis of the offender, not emotional recompense, is the more effective corrective procedure. With this new concept, an added responsibility has come to the judiciary and particularly those charged with the sentencing function. And we literally grope for guides along the way. It is startling to note that in this great civilized country, the authority of a federal judge to suspend a sentence and grant probation was first given by Congress in 1925, after much agitation and controversy.[1]

Since Chief Justice Taft described the probation law as "giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment,"[2] social science has made progress toward the promulgation of guides or criteria for the sentencing function. The Probation Department of the Office of the Director of Courts' Administration has been expanded with the years from an appropriation of $50,000.00 in 1925 to more than $2,000,000.00 in the current year.[3] Probation officers, schooled and dedicated to their tasks, sit at the right hand of judges to inform and counsel; the American Law Institute has undertaken the drafting of a model criminal code of substantive criminal law under the capable direction of Professor Herbert Wechler; The American Bar Association, with a generous grant from a private foundation, under the capable leadership of Mr. Donovon, proposes a study of probation, sentence, parole and release procedures and their effectiveness as instrumentalities of law administration. The National Probation and Parole Association is actively engaged in the study of correctional procedure for crime and the promotion of the sensible and practical use of probation. Under the directorship of Mr. Will C. Turnbladh, an Advisory Council of Judges under the chairmanship of Chief Judge Bolithia Laws has been recently created, and that Council is now in the process of promulgating a guide for sentencing, to be made available to the judiciary of the country. Not only that, the National Probation and Parole Association, supported by private grants, has, after research, proposed the preparation of an authoritative volume on the law of criminal correction, to be offered as a part of the curriculum in law schools. The purpose of this volume is, for the first time, to comprehensively

[1] PUBLIC LAW 596, 43 Stat. 1259.

[2] United States v. Murray, 275 U.S. 347, 357, 48 S.C. 146, 72 L.Ed. 309. See also Burns v. United States, 287 U.S. 216, 53 S.C. 154, 77 L.Ed. 266; Roberts v. United States, 320 U.S. 264, 272, 64 S.C. 113, 88 L.Ed. 41; United States v. Banks, 108 F.Supp. 14.

[3] See CHANDLER, *Latter Day Procedures in Sentencing and Treatment of Offenders in Federal Courts*, VA. L. REV., October, 1951.

state, explore and suggest the legal process by which society deals with those who are found guilty of violating its laws. It will deal extensively with the problem posed by the person whose guilt has been established.[4]

In his address to the annual meeting of the American Law Institute last May, the Chief Justice of the United States emphasized the importance of probation in the Federal system, saying "The public and even our own profession know altogether too little about it as a factor in the administration of criminal justice."[5] And, there are other worth-while studies by the social scientists on whose advice and counsel we are slowly but surely learning to rely. All of this indicates an aroused interest in the problem confronting a judge charged with the responsibility of imposing sentence after guilt has been established.

Let us consider for a moment some of the suggested considerations which should enter into the imposition of a sentence. At the outset, we must lay to one side as not within our competence, the vast number of criminal cases wherein the jury is the final arbiter, not only of guilt or innocence, but the extent of punishment as well. In those cases punishment is determined by the imponderables of courtroom psychology, depending upon the jurors' individual concept of punishment to fit the crime. Without having access to the deliberations in the jury room, we know that the degree of punishment is ofttimes a compromise between those who would hang and those who would acquit. In those cases the judge has no responsibility and the sentencing process is purely perfunctory.

And, we must also lay aside that vast number of criminal cases wherein the extent of punishment is determined across the bargaining table of the prosecutor, with the prosecutor on one side and the defense attorney or public defender on the other, the prosecutor contending that he cannot only secure conviction, but a long sentence as well, and the defense attorney making equally extravagant claims. The result is a compromise in which the offender agrees to plead guilty to a sentence which may or may not fit the crime or the offender. In those cases, the plea and agreement are announced in court and the judge usually follows the recommendation with formal pronouncement of the sentence. The defendant is ordinarily fully informed of the bargaining process and goes off to prison thinking that he made a pretty good trade with the society he has wronged.

Let us hope that the day is not far when the responsibility for the imposition of sentence after the establishment of guilt shall rest upon the broad shoulders of a conscientious judge who approaches the discharge of his inescapable duty with the concept that in the last analysis, rehabilitation, not retribution and revenge, is the prime objective of a sentence; that rehabilitation is seldom achieved by the imposition of punitive punishment; and that no man should be sent to a penal institution until it is definitely determined that he is not a fit subject for probation. Until that day comes, we must content ourselves with the practical considerations available to us as representatives of a society which has not yet reached that stage of civilization which will enable us to discharge our sentencing function on the same scientific basis now employed in the detection and apprehension of the offender.

[4] See Report of Committee on Law School Curriculum to Advisory Council of Judges, National Probation and Parole Association, May 12, 1955.

[5] Address to Annual Meeting, American Law Institute, Washington, D. C., May 18, 1955.

Assuming, therefore, that probation is available to the sentencing judge, when and why should it be granted? Two factors usually enter into the determination of whether or not an offender will be placed on probation, one, the nature of the offense, the other, the nature of the offender. The criminologist would first consider the nature and character of the offender, but most judges, either consciously or unconsciously, usually consider first the offense and then the offender. There are judges who, respecting the tenor of the community and society which they represent, hold to the idea that certain offenses are not probationable, regardless of the circumstances under which they were committed or the nature of the offender. And, as a further reflection of this social attitude, many legislatures have seen fit to prescribe mandatory prison sentences for certain offenses. The sentencing records of many judges, as well as their own statements, show "highly subjective factors and personal biases in the imposition of sentence."[6]

There are undoubtedly certain offenses which in their nature are not probationable, such as certain classes of sex crimes. Not because of the nature of the offense, but because of the nature of the offender. Then there are those offenses which are not probationable, not because of their nature, but because probation would tend to impair public respect for law. The court is not likely to place a bank robber on probation although he may be a first offender and otherwise fit for rehabilitation. We know that certain crimes of violence are committed impulsively by men of previous good character who we know are not likely to ever again threaten the safety of the community. And then there is the embezzler and the violator of a public trust. We know that the judge could confidently return them to society without hazard to the community. The stigma of the crime itself is punishment enough, but the judge is nevertheless constrained to impose imprisonment, not only as a deterrent, but to satisfy the community's outraged sense of justice or to vindicate its standards of public morality. Public opinion, constructively and adroitly used, is often an aid in the sentencing process. In the language of Glueck, "While the judge must not allow public or private demands for vindictive punishment to sway him toward undue severity, he must not, on the other hand, allow the advanced thought of science to sway him toward a degree of clemency that might shock the public conscience and bring the processes of law into disrespect."[7]

There is of course a great mass of criminal offenses in which the public has no aroused interest, and in which the judge is free to exercise his own informed judgment in the performance of the sentencing function. Even apart from public sentiment, a learned judge knows that certain offenses are so revolting and incomprehensible as to require permanent incapacitation. He also knows that probation is not intended for the professional criminal who makes his living by lawless pursuits, such as those of the narcotic peddler, professional thief, confidence man, fence, pick pocket, swindler, gangster and racketeer. They are a menace to society and it is the duty of the court to protect society by isolation or even elimination.

On the other hand, an informed judge knows that more than ninety percent of the offenders sentenced to imprisonment return to society, most of them within two or

[6] ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, Vol. II, pp. 470–1.

[7] ULMAN, THE TRIAL JUDGE'S DILEMMA, in PROBATION AND CRIMINAL JUSTICE, ed. by GLUECK, 1933, p. 114.

three years, faced with the difficult task of readjusting themselves to normal habits. And, the judge also knows that the path of a great majority of these prisoners leads inevitably back to prison for offenses more atrocious than the former ones. An experienced judge knows that a first offender is not for that reason alone eligible for probation. No one has a license to violate the law one time without fear of punishment. There are undoubtedly some first offenders for whom short terms of imprisonment are not only a benefit to the community, but to the offender as well. Most judges accept the premise that a prior offender is not for that reason an unfit subject for probation. Statistics show that many second and third offenders are redeemed from a life of crime through the good judgment, faith and perseverance of the judge and the application of the wise and compassionate friendship of a dedicated probation officer.

But the resolution of all these imponderables in determining whether the judgment shall be prison or probation taxes the wisdom of a Solomon. By what standards, guides or criteria shall the judge arrive at this tremendously important decision? Some judges choose to call it ingenuity, wisdom, experience, knowledge of human nature, and relying upon that alone, claim to possess some magic power of divination by which they look into the mind and soul of the prisoner before them, and come up with a sentence which meets the ends of justice. Others call this approach the "hunch system," which "cannot be justified as a substitute for a thorough study of the individual characteristics and problems of the prisoner."[8] There will always be an indispensable need for the analytical skill and judicial acumen in the imposition of sentence, but no amount of wisdom or discernment can take the place of factual background and diagnostic study. Statistics prove it and most judges now concede it.

How best then can the sentencing judge be apprised of all this essential data? Judge William Campbell[9], a great judge of one of the busiest courts in the land, says, "of all the administrative aids available to the judge an adequate, comprehensive and complete presentence investigation is the best guide to intelligent sentencing. The evaluation, interpretation and conclusions reached by a highly trained, widely experienced probation officer possessed of a high sense of integrity, a keen understanding of human behavior and great skill in the collection and appraisal of information from many sources is of utmost value." "The presentence report," continues Judge Campbell "can and should be a most thoroughgoing document involving the entire social, economic and psychological background of the offender."[10] In recognition of this sound philosophy, the Federal Rules of Criminal Procedure provide that unless the court directs otherwise, a presentence investigation and report containing information about the offender's prior criminal record, his characteristics and financial condition, and circumstances affecting his behavior, and such other information as may be helpful in imposing sentence, shall be submitted to the court prior to sentence.[11]

[8] ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, Vol. II, p. 447.

[9] JUDGE WILLIAM CAMPBELL, Judge of the United States District Court, Northern District of Illinois.

[10] JUDGE WILLIAM J. CAMPBELL, *Developing Systematic Sentencing Procedures*, FEDERAL PROBATION, September 1954.

[11] FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 32(c) (2).

But the probation officer's duties do not end with the submission of the presentence report. If probation is granted, the probationer becomes the responsibility of the officer. He is the friend and confidant of the probationer—all of the probationer's troubles and all of his problems are laid at his feet; the officer stands between him and the community and between him and the judge. The most gratifying experience in the career of a judge is the dedicated interest and perseverance of his probation officers. These fine public servants are giving their lives and their talents to the piecing together of broken lives and making them into useful citizens. Certainly nothing can be more important to the preservation of our social structure today. A fine probation officer told me the other day that he never "lost a case" as he called it, that he "could not have won" if he had the time to give the probationer. From other sources we know that many revocations result from lack of proper supervision, and that probation is often denied because of the unavailability of proper probation supervision.

Up until very recently, the Congress and the legislatures, reflecting the public suspicion of probation, have been niggardly with appropriations for the support of the probation service, and we have also been reluctant to provide adequate salaries for probation officers. There is still evidence of parsimony in this respect. When it is pointed out that the cost of maintaining a federal probationer is 26.9¢ per day or $98.26 per year, and that the cost of confinement in the penitentiary is $3.41 per day or $1243.19 per year; and that the average yearly earnings of a federal probationer is $2,649.25,[12] to say nothing of what it costs to support a convict's family while he is in prison, there can be no defense to the denial of adequate probation service or the revocation of a probation because of lack of supervision by a capable probation officer.

What we need to do as judges and interested citizens is to educate ourselves. We need to keep abreast of the advancement of the social sciences and learn to utilize their services in the performance of our high duties. Just as we have followed the psychiatrist in the repudiation of right and wrong for criminal responsibility, so should we follow the scientists in the rehabilitation of those found criminally responsible. Franz Alexander, a psychoanalyst, and Hugo Staub, a lawyer, collaborated to say: "Only when the community, in its dealings with the criminal, will become ready to give up the gratification of those affects which demand expiation, retaliation and compensation for the socially inhibited sadism, only then will our sense of justice find itself in harmony with a purely rational and scientifically sound treatment of the lawbreaker."[13] We must find some way to combine socially indispensable punishment with the psychiatrist's knowledge and help.[14] We need to open our judicial eyes to the established fact that the solution to lawlessness is not to be found in bigger and stronger prisons, but in reclamation through scientific research and application of humane treatment. We have made a good start but we have only scratched the surface, and time is running out.

[12] ANNUAL REPORT OF DIRECTOR OF THE ADMINISTRATIVE OFFICE OF UNITED STATES COURTS FOR FISCAL YEAR 1954, page 74.

[13] FRANZ ALEXANDER AND HUGO STAUB, THE CRIMINAL, THE JUDGE AND THE PUBLIC.

[14] WALTER GOODMAN, *Punishment or Cure*, NEW REPUBLIC, August 1, 1955.