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THE PUNISHMENT OF CRIME

W. H. TOWNSEND¹

Inspired by a suggestive article² on the function of punishment by a member of the Florida bar, the assertion is made that the power to sentence should not be entrusted to, or exercised by, the trial judge. Governor Manning, a layman, in an address before the National Conference of Charities and Corrections at Pittsburgh, on June 13th, 1917, said: "The work of the criminal courts should be judicial merely, and not both judicial and administrative as now."³

As the punishment of crime has been regarded in this state from earliest times as a semi-legislative and semi-judicial act, the suggestion of the governor invites a review of this subject.

Mr. Garrett, whose article inspired the governor's opinion, speaking of the judiciary, says: "Its appropriate duty (in relation to crime) is to perform one function, the determination of the guilt or innocence of the accused. An act has been declared unlawful. Has the defendant done that act? That is all that appertains to the province of the courts of law. Consequently, the trial should end with the verdict. Sentence is not merely superfluous (aside from its mere formal aspect as approval of the verdict), it is extra judicial. That the power of sentence does not belong to the *nisi prius* judge may appear an unjustifiable didactic conclusion. It is, however, rested upon sound argument. The object of a criminal trial is to adjudicate guilt or innocence of one act. On the other hand, the object of sentence is according to notions now becoming current, to reform the person convicted of having done that act. . . . The legislature acts only on the mass, and as the courts, without another trial of each prisoner convicted, are not sufficiently informed to give sentence, the function of punishment lies outside the purview of the legislature and the judiciary. As a consequence, if all government is 'divided into three parts,' the administrative department is the proper organ to perform the function." Administrative are here treated as executive acts. There may be a difference between them.

¹Circuit Judge, Columbia, S. C., before the State Bar Association, Spartansburg, S. C., 1918.

²See this JOURNAL, Vol. VI, No. 6, pp. 422 ff.

³Quarterly Bulletin, State Board of Charities, vol. 3, n. 2, p. 8.

Because he regards reformation an individual matter, the main, if not the only, object of punishment; and punishment an application of known laws and principles to the individual case; sentence, imprisonment and pardon are declared to be part of a single administrative or executive function.

"The authority to define and fix the punishment for crime is legislative, and includes the right in advance to bring within the judicial discretion for the purpose of executing the statute, elements of consideration, which would be otherwise beyond the scope of judicial authority."⁴

The prime matter is the punishment, the other elements for consideration, such as deterrence of crime and reformation of the criminal, are the complements of punishment.

The legislature has adequate power "to cause the imposition of penalties as fixed by it, to be subject by probation legislation or such other means as the legislative mind may devise, to such judicial discretion as may be adequate to enable courts to meet, by the exercise of an enlarged but wise discretion, the infinite variations which may be presented to them for judgment."⁵

The objection that the human mind has no such standard for weighing guilt and ill-desert as enables it to exercise perfect equality in punitive sentences, does not excuse the legislature from the duty to fix and declare the punishment for crime. Otherwise there can be no government by law.

In France, before the revolution, the fixation of penalties was left to the arbitrary power of the judges. The judge had full power to adapt the penalty to the gravity, not legal, but real of the crime; in fixing the penalty he was never bound by law. He could regulate the penalty according to each fact, and in proportion to the gravity of each crime taken by itself.⁶

The exercise of this power by the courts was one of the most potent causes of the revolution, the anniversary of which we celebrated on the fourteenth of July. It is a matter for gratitude that we inherit English law and freedom. Illegal acts of power have been borne by us and our forefathers, and may be borne again, but Americans of English descent will never bear illegal arbitrary acts under color of law. Lord Eldon refers to a passage in Thucydides (Bk. 1, ch. 79), where the Athenian ambassador observed to the

⁴*Ex parte* United States, 242 U. S. 27.

⁵*Ex parte* United States, 242 U. S. 27; *State v. Abbott*, 87 S. C. 466.

⁶*Parmalee*, Criminal Procedure, p. 140

Lacedaemonian magistrates, that men were much more provoked by injustice than by violence, inasmuch as injustice, coming from an equal, has the appearance of dishonesty; while mere violence, proceeding from one stronger, seems but the effect of inevitable necessity.

The French penal code, formulated soon after, and under the influence of the revolution, went to the other extreme and fixed a penalty for each crime, leaving to the judge no opportunity for any individualization at all.⁷

Individualization is the process of adjusting a penalty to the character of a criminal. The criterion of judgment is threefold, including the crime, social conditions, and the criminal. Tarde has said: "The misfortune is that to individualize punishment is to make it unequal for equal faults, and it is well to take into account the feeling of apparent injustice that this inequality cannot fail to make the criminal or a large number of them or even the ignorant mass of the public experience."

"Justice both to society and to the individual frequently requires that the punishment shall vary greatly in cases where the crime is exactly the same. So the injustice above mentioned is only apparent. However, if there is danger of many persons regarding individualization as unjust, measures should be taken to prevent this, since it would result in discrediting all criminal justice. It is possible that criminals do sometimes feel that they are being treated unjustly when others who are guilty of the same crime receive a lighter punishment."⁸

"However," says Prof. Conti, "the concept of punishment cannot be separated from the old rule, so much punishment for so much crime."

The judges, no doubt, would welcome relief from the difficult task of exercising their discretion as to what punishment, within the limits of law, is just and proper in the cases coming before them; but the transfer of such power to a state administrative board, such as the State Board of Correctional Administration created by the last legislature (30 Stats. 888), would necessarily be the means of postponing and delaying the administration of justice; and the unlimited power proposed to be given such board, and the proposed practice of fixing the punishment as they might see fit in each case, without following rules of law, might result in the condition which existed under the French kings, and give rise to the appearance at least of par-

⁷*Parmalee*, *Crim. Proc.* 141.

⁸*Parmalee*, *Crim. Proc.* 152.

tiality or influence of convicts and their friends, and might be the means of accommodating, commuting or eluding punishment. It would look suspicious in the eyes of sagacious bystanders, and that alone is a reason for rejecting a practice so novel, in lands governed by English law.⁹

"Crime is primarily to be punished because it is a violation of the law, and society is to punish crime, because society is the divinely appointed vindicator of the moral law."¹⁰

The difference between punishment and its complements is stated by the late John Lisle, of the Philadelphia bar, in a review of Conti's book on that subject: "Punishment is the penalty inflicted by law, and is aimed at the prevention of crime. It is inflicted only in cases in which its threat has been useless. It is therefore directed to prevent crime in a generic sense, and also to prevent a new crime by the same criminal; but even if both the generic and specific prevention is lacking, punishment must be inflicted as a means of repression. . . . Its results must be a general condition of security. When a crime has been committed, there is no other way of re-establishing public security except by the infliction of punishment. Expiation, a concept belonging to religion and morals, is not enough; neither is vendetta, a concept opposed to custom and law; but there must be a reaffirmation of the authority of the state in regard to the act of rebellion. Punishment also presupposes individuals capable of understanding the values of admonition and penalties. Inasmuch as punishment relates to crime, it must fit the crime, and the punishment, in order to be effective, must also be preventive. The system of punishment must therefore comprehend three phases. It must be related to its threatening aspect, and must be measured in regard to the crime in its application and execution. . . . A crime is a fact, a voluntary act in violation of juridical order, and as such it must be met by a definite quantum of punishment. The punishment must fit the crime, but in addition to its objective element there is the criminal to be considered, and in his regard the complements of punishment must be applied; and while the punishment must fit the crime, the complements of punishment must fit the criminal. Punishment is repression, the complements of punishment are prevention, and while they are more or less co-ordinative, the former is judicial and the latter administrative." The imposition of punishment is judicial. Its complements are at least quasi-judicial.

⁹*State v. Chitty*, 1 Bail. 405.

¹⁰*Wharton*, Crim. Law, sec. 11.

"The duty of defining and punishing crime has never in any civilized country been exerted upon mere abstract considerations of the inherent nature of the crime punished, but has always involved the most practical consideration of the tendency at a particular time to commit certain crimes, of the difficulty of repressing them, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes."¹¹

The theories of punishment are well stated in the first chapter of the eleventh edition (to which all references in this paper are made) of Wharton's Criminal Law. "The absolute theory" says the author, "on which we must . . . fall back, rests on the assumption that crime as crime must be punished; *punitur quia peccatum est*. But then comes the question by whom? The state, as representing society at large, springs from a moral necessity. It is not a matter of choice whether we live under government. Some government, some form of civil organization we must have. And the state is not to be guided simply by expediency, or by the merely external purposes of society. It has an existence of its own to maintain, a conscience of its own to assert, moral principles to vindicate. Penal justice, therefore, is a distinctive prerogative of the state, to be exercised in the service and in satisfaction of the duty of the state, and rests primarily upon the moral rightfulness of the punishment inflicted. Penal discipline is undoubtedly expedient, both for the community and for the individual punished. But the jurisdiction is exercised, not because it is expedient, but because it is right."¹²

The text accords with the statement of the trial judge in *ex parte United States*, 242 U. S. 27: "Modern notions respecting the treatment of law breakers abandon the theory that the imposition of sentence is *solely* to punish, and now the best thought considers three elements properly to enter into the treatment of every criminal case after conviction. Punishment in some measure is still the object of the sentence, but, affecting its extent and character, we consider the effect of the situation upon the individual as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies."

The definition of punishment is "any pain, penalty, suffering or confinement inflicted upon a person by the authority of the law, and the judgment and sentence of a court, for some crime or offense com-

¹¹*Weems v. United States*, 217 U. S. 384.

¹²*Wharton*, C. L., sec. 10.

mitted by him or for his omission of a duty enjoined by law."^{12a}

"Laws, freedom, truth and faith in God" came with our fathers from England, and with them came the doctrine of rewards and punishments, necessary accompaniments of law, "established," as said the virtuous Sidney, "for the good of the people, which no passion can disturb; void of desire and fear, lust and anger; mind without passion, written reason, retaining some measure of the divine perfection; not enjoining that which pleases a weak, frail man, but, without any regard to persons, commanding that which is good, and punishing evil in all, whether rich or poor, high or low; deaf, inexorable and inflexible."

This law treats crime not as a disease, but the act of a responsible person, and retribution aims at a just measure of penalty, and would limit the pain to what is regarded as just, fair, due and reasonable. The righting of a past wrong. The avenging of the oppressed.

In early English law life or limb was a usual form of punishment. In Stephen's History of the Criminal Law, vol. 1, pp. 58, 59, it is said:

"The punishment upon a second conviction for nearly every offense was death or mutilation. In Ethelred's laws it is said of the accused when ultimately convicted, 'let him be smitten so that his neck break.' The laws of Cnut lay down the principles on which punishment should be administered, and also regulate the practice of the court. The principle is thus stated: Thought any one sin and deeply fordo himself, let the correction be regulated so that it be becoming before God and tolerable before the world. And let him who has the power of judgment very earnestly bear in mind what he himself desires when he says: 'Et dimitte nobis debita nostra sicut et nos dimittimus. And we command that Christian men be not on any account for altogether too little condemned to death; but rather let the gentle punishments be decreed for the benefit of the people, and let not be destroyed for little God's handiwork and his own purchase which he dearly bought.' The practice of the court is regulated by the following enactment: 'That his hands be cut off, or his feet or both, according as the deed may be. And if he hath wrought yet greater wrong, then let his eyes be put out, and his nose, and his ears, and his upper lip be cut off, or let him be scalped; whichever of these those shall counsel whose duty it is to counsel thereupon so that punishment be inflicted, and also the soul preserved.'"

^{12a}*State v. Pope*, 79 S. C. 91.

"Law," says Mr. Justice Holmes, in his lectures on the common law, "must express the prevailing sentiment of the community."

Unless it does, it is of no effect. Prosecutors and witnesses abstain from pressing home the evidence of guilt, and connive at escapes. So as to the law against dueling prior to 1880, the dispensary law in Charleston in the nineties, and, I fear, the laws against lynching today.

"It is highly desirable that criminals should be hated; that the punishment inflicted upon them should be so contrived as to give expression to the hatred, and to satisfy it, so far as the public means for expressing and gratifying a natural healthy sentiment can justify and encourage it."¹³

Because the crimes of murder, arson, rape, and assault with intent to ravish are hated and not tolerated in this state, our laws prescribe death as their penalty, unless the jury should see fit, because of circumstances in the particular case, to inflict a lesser penalty.

"Social vengeance is occasionally referred to in the courts, while it manifests itself outside of the law every time a mob takes the law in its own hands. When a lynching takes place, for example, the mob is inspired by the necessity of defending itself against a dangerous kind of crime and criminal, but in its blind rage it is frequently carried beyond the necessity of defense. And here may be noted the incapacity of the spirit of vengeance for administering justice. While it may be inspired by the legitimate motive of defending itself, it is incapable of judging calmly and wisely what measures social defense demands and then going no further than those measures."¹⁴

The statistics quoted in the postscript to the fourth volume of the *Newgate Calendar* show that in the seven years from 1819 to 1825, both inclusive, 7,770 persons were sentenced to death in England, an average of 1,110 a year, and of this number only 579 were actually executed, an annual average of nearly 83. Their offenses were: Arson and other willful burnings of property, 128; cattle stealing, 2; malicious killing, 1; forgery and uttering forged instruments, 62; horse stealing, 21; housebreaking in the day-time and larceny, 9; larceny in dwelling houses to the value of 40 shillings, 27; secreting and stealing letters containing bank notes, 5; murder, 101; shooting at, stabbing and administering poison with intent to murder, 30; rape, 31; riot (remaining assembled with rioters one hour after the riot act was read); 1; robbery from the person on the highway and

¹³*Stephen*, *History Crim. Law*, vol. 2, ch. 17, 82.

¹⁴*Parmalee*, *Crim. Proc.* 106.

other places, 96; sacrilege, 2; sheep stealing, 29; unnatural offenses, 15; high treason, 5. Total number of persons executed on above charges, 579. Some few years before 1837 the punishment of death had ceased to be inflicted in England except for the crime of murder.

In South Carolina, a little over a half century ago, death was the penalty ordinarily prescribed for felonies,¹⁵ while lesser offenses were punishable by imprisonment, whipping, or fine.¹⁶ The idea of associating reformation with punishment seems to have been then unknown to the public mind.

In the debate on the bill to abolish the death penalty in cases of privately stealing to the amount of five shillings in a shop, May 30th, 1810, Lord Eldon said: "For the purpose of preventing crime, the certainty of punishment, it is said, and not the severity of it, is the efficacious principle. It may be so; but no man will say upon the question of terror, that the threat of that extreme punishment has not a great effect—an effect not only upon the offender himself, but upon the rest of mankind. And when we talk of the severity of punishment, the objection to the law is diminished by the practice of it; for it is severe only in its frequent execution, whereas in practice its execution is extremely rare. It is needless for us to differ about theories, if the practice reconciles the difference."

In 1832 the lord chancellor declared his conviction that fear of death was a most effectual preventive of minor offenses, and after the experience of half a century he had never known a lawyer or politician able to point out to him a satisfactory substitute.

Deterrence is one of the supplementary complements of punishment. There are some natures which feel no sense of disgrace as a consequence of conviction and imprisonment for crime, and in order to deter them the sanction of a sharp cutting lash may at times be necessary. For such criminals, who though grown in body are mentally children, corporal punishment, an application of physical force, an argument addressed to the body alone, may be necessary or advisable to prevent the repetition of crime.

Maj. E. Spann Hammond, now residing in Blackville, told me, while I was reading law in an office adjoining that of Governor Evans in Aiken, that while he was engaged on a Richmond newspaper, prior to the abolishment of the whipping-post in this state,³he interviewed members of a gang of thieves, who had operated from New Orleans to Baltimore, but never in South Carolina, and inquired why they over-

¹⁵2 Faust 381; *State v. Fields*, 2 Bailey 555.

¹⁶Ib. 557.

looked this state. The reply was, "They whip for stealing in South Carolina, and that is something no gentleman will submit to." Some years ago, when notorious yeggmen, who had been engaged in breaking and entering postoffices and other places of safety deposit all over the country, were caught in South Carolina, the federal authorities acquiesced in their punishment first in the courts of this state, appreciating that a term on a South Carolina chain gang was a greater deterrent from crime than any punishment in a federal prison. As a result, yeggmen have since steered clear of South Carolina.

"Self-defense cannot be invoked to punish a crime that is consummated. It is preventive, but cannot be retributive."¹⁸ But in fixing the punishment of a convicted criminal, deterrence is a legitimate complement of punishment to be considered by the state.

"While punishment is based on justice, it must be proportioned to guilt. . . . There is no necessity . . . for resorting to the ground of expediency, as a means of grading punishability, when we can reach the same result by adopting the right principle of the adaptation of punishment to guilt."¹⁹

Dr. Francis Lieber, in his work on Civil Liberty and Self-Government, ch. vii, taught: that the punishment must adapt itself to the crime and the criminality of the offender; that nothing but what the law demands or allows be inflicted, and that all the law demands be inflicted. He denounced arbitrary, injudicious pardoning of criminals as a direct interference with the true government of law.

"The aim of the penal codes has always been to graduate and apportion the punishment according to the degree of guilt involved in each crime, and this assumes the possibility of measuring the relative amounts of guilt that are inherent in the various crimes defined in the codes. These degrees of guilt are expressed in terms of years of imprisonment, life sentences, fines or capital punishment; retributive punishment, inflicted on offenders and exactly apportioned in each case to the amount of guilt indicated by the particular crime committed. This is the ideal of justice that seeks embodiment in the penal codes."²⁰

Punishment in order to satisfy public opinion should be as nearly uniform as the circumstances of the case permit. Justice must, in fact, be just. It being impossible for the law to anticipate with exactness the punishment best suited to each individual offense, in most cases,

¹⁸Wharton, C. L. 4.

¹⁹Wharton, C. L. 12.

²⁰Smith, Crim. Law in U. S., 38.

latitude has been given to the trial judge for the employment of the necessary discretion, the exercise of which is so important in the administration of criminal law. In exercising this discretion the judges should make an effort toward uniformity in determining responsibility and punishment; the public and criminal should both be made to understand that in determining punishments the judgment of the court is not arbitrary, but is adapted under the law to the particular case; that it is just, upright and impartial.

This principle of retribution in punishment governs not only in the law of nature, and in the Holy scriptures, but in our criminal code. It is embodied in the common law, and has prevailed for untold centuries. These facts raise a strong presumption in favor of the principle.

The code prescribes punishment "according to the nature of the offense,"²¹ allowing the trial judge in some cases and within specified limits discretion "according to the aggravation of the offense."²² The punishment represents the penalty imposed by society upon the wrongdoer in satisfaction for his transgression of its law.

The admeasurements of guilt and of corresponding punishments are approximate only, except in cases where death or life imprisonment is prescribed. The usual expressions being, for example, "imprisonment for not less than three months nor more than ten years," or "not exceeding twenty years." This throws upon the trial judge the real burden of computing the degree of the prisoner's guilt within the limits prescribed by the code.

In discussing the bill to abolish the punishment of death in cases of privately stealing from a shop Lord Eldon said:²³

"I feel great doubt whether I can accede to the principle that the law should apply a fixed punishment to every case within a certain definition, excluding all consideration of the particular circumstances, or whether it may not be more advisable to leave the law on its present principle, which trusts to the discretion of the judge to distinguish between the different grades of the same offense. The necessity for this discretion very often exists, and I think the judge should not be divested of it. Without it great violence might be done to justice and humanity. . . . On the one hand you would be leaving heavy offenses inadequately punished, on the other you would be visiting light ones with unjustifiable severity."

²¹Crim. Code, sec. 105.

²²Crim. Code, sec. 190.

²³10 and 11, W. 3, c. 23.

"Until a man is proved to be guilty of a crime, we have no right either forcibly to reform him, or to punish him as an example to others, and neither reformation nor example will be promoted by assigning to him, after he is convicted a punishment disproportionate to his offense."²⁴

It was on this ground that Mr. Justice Watts bases his dissent in *State v. Cagle*, below referred to. The majority of the court held, that where a youth has been convicted of crime, the state in administering punishment may, as *parens patriae*, make and enforce reasonable laws looking to his education, welfare and protection in a reformatory, as a complement to his punishment. The Scriptures make a clear distinction between punishment and chastisement.

The editor of the last edition of Wharton says: "In the application of punishment, reform and example are to be kept incidentally in view. Conviction and sentence are to be according to justice; but prison discipline is to be applied so as to make the punishment conduce as far as possible to the moral education of both criminal and community."²⁵

There is abundant room for reform in our prison discipline, especially on our chain gangs. The criminal law is state law, and the state is responsible for its execution. The county chain gangs are under the supervision of the county supervisors, without any central control, and managed as a means of building good roads by cheap labor; this system has incurable defects. Local administrations are unequal and unlike. Each county has its own standards. Each new officer brings in a different rule. The execution of the sentence being unequal the sense of justice is offended. It is in the field of prison discipline that greater power should be given the State Board of Charities and the State Board of Correctional Administration.²⁶

Our code has regard to the reform theory of punishment in cases where it is practicable without sacrificing the demands of justice. The power of the trial judge to suspend, on conditions, sentence after it is pronounced, was before our court in *State v. Abbott*, 87 S. C. 466. Its was decided that the trial court had no such general and unlimited power at common law. The court stated: "It is the function of the legislative branch of the government to affix punishment to conviction of crime, subject to the pardoning power of the governor. The legislative power to set punishment for crime is very broad, and in the exercise of this power the general assembly may confer on trial

²⁴*Wharton*, C. L. 13.

²⁵*Wharton*, C. L. 13.

²⁶30 Stats. 888.

judges, if it see fit, the largest discretion as to the sentence to be imposed—as to the beginning and end of punishment, and whether it should be certain or indeterminate or conditional. But when the legislature provides the punishment, the trial court cannot set the provision aside.”

This decision, filed February 2, 1911, was followed and approved by the United States Supreme Court, December 4th, 1916, in *ex parte United States*, 242 U. S. 27. This is not the only time this South Carolina jurist has anticipated the United States Supreme Court in its announcement of legal principles.

As a result of the Abbott case, our legislature at its next session, January, 1912, gave to the circuit judges of this state the power in their discretion, except in cases of felony, to suspend sentences imposed by them, upon such terms and conditions as in their judgment might be fit and proper.²⁷

Section 994, Criminal Code, amended in 1912 (27 Stats. 529-531), with a view to the reformation of youthful offenders, provides for their commitment, in the discretion of the court, to a state reformatory during the period of their minority, unless sooner discharged by the authorities in charge of the reformatory, or by order of a judge. This statute was sustained in the case of *State v. Cagle*,²⁸ filed July 19th last. This decision holds: “There can be no doubt that the legislature has the power under the state and federal constitutions to classify crimes and criminals, and provide for differences in the extent or degrees of punishment for crimes of the same class, according to the circumstances, and for differences in the treatment or punishment of criminals of different classes for the same crime, provided such classification be reasonable, and all offenders of the same class be subject to the same treatment.”²⁹

“The old convict . . . needs severer treatment, . . . because his guilt is of the deeper dye. On the other hand, the youthful culprit is sentenced to a more lenient punishment, under more generous influences, because his grade of guilt is light, and the very lightness of this grade calls for that mildness of sentence which the reformatory system in such a case recommends.”³⁰

These views are vindicated by Lord Justice Fry, in an article in the *Nineteenth Century*, reprinted in 5 *Crim. Law Magazine* 16, and by President Woolsey in his *Political Science*, sec. 100 to 107, et seq.

²⁷27 Stats. 773; *State v. Teal*, 108 S. C. 489.

²⁸*State v. Cagle*, 109 S. C. . . . ; 96 S. E. 291.

²⁹*Graham v. W. Va.*, 224 U. S. 616.

³⁰*Wharton*, C. L. 13.

The reformation of the criminal, important as it is, is only one of the ends of justice. Some offenders are beyond reformation, others do not need it; all ought to be punished.

In the *Cagle* case, the court, by Mr. Justice Hydrick, says: "Classification may be based upon the nature of the offender as well as upon the nature of the offense. There are many sound reasons for basing it upon the age of the offender. If habitual criminals may be put in a class and imprisoned for life, in order that society may be protected against them, there are stronger reasons why youthful offenders should be put into a class, and kept at school, until they attain their majority, in order that they may be given the benefit of that training and guidance which may reform them and make them fit for citizenship. Society has learned from experience that preventive justice is preferable to punitive justice, and more effective for its protection. And so, the chief end of punishment—especially of youthful offenders—has come to be reformation, which was the manifest purpose of the legislature in founding the school to which these appellants were committed. Reformation requires time—more in some cases than in others; therefore, the legislature, in its wisdom, left it to the managers of the school to determine when it has been accomplished, within the limit of time prescribed by the statute, with authority to discharge or parole those placed under their tuition, when, in their judgment, the purpose indicated has been accomplished. It is scarcely necessary to add, that their discretion is not arbitrary, but subject to supervision, revision and control in the manner prescribed by law."

It may be added, that the power to discharge or parole may be more wisely vested in the managers of the school, who have supervision of the youthful offender during the period of his imprisonment, than in the first instance in the trial judge, who after trial loses all connection with the prisoner's life, and is ignorant of his conduct under discipline, which must be considered in relation to parole and discharge.

In his address before the Conference on Charities, Governor Manning said: "It goes without saying, I suppose, that probation, merited parole, educational and religious training, with an indeterminate, or at least indefinite, sentence law are essential."

This statute, before the court in the *Cagle* case, introduced in this state the use of the indeterminate sentence for youthful offenders committed to the state reformatory. It was to this feature of the sentence, where it exceeds the maximum punishment prescribed for the

crime, that Mr. Justice Watts dissents. The principle of the indeterminate sentence conflicts with the fundamental conceptions of retributive justice taught in the Holy Scriptures and upon which our criminal law has rested from time immemorial, and should only be used as complementary to the administration of punishment. Many advocates of the indeterminate sentence ignore, or deny, that retributive justice is right. They believe "that the true aim of imprisonment is not to inflict retributive suffering upon the prisoner but to make him fit for freedom, that the imprisonment should continue until that aim is accomplished, no matter how long it will take, and no matter what the prisoner's crime may have been; that, in perfect analogy to a hospital or an insane asylum, a prison is only a sanitarium, where every inmate must be retained and treated until he is cured, and can be safely discharged."

The answer is, criminals are responsible persons, not lunatics; where a person has sufficient mental capacity to distinguish between right and wrong, and their consequences, he is not to be relieved of the consequences because he has not moral ability to do the right, and to abstain from the wrong.

The introduction of the indeterminate sentence is an experiment of this generation, and while of use to society in most cases of imprisonment, it should not be allowed to defeat justice. And in order to be a benefit, it presupposes a reformatory system of treatment, with tests and means of judging the results in each individual case. It is the purpose of the State Board of Correctional Administration to develop such system.

"The indeterminate sentence is not applicable to all crimes. It ought not to be applied to the gravest crimes, denominated capital crimes, which do irreparable and deadly harm. . . . the possibility that one who has committed a deadly crime may be capable of repeating it, renders the danger to the public too great to justify the risk of releasing him."³¹

"On the other hand, for a wholly different reason, there may be a question whether the indeterminate sentence can be justly applied to all the minor crimes and petty misdemeanors. . . . It is a serious matter to deprive a human being of liberty by life long imprisonment; only an urgent necessity justifies the state in resorting to so extreme a measure. . . . There is a practical difficulty of procuring a verdict of guilty from a jury if such verdict entails the possibility of a virtual life sentence against the prisoner. . . .

³¹*Smith's Crim. Law in U. S.*, 69.

This difficulty disappears when the sentence is qualified by imposing a maximum limit to the possible duration of the imprisonment; and if the maximum limit is made large enough the indeterminate sentence thus limited seems the best possible treatment for misdemeanors and minor offenses generally. It does away with the evil of short, repeated sentences, and goes as far as public sentiment at the present time will approve. In all the states where the indeterminate sentence has been adopted, it is qualified by confining its operation between a minimum and maximum limit. Although it is hard to regard such limitation as legally defensible, there is much to be said in favor of it from a practical point of view."³²

Judge John Franklin Fort, former justice of the Supreme Court of New Jersey, afterwards governor of that state, said in an address before the National Prison Association in 1902, with reference to the indeterminate sentence: "Given the right conditions and an impartial, nonpartisan tribunal to control discharges, I would favor its application to all offenders. I would go a step further. I would have neither the minimum nor the maximum term fixed by statute, and possibly, not by the sentencing court. The proper way to cure those who are really criminal is as you cure other diseased persons; namely, keep them under treatment until they are cured, or at least, so nearly cured that they may be discharged safely." As to the method of discharge, he adds: "A board of managers of penal institutions is not always the safest body with which to leave the liberty of the prisoner. Even if it were constitutional and otherwise legal, to confer upon the managers of a penal institution the power of discharge, is it not of doubtful wisdom under our form of government? Even when the parole board is not identical with the administrators of a prison it is still a part of the executive and not of the judicial organization of the state. Is it not a matter of serious concern whether a court of discharge should not exist in each state, having judicial power of inquiry and action? Would not both the public and the prisoner feel safer in the hands of an impartial tribunal in which was lodged the ultimate decision as to discharge; a tribunal with power to hear the whole matter and with sole power to remand into custody for cause? Should not a man have the right to be heard on the question of his remand into custody?" He recommends that a judge should preside over such a court. "In the interest of absolute impartiality and assured public confidence, which are essential to the permanence of the system, it seems clear that some such protection should be thrown around it."

³²Ib. 71.

In passing, it may be noted that when our last legislature undertook to classify criminals, they put a heavier punishment upon women than upon men, convicted of offenses involving sexual immorality.³³ If the suffragists should gain power, this classification may be reviewed.

Indisputably under our constitutional system the right to try offenses against the criminal laws, and, upon conviction, to impose the punishment prescribed by law, is judicial, and it is equally to be conceded that, in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority.³⁴

As to the performance of such duty, Judge Osborne, of New Jersey, in the *Journal of Criminal Law and Criminology*, says:

"Their guilt having been judicially established, the criminals appear before the judge for the imposition of such penalty within the limits of the law as he may prescribe. Upon him rests the final responsibility. How important his decision, what infinite care should be exercised by him that punishment shall be adjusted accurately to the crime and to the needs of the prisoner. The consequences are momentous. The prisoner may have, probably has, a family dependent upon him for support; consider what it means to them. He may be a man of good purpose and high ideals subjected to too great a temptation; he may be youthful and led astray by vicious companions; he may be a first offender, or perhaps a victim of circumstances; possibly he is mentally irresponsible, or depraved or vicious or an old offender. Each case presents a separate field of study."

The problem must be solved promptly at the time of trial in order that justice may be speedily administered, without delay, which tends to defeat its effect both on the criminal and the community.

"Judges administering the criminal law should have some knowledge of scientific penology, sociology and psychology, criminal anthropology and statistics. They should have an intimate familiarity with penal institutions and a keen insight into human nature. . . . Uniformity must be attained under our present system by reaching a common understanding and acceptance of corresponding methods. Until the importance of a correct knowledge of the problem is realized and an earnest effort is made by the judges of the criminal courts to meet the situation by suitable preparation, little progress will be made."

³³30 Stats. 890.

³⁴*Ex parte United States*, 242 U. S. 27.