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SOME ASPECTS OF THE INDETERMINATE SENTENCE.

It is unnecessary to say in a Law Journal that the Indeterminate Sentence is a measure as yet untried. The phrase has passed into current speech, and a considerable portion of the public is under the impression that an experiment of the indeterminate sentence is actually being made. It is, however, still a theory, not adopted in any legislation or in practice anywhere in the world.

The misconception in regard to this has arisen from the fact that under certain regulations paroles are granted before the expiration of the statutory sentence.

An indeterminate sentence is a commitment to prison without any limit. It is exactly such a commitment as the court makes to an asylum of a man who is proved to be insane, and it is paralleled by the practice of sending a sick man to the hospital until he is cured.

The introduction of the indeterminate sentence into our criminal procedure would be a radical change in our criminal legislation and practice. The original conception was that the offender against the law should be punished, and that the punishment should be made to fit the crime, an opera bouffe conception which has been abandoned in reasoning though not in practice. Under this conception the criminal code was arbitrarily constructed, so much punishment being set down opposite each criminal offence, without the least regard to the actual guilt of the man as an individual sinner.

Within the present century considerable advance has been made in regard to prison reform, especially with reference to

the sanitary condition of places of confinement. And besides this, efforts of various kinds have been made with regard to the treatment of convicts, which show that the idea was gaining ground that criminals should be treated as individuals. The application of the English ticket-of-leave system was one of these efforts; it was based upon the notion that if any criminal showed sufficient evidence of a wish to lead a different life he should be conditionally released before the expiration of his sentence. The parole system in the United States was an attempt to carry out the same experiment, and with it went along the practice which enabled the prisoner to shorten the time of his confinement by good behavior. In some of the states reformatories have been established to which convicts have been sent under a sort of sliding sentence, that is, with the privilege given to the authorities of the reformatory to retain the offender to the full statutory term for which he might have been sentenced to state prison, unless he had evidently reformed before the expiration of that period. That is to say, if a penal offence entitled the judge to sentence the prisoner for any period from two to fifteen years, he could be kept in the reformatory at the discretion of the authorities for the full statutory term. It is from this law that the public notion of an indeterminate sentence is derived. It is in fact determinate, because the statute prescribes its limit.

The introduction of the ticket-of-leave and the parole systems and the earning of time by good behavior were philanthropic suggestions and promising experiments which have not been justified by the results. It is not necessary at this time to argue that no human discretion is adequate to mete out just punishment for crimes; and it has come to be admitted generally, by men enlightened on this subject, that the real basis for dealing with the criminal rests, firstly upon the right of society to secure itself against the attacks of the vicious, and secondly upon the duty imposed upon society to reform the criminal if that is possible. It is patent to the most superficial observation that our present method does not protect society and does not lessen the number of the criminal class, either by deterrent methods or by reformatory processes, except in a very limited way.

Our present method is neither economic nor scientific nor philanthropic. If we consider the well-defined criminal class alone, it can be said that our taxes and expenses for police and the whole criminal court machinery, for dealing with those who are apprehended and watching those who are preying upon

society, yearly increase, while all private citizens in their own houses or in the streets live in constant terror of the depredations of this class. Considered from the scientific point of view our method is absolutely crude and but little advance upon medieval conditions; and while it has its sentimental aspects it is not real philanthropy because comparatively few of the criminal class are permanently rescued.

The indeterminate sentence has two distinct objects; one is the absolute protection of society from the outlaws whose only business in life is to prey upon society; and the second is the placing of these offenders in a position where they can be kept long enough for scientific treatment as decadent human beings, in the belief that their lives can be changed in their purpose. No specific time can be predicted in which a man by discipline can be expected to lay aside his bad habits and put on good habits, because no two human beings are alike, and it is therefore necessary that an indefinite time in each case should be allowed for the experiment of reformation.

We have now gone far enough to see that the ticket-of-leave system, the parole system as we administer it in the state prisons (I except now some of the reformatories), and the good conduct method are substantially failures, and must continue to be so until they rest upon the absolute indeterminate sentence. They are worse than failures now, because the public mind is lulled into a false security by them, and efforts at genuine prison reform are defeated.

It is very significant that the criminal class adapted itself readily to the parole system with its sliding scale. It was natural that this should be so, for it fits in perfectly well with their scheme of life. This is to them a sort of business career, interrupted now and then only by occasional limited periods of seclusion. Any device that shall shorten those periods is welcome to them. As a matter of fact we see in the state prisons that the men most likely to shorten their time by good behavior, and to get released on parole before the expiration of their sentence, are the men who make crime their career. They accept this discipline as a part of their lot in life, and it does not interfere with their business any more than the occasional bankruptcy of a merchant interferes with his pursuits.

It follows therefore that society is not likely to get security for itself, and the criminal class is not likely to be reduced essentially or reformed, without such a radical measure as the indeterminate sentence, which, accompanied of course by scientific treatment, would compel the convict to change his course of life or to stay perpetually in confinement.

Of course the indeterminate sentence would radically change our criminal jurisprudence and our statutory provisions in regard to criminals. It goes without saying that it is opposed by the entire criminal class, and by that very considerable portion of the population which is dependent on or affiliated with the criminal class, which seeks to evade the law and escape its penalties. It is also opposed by a small portion of the legal profession which gets its living out of the criminal class, and it is sure to meet the objection of the sentimentalists who have peculiar notions about depriving a man of his liberty, and it also has to overcome the objections of many who are guided by precedents and who think the indeterminate sentence would be an infringement of the judicial prerogative.

It is well to consider this latter a little further. Our criminal code, artificial and indiscriminating as it is, is the growth of ages and is the result of the notion that society ought to take vengeance upon the criminal, at least that it ought to punish him, and that the judge, the interpreter of the criminal law, was not only the proper person to determine the guilt of the accused, by the aid of the jury, but was the sole person to judge of the amount of punishment he should receive for his crime. Now two functions are involved here: one is the determination that the accused has broken the law, the other is gauging within the rules of the code the punishment that each individual should receive. It is a theological notion that the divine punishment for sin is somehow delegated to man for the punishment of crime, but it does not need any argument to show that no tribunal is able with justice to mete out punishment in any individual case, for probably the same degree of guilt does not attach to two men in the violation of the same statute, and while in the rough view of the criminal law, even, one ought to have a severe penalty, the other should be treated with more leniency. All that the judge can do under the indiscriminating provisions of the statute is to make a fair guess at what the man should suffer.

Under the present enlightened opinion which sees that not punishment but the protection of society and the good of the criminal are the things to be aimed at, the judge's office would naturally be reduced to the task of determining the guilt of the man on trial, and then the care of him would be turned over to expert treatment, exactly as in a case when the judge determines the fact of a man's insanity.

If objection is made to the indeterminate sentence on the ground that it is an unusual or cruel punishment, it may be

admitted that it is unusual, but that commitment to detention can not be called cruel when the convict is given the key to the house in which he is confined. It is for him to choose whether he will become a decent man and go back into society, or whether he will remain a bad man and stay in confinement. For the criminal who is, as we might say, an accidental criminal, or for the criminal who is susceptible to good influences, the term of imprisonment under the indeterminate sentence would be shorter than it would be safe to make it for criminals under the statute. The incorrigible offender, however, would be cut off at once and forever from his occupation, which is, as we said, varied by periodic residence in the comfortable houses belonging to the state.

A necessary corollary of the indeterminate sentence is that every state prison and penitentiary should be a reformatory, in the modern meaning of that term. It would be against the interest of society, all its instincts of justice, and the height of cruelty to an individual criminal to put him in prison without limit unless all the opportunities were afforded him for changing his habits radically. It may be said in passing that the indeterminate sentence would be in itself to any man a great stimulus to reform, because his reformation would be the only means of his terminating that sentence. At the same time a man left to himself, even in the best ordered of our state prisons which is not a reformatory, would be scarcely likely to make much improvement.

I have not space in this article to consider the character of the reformatory; that subject is fortunately engaging the attention of scientific people as one of the most interesting of our modern problems. To take a decadent human being, a wreck physically and morally, and try to make a man of him, that is an attempt worthy of a people who claim to be civilized. An illustration of what can be done in this direction is furnished by the Elmira Reformatory, where the experiment is being made with most encouraging results, which, of course, would be still better if the indeterminate sentence were brought to its aid.

When the indeterminate sentence has been spoken of with a view to legislation, the question has been raised whether it should be applied to prisoners on the first, second, or third conviction of a penal offence. Legislation in regard to the parole system has also considered whether a man should be considered in the criminal class on his first conviction for a penal offence. Without entering upon this question at length, I will

suggest that the convict should for his own sake have the indeterminate sentence applied to him upon conviction of his first penal offence. He is much more likely to reform than he would be after he had had a term in the state prison and was again convicted, and the chance of his reformation would be lessened by each subsequent experience of this kind. The great object of the indeterminate sentence so far as the security of society is concerned is to diminish the number of the criminal class, and this will be done when it is seen that the first felony a man commits is likely to be his last, and that for a young criminal contemplating this career there is in this direction "no thoroughfare." By his very first violation of the statute he walks into confinement, to stay there until he has given up the purpose of such a career.

In the limits of this paper I have been obliged to confine myself to remarks upon the indeterminate sentence itself, without going into the question of the proper organization of reformatory agencies to be applied to the convict, and without consideration of the means of testing the reformation of a man in any given case. I will only add that the methods at Elmira have passed far beyond the experimental stage in this matter.

CHARLES DUDLEY WARNER.