

The Individualization of  
Punishment in Missouri  
Criminal and Penal Procedures

by Frederich M. Smith

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A Study in Criminology.

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## THE SCIENCE OF CRIMINOLOGY.

It is well in this attempt to examine the criminal procedure and penal systems of Missouri in the light of the modern science of criminology to take at least a cursory glance at the development of the science of criminology itself, for it along with all other sciences has undergone an evolution at times rapid, always yielding, though slowly at times, to dominant thought and philosophy or rather to methods of thought.

### The Classical School.

The first efforts at forming a "science" of criminology were made in the eighteenth century, and resulted in the formation of what has been termed the "classical school" of criminologists. Cesare Beccaria might well be called the father of this school; for while he was but one of many writers who were demanding reform in criminal procedure and punishment at that time, it remained for him to collect and state the principles set out by these writers and himself. This was done in his book "Crimes and Punishments," which appeared in 1764. His work was so well done that it has formed the basis for many reforms in the past and its principles are still found operative in many systems of criminal procedure today.

The principles underlying this school of criminology might be said to be three: 1. Conservation of individual rights. Individuals are equal, hence same crimes should always have like penalties. This was an age when individual rights were being contended for by sword, pen, and tongue, and it is not at all surprising that it should have found its way into demanded reform in criminal procedure and punishment. 2. Crime is a juridical abstraction; hence an invariably inflicted penalty must be attached to each crime. 3. The limitations of punishment should be prescribed by the social need. The utility of punishment was intimidation. The tendency was toward diminution of punishment.

"Back of these principles," says Parmelee, "though not so clearly formulated was a belief in the existence of a free will. The necessary corollary of this belief is that a criminal is morally responsible for the crimes he has committed. ...Consequently all persons who have committed the same crime were equally guilty and it became unnecessary to give any further thought to the nature of the criminal."<sup>1</sup>

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#1. Anthropology and Sociology in Relation to Criminal Procedure, pp.14, 15.

The classical school did its work, and accomplished much in the way of needed reform, and considerable in the way of establishing a "science" of criminology.

### The Positive School.

The "Positive" school of criminologists was inaugurated in 1872 by Lombroso, of Italy. He spent four years (1872-1876) in studying the anthropological characteristics of Italian criminals in the prisons of Italy. He attempted to distinguish a criminal type. His first step in this direction was taken when he discovered atavic characteristics in the skull of a noted criminal. He then set about a vigorous search for others, and in his first work on the subject, which appeared in 1876, he laid so much stress on this point that he blinded his readers to other matters of perhaps equal importance. He was a pioneer, however, and did a prodigious amount of research work and gathering of data and statistics which have been of immense value to the school. The publication of his work, at first little noticed, was soon followed by pamphlets by Garofalo and Ferri, both Italians, the former a lawyer, the latter a sociologist, who recognized the value of Lombroso's researches and findings, and attempted to make application of them to criminal procedure and punishment. Garofalo held that the character or dangerousness of the criminal should be the criterion of society's dealings with crime; while Ferri denied the doctrine of free will and individual responsibility, and directed scientific criminologists to society for their facts. Ferri's work on Criminal Sociology appeared in 1881, Garofalo's on Criminology in 1885.

This "Italian school," as it is frequently called by reason of the fact that its promoters were Italians, sought to use the inductive method, which had been doing so much for science in other fields,- namely, amass facts from large numbers of observations and from them learn the underlying principles, rather than depend upon a priori reasoning to lay down a theory or philosophy. Because of using this method it has been designated the "Positive" school of criminologists in contradistinction to the Classical school. The devotees of the Positive school are prone to characterize the Classical school as unscientific inasmuch as the latter is based upon the doctrine of free will or moral liberty, and moral liberty, say the positivists, is not reducible to "terms of scientific law." Be it said, however, that the classical school, whatever may be our opinion of its present worth, was much more scientific than the conditions existing in criminology and penology previous to its inauguration.

The principles of the Positive school may be summed up by saying that this school does not accept moral liberty as a basis for responsibility, because it is so intangible, so incalculable; but it studies physical, psychical, and sociological,- subjective as well as objective criteria of criminality. The causes of criminality may lie within or without the criminal, or both, all of them beyond the control of the criminal himself, without help. The fields of anthropology and sociology are thus scrutinized for causes of criminality.

These constitute the theoretical side.

For the practical side we have Criminal Jurisprudence and Penology, criminal jurisprudence having to do with Criminal law, criminal procedure, and penal codes; penology, with the treatment of the criminal class. Criminal procedure determines the criminal class, or rather is the process by which they are separated from society. Penology has to do with this class when thus separated.

Scientists of the "Positive" school would eliminate crime by finding and removing the causes of crime.

#### Definition of Crime.

In attempting a definition of crime if we are seeking for one in a legal sense only, the task becomes an easy one, for from such a viewpoint there are many excellent ones found in various treatises on law.

"A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, the punishment of death, imprisonment, fine, removal from office, or disqualification to hold and enjoy any office of honor, trust or profit in the State.

"A crime is a wrong directly or indirectly affecting the public, to the commission of which the State has annexed certain pains and penalties, and which it prosecutes and punishes in its own name and in what is called a criminal proceeding." 1

"A crime is an act or omission punishable as an offense against the State." 2.

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#1. Am. & Eng. Encycl. of Law, pp. 642, 3.

#2. McClain's "Criminal Law," p. 5.

Or we might cite the definitions of crime and offense which appear in the Statutes of Missouri and Kansas:

"Infamous Crime. Whenever the term 'infamous crime' is used in this or any other statute, it shall be construed as meaning every offense for which the offender on conviction or sentence is declared to be disqualified, or rendered incompetent to be a juror, or to vote at any election, or to hold any office of honor, profit or trust within this State."

"Crime, offense, and criminal offense. The terms 'crime,' 'offense,' and 'criminal offense,' when used in this or any other Statute, shall be construed to mean any offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted."

But when we remember that crime is purely social in significance, that crime, or offense against society occurs only because of association, then a sociological definition of crime becomes much more difficult than to find a legal definition. Legal crime is but social offense crystalized into statutes; or it is social offense writ large. Even in law books and legal parlance distinction is constantly made between mala in se and mala prohibita. Some sociologists have attempted definitions of crime which would answer the purpose of sociological examinations; but all such definitions have in turn been fatally criticised by other sociologists and criminologists as not being adequate,- too extensive or too refined. Indeed, can we not say with Mr.A.C.Hall,

"Often, very often, evil is but good out of its proper place. Things must be looked at in their historic setting, if we would rightly value them." <sup>1</sup>

In the steady march of progress, things once complacently tolerated by society become subject to general disapproval and final inhibition; and things once punished severely have been taken out the list of punishable crimes.

Professor Parmelee in treating of definition of crime, after pointing out the fact that the work of the criminal anthropologist can proceed without starting from a definition of crime, says:

"Nor is it necessary for the criminal sociologist to start out from a definition of crime, for his inductions must be added to those of the criminal anthropologist

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#1. "Crime and Social Progress," p. 5.

before the synthesis can be made from which will come the definition of crime. And as this synthesis can never be complete on account of the complexity of the phenomena involved so this definition can never be complete, and as this synthesis can never be final on account of the changes that are certain to take place so this definition can never be final." 1.

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#1. "Anthropology and Sociology in Relation to Criminal Procedure," p.93.



## CRIMINAL AND SOCIETY.

The new science of criminology, particularly of penology, cannot lose sight of the fact that the criminal is the product of society, though in this view our eyes are for a time closed to the fact that in heredity there may be elements in the criminal which antedate society. Once admit that the criminal is the product of society and you easily reach the conclusion that society is responsible for the crime and the criminal. Carry this to an extreme conclusion and punishment itself becomes a crime.

This idea of social responsibility for crime has given rise to Ferri's "law of criminal saturation," that at any given moment in a community the forces therein tending to criminality produce a definite amount of crime. As a certain volume of water at a given temperature will hold in solution a definite quantity of a certain chemical substance, so in a given social environment the number of crimes will be determinate. L. "Societies have the criminals they deserve," says Lacassagne.

Each individual is the produce of Society, but Society in turn is made up of individuals, hence social welfare is merely individual writ large; and society to best guard its welfare will guard and respect every individual's rights, and in the case of the criminal the tendency to look upon punishment for crime as merely juridical must not be allowed to blind us to his rights as a part of society. However much we may boast of our great progress in the treatment of criminals, we must admit that punishment even yet can be said to have its sanction in revenge, and revenge in its blind fury has in the past not infrequently gone too far even in law, and may do so yet.

"Inprisonment involves suffering; suffering breeds resentment, and resentment is conducive to crime." 2.

"Punishment is moral surgery." 3.

"Criminality is mainly a question of degree; ... we all have the potentialities of crime in us, greater or less according to our state of health and our conditions of life." 4.

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- #1. See Ferri's "Criminal Sociology," p.76  
 #2. C.J.Whitby, M.D., in Hibbert's Journal, July, 1910, Art. "Is Punishment a Crime?"  
 #3. Ibid p.859.  
 #4. Ibid p. 860

According to the old view the criminal is an "evil doer" because he "likes to sin," and hence deserves man's vengeance and God's wrath. <sup>1</sup> But now to the scientific criminologist what is needed is a careful and precise examination to determine the extent of his responsibility. <sup>2</sup>

#### Sanction for Punishment.

There have been different theories advanced to find sanction for the imposition of duties and restrictions upon individuals by society. One such theory was Rousseau's Social Contract. But inasmuch as this theory is quite generally discredited now we shall give it no further attention. Another theory is a phase of the struggle for existence. According to this punishment finds its sanction in the law of reaction against injury, found even in the plant world, due to the power of "organic matter to respond to impressions from outside." <sup>3</sup> In lowest forms of society or association individuals reacted against injury. Gradually individual reaction gave way to social reaction. In the tribe the power to take vengeance was finally given to the chief, who became religious head. Later his religious powers were delegated, and so the priests became the executors of punishment. Later this function passed from the religious field into the juridical. The steps are: 1. Private (individual); 2. Public (chief); 3. Divine (through the priests); 4. Juridical. In passing from priests to juridical it still retained its ethical significance.

So Dr. Whitby in an article in a recent number of Hibbert's Journal exclaims:

"The idea of punishment clearly has no claims to noble birth; it is born of the desire for retaliation, revenge." <sup>4</sup>

In this connection it is not without interest to note the language of Dr. Henderson. In speaking of the progress which has been made in the treatment of the criminal he says that

"the order of historical development and the order of logical thought may be indicated in a very general way by these words: revenge, intimidation, reformation, positive

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- #1. Hall's Crime & Social Progress. Introd. by Giddings, p. 9.
  - #2. Ibid page 9.
  - #3. Parmelee, p. 101.
  - #4. Vol. 8, No. 4, p. 851.

effort to reform the actually criminal, prevention, and socially constructive effort." 1.

Parmelee speaks of its evolution as an "aspect of the struggle for existence." 2.

Thus according to this theory punishment finds its sanction in social defense, "a necessity imposed by the struggle for existence." 3.

When the administration of punishment was under the control of the priests, punishment had religious significance, and was administered with religious formalities, and was for the avowed purpose of effecting penitence and purification within the person undergoing the punishment. Since the administration of punishment has passed from under ecclesiastical control it has lost some of this penitential and purifying character which must in the opinion of some penologists be restored.

Logically this subject at this point passes into the question of free will or moral responsibility, into which it will be impractical to go in this paper. Indeed, it might well be considered useless for us to do so, for it is a question which learned men have debated for centuries and it is still a mooted question.

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- #1. International Journal of Ethics, April, 1910, p.286.  
#2. Anthropology and Sociology in Relation to Criminal Procedure, p.104.  
#3. Ibid 104.

## CRIMINAL LAW.

"The peculiar province of the criminal law is the punishment of acts intrinsically vicious, evil, and condemned by social sentiment; the province of the police power is the enforcement of merely conventional restraints. . . . The difference here referred to roughly corresponds to that between misdemeanors and felonies or infamous crimes, or perhaps still more to that between mala prohibita and mala in se." 1.

"Criminal law is that branch of jurisprudence which treats of crimes and offenses."

Criminal procedure Is "the method pointed out by law for the apprehension, trial, or prosecution, and fixing the punishment, of those persons who have broken or violated, or are supposed to have broken or violated, the laws prescribed for the regulation of the conduct of the people of the community, and who have thereby laid themselves liable to fine or imprisonment, or both." 2.

Dr. F.H.Wines in discussing criminal law would have it resting on a three-fold basis:

"(1) There is in it the element of retribution seen by Kant, or the recognition of the rightfulness and obligation of expiatory sacrifice, a sacrifice made to the sense of justice which is inextinguishable in every human breast. (2) There is in it the element of deterrence seen by Hegel. Its judgments are monitory and minatory, they do not affect all persons alike, their influence over the minds of congenital and habitual criminals is very slight, but they did materially aid to restrain the feet of those who are naturally disposed to do the right, from wandering into crooked paths. (3) The criminal law is also, when it is rational and equitable, and is administered with intelligence and humanity, designed and adapted to effect the amendment of those subjected to its afflictive penalties. The model of human government is found in the divine order, in which we are chastened for our profit. The judgments of God are designed to lead us to repentance." 3.

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#1. Freund, "The Police Power, p.22

#2. Am. & Eng. Encycl. of Law p.730.

#3. Punishment & Reformation, pp. 287, 288.

Congress has authority to specify punishment for certain crimes which fall into four classes:

"(1) Those specified in the federal constitution or which Congress is therein given express power to punish; (2) Those committed within territory which is permanently subject to the exclusive jurisdiction of the United States such as the District of Columbia, and forts, arsenals, navy-yards, and public buildings, the sites of which have been ceded for public purposes by the state to the federal government; (3) those committed within territory subject to the jurisdiction of the United States, but not included within the limits of states admitted to the Union; (4) offenses the punishment of which is provided for by Congress under implied power to carry out the express provisions of the constitution." <sup>1</sup>

To the States belong all other matters relative to crime,—their definition, punishment, criminal procedure, etc., under general police powers; with some exceptions, those provided in the Federal Constitution and its amendments wherein are placed certain limitations on state power,

"such as that no state shall pass any bill of attainder or ex post facto law (Art.1,par.10; ...) nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (Amend.14)." <sup>2</sup>.

These stipulations in the Federal Constitution apply equally to State constitutions and statutes, while the State statutes relative to crime are in turn limited by the state constitutions wherein

"are usually found provisions as to ex post facto laws, due process of law, trial for the graver crimes only on indictment, the right of trial by jury, and other like guaranties."

"It is sufficient for the present to say," says McClain, <sup>3</sup>. "that the general criminal jurisdiction is with the state government, and only those acts affecting the safety of the federal government or interfering with its exercise of the powers granted to it can be made crimes under the federal law."

So in an examination of the criminal code and procedure of the State of Missouri we have opportunity to see pretty

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#1. Constitutional Law in the United States, pp. 91, 92. McClain.  
 #2. Ibid, p.91.  
 #3. Ibid, p.91.

accurately how the criminal stands to society,- that is to say how nearly apace with modern criminology Missouri has kept, because it is free to define what shall be considered crime and how the criminals shall be treated.

## INDIVIDUALIZATION OF PUNISHMENT.

The new science criminology may be said to center in the individualization of punishment, which has in one form or another been adopted by most of the schools of criminology today. This means the adjustment of penalties or punishment to the character of the criminals. This adjustment is usually made for the purpose of reforming the criminal by correcting within and around him those maladjustments which have caused or contributed to the criminality of the offender upon whom the hand of society has fallen through the operation of the law.

Individualization is essentially of two kinds, judicial and administrative. The former includes what has by some been termed legal individualization, that designation being meant for the laws which form the basis for or authorize either judicial or administrative individualization. An illustration would be legal classification of criminals. Were we to observe a strict regard for terminological exactitude we should say that legal individualization does not exist; for obviously law making must be general, and for future execution, hence individuals likely to come under penalties attached to certain laws can not be known by the legislators.

So in reality there are but the two forms of individualization, judicial and administrative. In the former the judge considers the conditions, in the latter individualization is left to the executors of the punishment. However sharply the distinction between the two may be drawn theoretically, in practice the line of demarcation becomes obscured at times by reason of the two overlapping. Indeed, it is necessary, in order for the best results to be brought about, for the two to work closely together. The diagnosis of the character of the criminal, his crime, and the probable resulting treatment is first made by procedure, and the application later made by penal administration. But it is apparent that final analysis of the character of the criminal must be left for penal administration, so that readjustment is quite likely to be necessary under administration. The real character of the criminal can be determined only after close observation carried over some length of time. This is impossible under the methods of the judiciary; besides, the functions of the court being chiefly to determine questions of fact concerning whether crime has been committed and by whom, the character of the criminal is left largely as a matter of judicial guess work. This is particularly true under our present criminal procedure though there is promise held out for the future in the reforms brought into our treatment judicially of juvenile delinquents.

The foregoing mentioned error must, if modern scientific penology is to be effective, be remedied, and individualization properly applied. This necessitates a criterion of judgment. The criminal act or the motive of the criminal in committing the crime may be considered, but are by many criminologists rejected as not affording a sufficiently broad basis on which to determine a prescribed penal treatment. From the standpoint of social defense, the criterion is the degree of danger with which the criminal threatens society, to determine which the whole personality of the criminal must be considered. So that a complete analysis will involve a knowledge of the crime, the social conditions, and the criminal, and the proper co-ordination of all these in the analysis will determine the individualization needed. All these factors are complex, but perhaps none more so than the personality of the criminal, to determine which it becomes necessary to critically examine the criminal act; the motive, so far as traceable; the life history of the criminal, to uncover any former criminal record if one exists; his intellectual training; his means of livelihood; his family connections; his habits, etc. These are sociological; and besides these there are the equally important and in some cases more significant examinations to determine the presence or absence of pathological or psychopathic conditions which might be contributory to if not the causes of the crime. And in the physiological and psychological examinations there is excellent opportunity to utilize the services of the criminal anthropologist. For whatever attitude we may assume as to the value of the deductions of the criminal anthropologists relative to a criminal type, atavism, etc., it can not but be conceded that the physical and mental condition of the criminal becomes of vital importance in prescribing a course of penal treatment calculated to return the criminal, at the end of his period of servitude, to a normal place in society as a citizen of use and probity.

The criminality must be considered from the view points of its origin, its type, and its intensity, and all three enter into the determination of the course of treatment. The origin is especially important, for differing origins of even identical crimes may need different treatment. The last of the three, or the intensity of the criminality may determine whether or not there is any chance for reformation. These three are not independent, but factors reacting upon each other in the final equation which expresses the value of the prescribed treatment.

The readiness with which types of criminals fall into groups results in overcoming what would otherwise be an insurmountable difficulty in individualization if each criminal



offender needed a different treatment. As it is the class to which each criminal belongs is determined, and the individualized punishment is applied to the group.

### The Indeterminate Sentence.

Chief among the agencies or means of individualizing punishment is the Indeterminate Sentence. In its strictest sense, the sentencing authority would simply commit, the termination of the sentence lying with the penal authorities entirely. In other words the commitment to the prison or reformatory would be as to an asylum or hospital, "until cured." Mr. Henry M. Boies has defined it thus:

"The 'indeterminate sentence' is a sentence which commits a convict to confinement in a scientific reformatory until he is pronounced fit to be restored to social freedom by a competent tribunal; with the condition that when this tribunal pronounces the convict incurable or incorrigible he shall be transferred to a prison, where secure seclusion and the cheapest maintenance are the chief objects, for continuous imprisonment." 1.

But an essential element is that the hope of release lasts until death. With the indeterminate sentence the key to his cell is put in the prisoner's hand, - his character becomes the key. This last statement will scarcely be accepted by those who reject the idea of moral responsibility in dealing with crime and criminals.

When once one accepts the idea that crime is a disease growing out of pathological conditions, both physiological and social, the acceptance of the indeterminate sentence follows as a matter of logic. Commitment or punishment becomes criminal therapeutics, and it is folly to discharge an inmate from the criminal hospital until cure has been effected, or at least until wholesome convalescence has been attained. Thus looked upon the importance of prison science becomes apparent. After serving their terms, as now determined, the convicts go free, as free as men of normal conduct, and how they then shall conduct themselves depends to a very great extent upon how they have been trained while under restraint. The average term served by convicts under present system is said to be three or four years.

It will not be out of place here to incorporate a brief history of the indeterminate sentence. It is doubtful if any one man can be credited with developing the idea of the indeterminate sentence. It was an outgrowth of the evolution of the individualization of punishment which was in

turn due to the development of the idea of reformation as an object of imprisonment and punishment. As early as 1839 Mr. Frederick Hill, Inspector of the Prisons of Scotland, advocated "distinctly reformation sentences" <sup>1</sup>. In 1868 Mr. Z. R. Brockway secured the passage of a law in Michigan in which the indeterminate sentence appeared at least in embryo. It was the so-called "Three Years' Law, applying to prostitutes, which authorized their commitment to the Detroit House of Correction, for an indefinite term, not exceeding three years, and had for its immediate effect a general exodus of women of that class from that city."

Mr. Brockway has been credited by some writers with having originated the indeterminate sentence; but it is probably the joint product of several great minds working upon the vexatious and important question of prison reform. But however doubtful may be Mr. Brockway's connection with the origin of the indeterminate sentence, no man in the world has done more towards applying it to the reformation of criminals than he. In 1876 he drafted the New York Statute "directing the sending of young first offenders to Elmira under an indeterminate sentence" with a maximum limit, the usual maximum fixed by the code. In 1870 at the National Prison Congress held at Cincinnati a series of resolutions were adopted, in which the indeterminate sentence has a prominent place. These resolutions Dr. Henderson credits to Dr. E. C. Wines. <sup>2</sup>.

In the Juvenile Court movement which really began as early as 1869 in Massachusetts, the indeterminate sentence appeared in one form or another.

The reformatory at Elmira, under the highly efficient guidance of Mr. Brockway has borne such good results in the reformation of criminals that other states than New York have taken up the matter until now something like fourteen or fifteen states have reformatories, the indeterminate sentence of necessity playing a part in all. But in no state has the indeterminate sentence in the strict sense been established in criminal procedure.

It is generally recognized that in American penology the chief object to be served is reformation of the criminal as the best and most economical <sup>means</sup> of protecting society. But reformation takes time. The punishment needed as well as its duration cannot be determined before hand. The short sentence does more to develop recidivism than reformation. Hence penologists have become convinced that sentence should be terminated

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#1. "Wines Punishment & Reformation," p.217.

#2. "International Journal of Ethics" for April 1910, p.286.

only after experience with the criminal has determined the time necessary for him to serve. Justice demands that society shall be protected from the criminal; on the other hand justice also demands that the criminal shall not be under duress or punishment when his liberty would not jeopardize society. The balance between this twofold demand of justice has been and is the crux of the science of penology. Mr. Eugene Smith thinks the ideal of justice has been reached in the theory of the indeterminate sentence, an ideal, though vague, which has been constantly before the formulators of criminal law for ages.

"Justice to the people by protection against crime; and to the criminal, not only justice but mercy in the form of Christian beneficence." <sup>1</sup>

The function of the State, according to the modern penologists, in inflicting punishment is not that of an avenger, but that of a protector both to society and the criminal. Hence all criminal law should have as its chief object public defense against crime.

The indeterminate sentence, embodying essentially the idea of reformation of the criminal, puts the state in the attitude of a benefactor to the criminal rather than a mere inflictor of "retributive justice." And as a result the reformed criminal will be compelled to look upon the state and its penal officials with gratitude, rather than as formerly with bitterness and defiance. And this in itself becomes a reforming and restraining force.

At this point, as perhaps explaining the reluctance with which the indeterminate sentence is adopted, it might be noted that objection is sometimes urged against the individualization of punishment in general and the indeterminate sentence in particular, in that it tends to an inequality of punishment for equal crimes. But this plea of injustice, especially if it come from the criminal himself, may be offset or removed by the credit system wherein the prisoner's condition is determined by a number of factors, not the least among which is his own conduct,- that is, the severity and duration of his punishment lie to some extent at least in his own hands,- making it possible for him to meritoriously mitigate it on the one hand and shorten it at the same time. Mr. Farmelee suggests <sup>2</sup> in this connection that this apparent violation of justice (that all are equal before the law) to the public mind can be explained, and the explanation have educational value, by the judge on pronouncing any sentence publicly stating the reasons for the sentence, "to show its justice both to the criminal and the public."

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#1. "Criminal Law in the United States," p. 68.

#2. "Anthropology and Sociology in Relation to Criminal Procedure," pp. 151, 152.

There will probably always exist in the public mind a well established idea that crimes vary much in gravity. The shades of variation in gravity may not in the popular mind be well defined or even the general lines of demarcation well fixed; but it is there together with a jealously guarded sense of justice, and together they will probably work to greatly delay the time when the indeterminate sentence, the great desideratum of scientific criminology or penology, shall in its complete application be put into practice or incorporated in its ideal form into our criminal and penal procedures.

But the demands made by the popular idea of justice looking to a recognition of the varying gravity of crimes can to a great extent find satisfaction in varying the duration of punishment rather than its nature. This will tend to a constant postponement of the strict application of the indeterminate sentence, though the underlying principle may be applied or made operative by fixing in the criminal procedure maximum and minimum limits between which the indeterminate sentence shall apply, leaving the working out of the principle as applied to each criminal to the practical penologists. As a matter of fact that is exactly what is being done, and we think wisely so; for we fear any attempt to unduly enforce the establishment of the absolute indeterminate sentence would mean its defeat, for personal liberty as a jewel, whose price has been much blood, will always be jealously guarded, and innovations in criminal procedure will come slowly.

A difficulty sure to be experienced in any application of the principle underlying the indeterminate sentence, the shortening of the duration by good conduct, is that the thought of shortening the sentence is likely to develop in some if not many instances hypocrisy or low cunning. The most unregenerate criminal is liable to assume an aspect of piety and good conduct closely simulating a heavenly messenger. The reformation is only assumed not real. It is a well known fact that where "good time" is allowed the recidivists are the most nearly model prisoners so far as prison discipline is concerned.

As great obstacles confronting the effective adoption of the absolute indeterminate sentence, Mr. Boies cites "two great physical reasons:" <sup>1</sup>

First. It necessitates the substitution of an entirely new criminal code, a simpler one, for our antequated one.

Second. It will necessitate an expensive remodeling of our already expensive prisons which have been designed and

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#1. "Science of Penology."

built "as places for secure punishment."

He also cites "three or four metaphysical objections to the indeterminate sentence," some of which we have touched upon. One we have not mentioned is the "unconstitutionality" objection. But seven or eight State courts have overthrown this objection he says.

An able writer Mr. Eugene Smith (previously quoted), holds that the indeterminate sentence "is not applicable to all crimes." <sup>1</sup> For the "cure" in any case is only probable, and a relapse is always possible. In cases where <sup>the crime</sup> is very grave with the possibility of recurrence with its great injury to society, permanent restraint is justified rather than release on the mere probability that cure has been effected.

The indeterminate sentence rigidly enforced might in some cases keep a minor offender in prison for life, if he failed to respond to the reformatory measures, and this has afforded some writers grounds for opposing the indeterminate sentence because it would be unjust to incarcerate for life a person who had been guilty of committing what is considered only a minor offense. But it must be remembered that in every case under the indeterminate sentence the key to a man's cell is practically placed in his own hands, and should he refuse to yield to the means instituted to effect his reformation and freedom he should be restrained to the maximum limit. As an instance it might be cited that drunkenness and disorderly conduct is a very common charge heard in police courts everywhere, and is considered a minor offence; yet society is beginning to realize that short sentences for this offence is worse than useless as it generally tends to recidivism. Hence, because of the really serious nature of the crime, because of the danger of worse crime likely to follow, the indeterminate sentence should apply even here, and commitment be "till cured."

"The indeterminate sentence defends the criminal from his worst enemy, himself, aims to awaken hope, to develop character, to infuse strength, to purify, elevate, reform the whole man; and thus it embodies the very spirit of the teachings and life of the Savior of men." <sup>2</sup>

It has been previously noted that in no state of the union has the absolute sentence been introduced into criminal procedure; but it has in a number of states been partially introduced by making the sentence indeterminate within the limits attached by the code to the crimes charged. Legal

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#1. "Criminal Law in the United States," p.69.

#2. Eugene Smith in "Criminal Law of the United States," p.74

battle has been waged against even this reform movement. Mr. E. Smith has summed up the grounds on which the various attacks have been made against the indeterminate sentence as follows:

"Investing judicial power in the boards of parole, which are given authority to discharge the convict; in encroaching upon the governor's constitutional power of pardon and vesting such power in the parole board; in depriving the court of all discretion in fixing the term of imprisonment; in depriving the defendant of the right of a common jury trial; and in inflicting a cruel and unusual punishment.)

- (George v People, 167 Ill.R.447;)
- (Miller v State, 149 Ind.R. 607;)
- (Shelton v State, 149 Ind.R. 641;)
- (Wilson v State, 150 Ind.R. 297)
- (State v Peters 43 Ohio St.R.629;)
- (Commonwealth v Brown, 167 Mass.R.144;)
- (Colon's Case, 148 Mass.R.,168)

(The one exceptional instance, mentioned above, in which this form of sentence was held to be unconstitutional, was the case of People v. Cummings, decided in the State of Michigan in 1891 (88 Mich.R. 249) The decision was rendered nugatory, however, by the prompt action of the people of the state in so amending the constitution of Michigan as to meet the objections upon which the decision rested; and in 1903 a new indeterminate sentence law was enacted in conformity with the new constitution. It has been held in several states that a statute establishing the indeterminate sentence properly applies only to offenses committed after the enactment of the statute, and that if applied to prior offenses it would be an ex post facto law. (Johnson v. People, 173 Ill.R. 131; Murphy v. Commonwealth, 172 Massachusetts R. 264; People v. Dane, 81 Mich. R.36.)

"The attack upon the indeterminate sentence law of Illinois was carried to the Supreme Court of the United States upon the claim that the law was repugnant to the Fourteenth Amendment of the United States Constitution, which declares that no State shall 'deprive any person of life, liberty, or property without due process of law.' The Supreme Court sustained the constitutionality of the law. (Dreyer v. Illinois, 187 U.S. 71). This decision rendered October, 1902, will probably be accepted as having definitely settled the legality of the indeterminate sentence." f.

Another objection rather more in the nature of a difficulty which has militated against the indeterminate sentence is the knotty question of who shall say when the sentence shall terminate, when the cure shall have been effected, or when the period of convalescence has been entered upon.

This brings up the question of pardons and pardon board, which we shall touch upon in another place.

#### Classification of Criminals.

The indeterminate sentence in practice presupposes an effective and complete reformatory system of penal procedure,—an efficient criminal hospital in other words; and the latter must really precede the former. And if our penal system is to be reformatory there must of necessity be classification of criminals. It would be folly to enter all patients in a hospital into the same course of treatment or keep them all together. Crime is coming to be looked upon as something akin to disease; at least it is a symptom of social pathology and calls for therapeutics as well as prophylaxis. To say nothing of such classes as convicted criminals might be divided into for the purposes of prison discipline and reformatory purpose, there are certain general classes into which criminals naturally fall and to which they must be assigned when their individual characteristics shall have been determined after proper examination and observation in one of the criminal pathological laboratories, which every reformatory should be. Various classifications have been presented by different writers on criminology. A recent writer in the Journal of the American Institute of Criminal Law and Criminology<sup>1</sup> examines several such classification. He rejects the one by Ellis<sup>2</sup> as not having clear principles of division. He also discards the one presented by Ferri<sup>3</sup> as lacking basic principle. But he accepts that presented by Drahm<sup>4</sup> as being "at once thoroughly scientific and easily applied in courts of law and other institutions dealing with the criminal class." Drahm's classification is: "Instinctive criminals, habitual criminals, and single offenders." Reverting to the hospital analogy the pathological phases of the three classes would be those in whom the disease has become incurable, chronic invalids, and sufferers from acute attack. For our sick we provide homes for incurables, sanitariums for those chronically ill, and hospitals or doctors at the residence for the ill. The parallel in criminal pathology would be, penitentiaries or prisons for

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- #1. C.A.Ellwood, Article in Journal for November, 1910, p. 536.  
 #2. Havelock Ellis, "The Criminal."  
 #3. Ferri's "Criminal Sociology."  
 #4. Drahm's "The Criminal"

the incurable criminal, reformatories for the habitual, and parole and probation for the single offender.

Crime is based on conduct, and conduct is psychological or relates to the psychological adjustment of the individual to others. Hence the classification of criminals must be psychological with the biological included in it as part. Hence these criminological laboratories in order to properly classify the criminals coming before them for observation, must be supplied with well equipped experts in these various lines.

As for penalties, Salielles would divide them into surety for incorrigibles, reform for criminals of such a character that reformation is likely to result from proper treatment, and intimidation for criminals who are criminals because of circumstances.<sup>1</sup>

To individualize properly there must be classification of criminals according to whether they are single offenders, habitual, or instinctive criminals., For the occasional criminal Parmelee would abolish "correctional punishment" retaining it only where necessary for social defense.<sup>2</sup> He would substitute payment of damages for short term imprisonment, where no bad motive is revealed in the crime. Where there seems to be a tendency towards crime he would have suspension of sentence together with payment of damages' For habitual and instinctive criminals the indeterminate sentence and the reformatory, and for persistent recidivists and incorrigibles, imprisonment for life, transportation, or death.

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#1. See p.156 Parmelee's Anthropology & Sociology in Relation to Criminal Procedure.  
#2. Ibid p.181.



## THE SOCIAL DEFENSE THEORY VS. THE IDEA OF RETRIBUTION.

"The theory of social protection is hardly broad enough to cover every case that may arise in the administration of the criminal law. It ignores too much the moral aspect of crime." <sup>1</sup>

That is virtually to say there must be some attention paid to retribution and expiation. Mr.Z.R.Brockway puts it thus:

"The just retribution for crimes or sin is always the necessary cost, to the criminal or sinner, of recovery." <sup>2</sup>.

In regard to the retention of the idea of retribution for crime which demands the equalizing to an extent the punishment for similar crimes, which Mr.Parmelee thinks will be satisfied by the element of duration, thus giving rise to maxima and minima, Mr.Charlton T.Lewis says:

"The criticism is founded on the false notion that his confinement is a punishment for his offense. Unless the conception of penalty and the thought of any relation or proportion between it and the crime is utterly abandoned, no right thinking on the subject is possible. As long as a man cannot be at large with safety to himself and others, he must be restrained. This is the dictate of mercy itself, and the particular act which has first disclosed to the community his character and its danger has no bearing whatever upon the question. It is the interests of society and of the convict for the future and not their memories of the past which are to be conserved." <sup>3</sup>.

It is quite evident that Mr.Lewis is viewing the subject almost entirely from the standpoint of the theoretical criminologist and penologist, for no other viewpoint would justify him assuming a position so radical that he has we fear lost sight of the historical development both of the question of personal liberty and the one of criminal procedure and its bearing on the popular mind. Furthermore, the question of retribution or expiation for crime has not by practical criminologists been disposed of or eliminated as having no place in the modern science of penology, as is evidenced by the quotations we have made ~~on a foregoing page~~ from such eminent penologists as Dr.F.H.Wines and Mr.Z.R.Brockway. Hence we fear that Mr. Lewis' assertion that right thinking on this subject can only be had by one who eliminates the factor of retribution is rather more dogmatic than wise.

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- #1. Dr.F.H.Wines, "Punishment and Reformation," p.290
  - #2. Art. in "The Reformatory System in the United States."
  - #3. "The Reformatory System in the United States," p.65

### Probation.

Another means of individualizing punishment is Probation. This is a suspension of sentence before commitment. It probably originated in Massachusetts in 1869 in their treatment of juvenile offenders. Adult probation was established in Massachusetts in 1878; in England in 1887, Belgium 1888, France 1891, in other countries later. Probation as an individualization of punishment is entirely under the control of procedure. Around it must be thrown safeguards; so suspension of sentence is made conditional, most of the conditions being generally well understood.

Unconditional release might be bad for the prisoner as well as for others likely or tempted to commit crime,- the deterrent effect is gone.

In order for this suspension of sentence rule to work properly intimate knowledge of the criminal by the judge must be had. Does he have it? Investigation in procedure is to reveal the character and extent of the crime rather than the type or character of the accused. The suspension should be determined by the character of the criminal rather than the circumstances of the crime or even the conduct of the criminal. Hence arises the necessity of probation officers to make thorough investigation for report to the judge relative to the character of the prisoner, the social conditions surrounding; in fact, on all points which are calculated to give the judge a comprehensive knowledge of the criminal about to be released under suspension of sentence.

But the work of probation officers before release is not enough; for after release under suspension of sentence it is highly important to have skillful probation work done. Far too much of the so-called probation work done for both juvenile and adult courts in the United States today is done by perhaps zealous but unskilled workers who are anything but scientific in their methods.

It is in this connection that Parmelee<sup>1</sup> suggests that the criminal should be compelled to pay damages to the injured, in proportion to his ability, - restitution. In practice this is done by some judges but it is not a regular part of procedure.

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#1. Anthropology and Sociology in Relation to Criminal Procedure, p.165

In America the probation work is done largely by private philanthropic agencies.<sup>1</sup> The police are to a great degree unfitted for probation work because of the lack of education and because of their "prejudiced attitude towards criminals."<sup>2</sup> For proper work to be done in probation there should be well educated officers of special training, employed by the State and giving all their time to the work.

As "a forerunner of suspension of sentence," some writers give the "judicial admonition," or the severa interlocutio of the Roman law, the monitio canonica of the canonical law, and in the ancient French law as correction par la bouche dei juge or blâme.<sup>3</sup> Ferri thinks this likely to do little good, as in some instances the lecture falls on unappreciative ears; otherwise the judicial apprehension is sufficient.

Individualization has been carried further in the juvenile court than in any other branch of our judiciary. The great change has come in the legal status of the juvenile offender as to his penal responsibility. The punishment is adjusted according to the discernment of crime on the part of the offender disclosed by the investigation. Below the age fixed at which responsibility is supposed to begin the treatment is not punitive but corrective.

#### Parole.

Parole is granting of freedom before expiration of sentence, under stipulated conditions of subsequent good behavior, and the freedom is even then under a degree of surveillance. Several states now have parole laws, as has also the United States, which we may later briefly examine when we are examining the Missouri parole law and its workings.

Under parole as well as probation there is great need for specialized "probation officers" to keep in constant touch with the probationers. Furthermore, the judge of the court before which the probationer has been tried should exercise opportunities to know what the released prisoner is doing so far as possible. Indeed it can be laid down emphatically that in any system of individualization the character of the judge is of supreme importance for his influence both during trial and after sentence has been pronounced is tremendous.

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- #1. Anthropology & Sociology in Relation to Criminal Procedure.
  - #2. Ibid p. 166.
  - #3. Ibid p. 166

### Juvenile Court and Procedure.

Here individualization is carried further than anywhere else. Its development has been gradual, and has effected some radical changes in criminal procedure as it affects the juvenile delinquent. The judge has a large measure of discrimination, and it has been pleasing to modern criminologists to see how far away from some of the worn out legal traditions the juvenile judges have in some instances advanced. It now appears that the reformed treatment of the juvenile delinquents has formed the entering wedge for more far-reaching reformation and innovations in criminal procedure. It is only a question of time till the new criminal procedure as applied to juvenile delinquency will, properly adapted, be introduced into the treatment of adult criminals; for after all adult criminality is only "grown up" juvenile delinquency. In the modern juvenile court scientific criminologists see the promise of needed reform in the treatment of adult crime and criminals. What the "state industrial schools" and community "homes for boys and girls" have become to the treatment of juvenile offenders, so the reformatory and hospital will become in general penology.

## MISSOURI AND HER CRIMINALS.

The Criminal Code.

It is but to iterate a well known and oft-repeated statement to say that there are wide differences in the criminal codes of the various states, both in the matter of what acts are made criminal and the penalties attached to even similar crimes. So great are the differences it is doubtful if there can be found a single act which has the same degree of criminality in all the states. Even the crime of first degree murder is variously punished in the several states. The differences in the criminal and penal codes of the various states have been set out to a considerable extent and it is unnecessary for us to go into it here further than to touch upon some underlying principles of all the codes.

"Some states," says Dr. Chas. R. Henderson, "have adopted penal codes which, in certain cases, are intended to cover the whole law, so that no act is a crime unless it is expressly declared to be so; in others the code abrogates the common law only in relation to acts prohibited, leaving in force the common law where it is not expressly set aside." <sup>1</sup>

In Missouri the criminal common law is theoretically held to be operative, though as a matter of fact practically all the provisions of the common law bearing on crime and criminal procedure have been incorporated into the criminal code. That is to say, those parts of the common law covering criminal procedure and crime have been transferred to the written law; yet wherein the provisions of the common law have not yet found their way into the code the common law holds. In fact in several places in the latest Missouri code references are made to the bearings of the common law upon procedure, etc.

The criminal code and procedure as they appear in the "Revised Statutes of Missouri, 1909" are incorporated in chapters 36 and 37, in Vol. 2, under the general headings "Crimes and Punishments" and "Criminal Procedure," covering pp. 1449 to 1711 inclusive, and sections 4339 to 5423 inclusive. In Chapter 36 under "Crimes and Punishments" are 9 articles and 593 sections while in Chapter 37 are 20 articles and 290 sections, or a total of 29 articles and 883 sections. In something over 400 of the 593 sections under "Crimes and Punishments" specific crimes are set out to which penalties are attached. Inasmuch as some of the sections specify more than one act which is made legally criminal,

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#1. Introduction to "Prison Reform and Criminal Law," p. <sup>XIII</sup> XIII.

sometimes as high as ten or more, it is safe to say that the chapter indicates in the neighborhood of 500 specific acts which are criminal in the eyes of the law and to which punishment in the form of penalty is attached. The penalties take on four forms; capital punishment, payment of money or fines, imprisonment in idleness, and incarceration at hard labor. The form of capital penalty is death by hanging, and attaches to five crimes: (1) Perjury, in trials on indictment for any capital offense with design to effect the condemnation and execution of the prisoner; (2) first degree murder; (3) Rape; (4) kidnapping; (5) train robbery. But in all these crimes the sentence may be changed to imprisonment, making five crimes for which a life sentence may be inflicted. Dr. F. H. Wines<sup>1</sup> in a recent article says that in Missouri imprisonment for life is had for "crime against nature, arson, burglary, robbery, and forgery," and the death penalty attached to "perjury and rape."<sup>2</sup> The discrepancy may occur by reason of revision of the code.

There are 67 sections under which sentence can be given, with sentences ranging from one year to 25 years (higher in cases mentioned above). There is one instance in which the minimum sentence is one year; 41 sections in which the minimum is two years; 6, three years minimum; 12, five years minimum, 1, seven years minimum; 8, ten years minimum. The maximum limits are: in 8 instances 2 years, in 11 instances, 3 years; in 76 instances, 5 years; in 21 instances, 7 years; in 17 instances, 10 years; in 3 instances, 20 years; in 3 instances, 25 years.

The jail sentences are to the county jails and vary from 2 days to one year. The minimum sentences run in numbers as follows: 2 days, 1; 10 days, 3; 50 days, 1; 1 month, 7; 2 months, 2; 3 months, 21; 4 months, 3; 6 months, 32; 1 year, 1. The maximum jail sentences run as follows; 10 days, 1; 20 days, 2; 1 month, 8; 2 months, 2; 3 months, 4; 5 months, 1; 6 months, 13; 1 year, 90.

The fines attached as penalties vary in amounts from \$3.00 to \$5,000.00

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#1. "Prison Reform and Criminal Law," p.118.

#2. Ibid, p.119.

### The Procedure.

It is not necessary here to enter into a discussion of the procedure further than to say that it is the jury system and accusation method, the jury fixing the penalty. The judge can reduce the sentence if he thinks it too severe, though he cannot increase the penalty if he thinks it too light. In the latter case, however, he can set aside and grant a new trial

### Missouri and the Indeterminate Sentence.

It is quite apparent from even the cursory glance at the criminal and penal code of Missouri that the indeterminate sentence at present plays no part in criminal or penal procedure of the State. As has before been stated the absolute indeterminate sentence has not as yet been introduced into the criminal and penal code of any State in the Union, though a form of it has appeared in several of them. The sentence is indeterminate within certain limits, usually the maximum and minimum limits fixed by the statutes for each crime. But Missouri has not even done this much to keep up with the progress of modern criminology and penology. Her code is still based on the idea of retributive justice to the extent that to each crime is fixed a definite penalty. To be sure the penalty is fixed between certain limits, thus allowing a certain amount of individualization if desired; but the determination of the penalty is previous to commitment; that is to say the sentence is definite, being fixed by the jury, the judge holding the power to commute.

### Missouri and Parole.

It would seem almost impossible, however, for Missouri in the midst of all the prison reform which has been taking place around her in neighboring states to fail to make some little progress in such reform, and so we find her introducing some individualization into her penal code as well as criminal procedure. Article XVIII of Chapter 37 of the Revised Statutes of 1909 is entitled "Pardon, Suspension of Sentence, Remittance of Fines and Parole of Prisoners;" and with the exception of certain provisions under "Penitentiary" whereby the prisoner by perfect conduct may reduce his term to three-fourths, all the progress in modernizing the penal code appears in this chapter. When we shall examine the methods of the penitentiary we shall note this three-fourths rule and one or two allied or contingent questions.

In seeking to examine the workings of the so-called "Parole Law" set out in Chapter 37 of Code we have been com-

pelled per force of circumstances to confine ourselves to Jackson County; but inasmuch as that county is the second most populous one in the State it is perhaps quite typical of the best application had of this law. The circuit court of Jackson is cared for judicially by eight judges, each over a division. Two divisions are devoted to criminal cases and are designated as "Criminal No.1," and "Criminal No.2." At present No.1 is under the administration of Judge R.S.Latshaw who devotes all his time to criminal cases. Judge E.E. Porterfield, in charge of No.2, sits as a judge of criminal cases only when a crowded docket makes his work necessary to expedite matters. The rest of the time he presides over Division No.7 as one of the divisions devoted to civil cases. (It might be of interest here to note that Judge Porterfield is the judge selected by the judges en banc to sit as judge of the juvenile division, sitting as such one day each week.)

Judge Latshaw has expressed to the writer in emphatic terms the opinion that the Missouri parole law "is the best law ever written," which brands him as an enthusiast in its application, so it will be interesting to observe his application of it to the criminals coming before his court.

But we shall first note some points of the law which have a bearing upon modern scientific criminology, especially such as point in the direction of individualization of punishment. It is perhaps well that the law be set out in full here.

#### Article XVIII.

##### Pardon, Suspension of Sentence, Remittance of fines and Parole of Prisoners.

"Sec.5349. Pardon.- In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper. (R.S. 1899, Sec.2747.)

"Sec.5350. Remission of fine or forfeiture.- For any fine imposed by any statute, and for any forfeiture of a recognizance, where the securities are made liable, the governor shall have power to grant a remitter, when it shall be made to appear to him that there is by such fine or forfeiture an injustice done, or great hardship suffered by the defendant or defendants, which equity and good conscience would seem to entitle such defendant or defendants to be relieved from. All applications for such relief shall be in writing, signed by the party or parties seeking such remitter, and accompanied by a statement of the facts of the case, signed by the judge or circuit attorney of the county in which such fine or



forfeiture is entered, and a certificate of the clerk that all costs have been paid; and the governor shall indorse his decision on each case and file the same in the office of the secretary of state. (R.S.1899, Sec. 2405.)

"Sec.5351. Pardon attorney-how appointed-term of office.- There is hereby created the office of pardon attorney to the governor to be appointed by the governor, by and with the consent of the senate, and shall hold his office for a term of two years; but the governor shall have the power to remove the pardon attorney from office whenever, in his opinion, the public interest may require it. If a vacancy shall at any time occur by removal or otherwise, the same shall be filled by the governor by appointment for the unexpired term subject to the confirmation of the senate, if in session, if not, then at its next session. (Laws 1901, p.178.)

"Sec.5352. Qualifications and duties.- Said pardon attorney shall be not less than twenty-five years of age, duly licensed attorney at law, and shall devote all his time to the duties of the office, except when otherwise permitted by the governor; he shall examine, index and report to the governor on all applications for pardons that may be submitted to him by the governor and perform such other and further duties as may be prescribed and required by the governor. A docket of applications for pardon shall be made and kept, on which applications shall be docketed according to the date which the same have been or may hereafter be filed, and each case shall be entitled to a hearing in its proper order, but the governor may advance any case for hearing when in his judgment the same shall be necessary and proper. (Laws 1901, p.178.)

"Sec.5353. Salary.- Said pardon attorney shall receive a salary of two thousand dollars per annum, payable out of the state treasury in monthly installments upon the certificate of the governor to the state auditor, who shall issue warrants for the same. (Laws 1901, p.178.)

"Sec.5354. Court or governor may suspend execution.- For good cause shown, the court in which the conviction is had, or the governor, may prolong the time or suspend the execution of any convict sentenced to the punishment of death; and no other court or officer shall have such authority, except in the cases and in the manner hereinafter provided. (R.S.1899, Sec.2665.)

"Sec.5355. Insanity after conviction, proceeding.- If any person, after having been convicted of any crime or misdemeanor, become insane before the execution or expiration of the sentence of the court, it shall be the duty of the governor of the state to inquire into the facts, and he may pardon such lunatic, commute or suspend, for the time being, the execution of such sentence, and may, by his warrant to the sheriff of the proper county, or the warden of the penitentiary, order such lunatic to be conveyed to the insane asylum, and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, it shall be executed upon him after such period of suspension has expired; and the expense of conveying such lunatic to the asylum shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the asylum for his board and clothing shall be paid as now provided by law in cases of the insane poor: Provided, if such person shall have property, the costs shall be paid out of his property, by his guardian. (R.S.1899, Sec.2666.)

"Sec.5356. Proceedings where party sentenced is insane.- If, after any convict be sentenced to the punishment of death, the sheriff shall have cause to believe that such convict has become insane, he may summon a jury of twelve competent jurors to inquire into such insanity, giving notice thereof to the prosecuting attorney. (R.S.1899, Sec.2667.)

"Sec.5357. Prosecuting attorney shall attend inquiry.- The prosecuting attorney shall attend such inquiry, and may produce witnesses before the jury, and may cause subpoenas to be issued by a justice of the peace for that purpose; and disobedience thereto may be punished by the court in the same manner as in other like cases. (R.S. 1899, Sec.2668.)

"Sec.5358. In case of insanity, execution to be suspended.- The inquisition of the jury shall be signed by them and by the sheriff. If it be found that such convict is insane, the sheriff shall suspend the execution of the sentence until he receives a warrant from the governor or from the supreme or other court, as hereinafter authorized, directing the execution of such convict. (R.S.1899, Sec.2669.)

"Sec.5359. Governor's duties on receipt of inquisition.- The sheriff shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of the convict, issue a warrant appointing the time and place of execution, pursuant to his sentence;

or he may, in his discretion, commute the punishment to imprisonment in the penitentiary for life. (R.S.1899, Sec. 2670.)

"Sec.5360. Female sentenced, if pregnant, proceedings.- If, after any female convict shall be sentenced to the punishment of death, the sheriff shall have reason to suspect that she is pregnant, he shall in like manner summon a jury of six persons, not less than three of whom shall be physicians, and shall give notice thereof to the prosecuting attorney, who shall attend, and the proceedings shall be had as provided in section 5358. (R.S. 1899, Sec.2671.)

"Sec.5361. If found pregnant, sentence suspended.- The inquisition shall be signed by the jury and the sheriff; and if it appear that such female convict is pregnant with child, the sheriff shall, in like manner, suspend the execution of her sentence, and transmit the inquisition to the governor. (R.S.1899, Sec.2672.)

"Sec.5362. Execution ordered when causes for suspension cease.- Whenever the governor shall be satisfied that the cause of such suspension no longer exists, he shall issue his warrant, appointing a day for the execution of such convict, pursuant to her sentence; or he may at his discretion commute her punishment to imprisonment in the penitentiary for life. (R.S.1899, Sec.2673.)

"Sec.5363. Power of courts to parole persons convicted.- The circuit and criminal courts of this state, and the court of criminal correction of the city of St.Louis, shall have power as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state. (R.S.1899, Sec.2815.)

"Sec.5364. Parole, how and when terminated- second parole.- The courts named in section 5363 of this article, or the judge thereof in vacation, subject to the restrictions hereinafter provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by said court, or any person actually confined in jail under judgment of a justice of the peace, or sentenced to the state industrial home for girls, or to the Missouri training school for boys, will, if permitted to go at large, not again violate the law, parole such person and permit him or her to go at large upon such conditions and under such restrictions as the court or judge granting the parole

shall see fit to impose; such court or judge may at any time, without notice to such persons, terminate such parole by simply directing execution to issue on the judgment, or in case the person shall have been actually confined in jail, the parole may be terminated by directing the sheriff or jailer to retake such person under the commitment already in his hands. After a parole has been terminated, as above provided, the court or judge may, in his discretion, after the payment of all costs in the case, grant a second parole, but no more than two paroles shall be granted the same person under the same judgment of conviction. If a parole shall be terminated, the time such person shall have been at large on parole shall not be deducted from the time he or she shall be required to serve; but the full amount of the fine shall be collected or the full time in jail, or the state industrial home for girls, or the Missouri training school for boys, be served the same as if no parole had been granted. (R.S.1899, Sec.2816, amended, Laws 1907, p.384)

"Sec.5365. Parole, except for certain offenses.- When any person of previous good character shall be convicted for the first time of any felony, except murder, rape, arson or robbery, and imprisonment in the penitentiary shall be assessed by the court or jury as a punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole shall be terminated, as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary. (R.S.1899, Sec.2817, amended, Laws,1907, p.385.)

"Sec.5366. Parole under section 5365, how terminated.- When any person shall be paroled under the provisions of section 5365 of this article the court granting said parole or the judge thereof in vacation may terminate said parole at any time without notice to such person by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and his parole has been terminated, and it shall be the duty of such officer, upon receipt of such certified copy of sentence, to immediately arrest such person and transport and deliver him to the warden of the penitentiary in the same manner as if no parole had been granted, and the time such person shall have been at large upon parole shall not be counted as a part of the

term of his sentence, but the time of his sentence shall count from the date of his delivery to the warden of the penitentiary. (R.S.1899, Sec.2818.)

"Sec.5367. Person paroled to execute bond.- When any person shall be paroled under the provisions of section 5365 of this article, it shall be the duty of the court, before or at the time of granting such parole, to require such person, with one or more sureties, to enter into bond to the state of Missouri in a sum to be fixed by the court, conditioned that he will appear in court on the first day of each regular term of court and during each and every day of such term of court during the continuance of such parole, and not depart without leave of court. Such bond shall be approved by the court, and forfeiture may be taken and prosecuted to final judgment on such bond in the same manner as now provided by law in cases of bonds taken for appearance of persons awaiting trial upon information or indictment. (R.S.1899, Sec.2819.)

"Sec.5368. Confined in jail under conviction from justice court, any court having appellate jurisdiction may parole.- Any person confined in jail under judgment of conviction before a justice of the peace may be paroled, his parole terminated and absolute discharge granted by the court or judge of the court having jurisdiction of appeals from justices of the peace in criminal cases in the county wherein the justice rendering the judgment resides, in the same manner and subject to the same restrictions as if such person had been convicted in said court. (R.S.1899, Sec.2820.)

"Sec.5369. Duty of person paroled to appear at each regular term, etc. It shall be the duty of any person paroled under the provisions of sections 5363 to 5375, inclusive, of this article, to appear at each regular term of the court granting the parole or at the court at which the judge granting the parole presides, during the continuance of such parole, and furnish, at his own expense, proof to the satisfaction of the court that he has, since his parole or since the last date at which such proof had been furnished, complied with all the conditions of such parole and conducted himself as a peaceable and law-abiding citizen. (R.S.1899, Sec.2821.)

"Sec.5370. Absolute discharge of person paroled, how and when granted. ~~4~~ - When any person who has been paroled under the provisions of sections 5363 to 5375, inclusive, shall have been at large under such parole for the minimum term prescribed by section 5371 of this article, and the court granting the parole shall be satisfied that the reformation of such person is complete and that he will

not again violate the law, such court may, in its discretion, by order of record, grant his absolute discharge. Such order of discharge shall recite the fact that such person has earned his discharge by good behavior, and such order shall operate as a complete satisfaction of the original judgment by which the fine or jail sentence or imprisonment in the penitentiary was imposed. (R.S. 1899, Sec.2822.)

"Sec.5371. Id. Not to be granted within what time.- No person paroled under the provisions of section 5364 of this article shall be granted an absolute discharge at an earlier period than six months after the date of his parole, nor shall such parole be continued for a longer period than two years from date of parole; but if he shall have been the second time paroled the time shall be counted from date of second parole. No person paroled under the provisions of section 5367 of this article shall be granted an absolute discharge at an earlier period than two years from date of his parole, nor shall such parole continue for a longer period than ten years: Provided, that if no absolute discharge shall be granted, nor the parole terminated within the time in this section limited, it shall be the duty of the court at the first regular term after the expiration of such time to either grant an absolute discharge or terminate the parole and order the judgment or sentence to be complied with, but if the court shall fail to take any action at such time, such failure to act shall operate as a discharge of the person paroled. (R.S.1899, Sec.2823.)

"Sec.5372. Persons paroled, disposition of costs.- It shall be the duty of the court granting the parole to require the person paroled to pay or give security for the payment of all costs that may have accrued in the cause, unless the person paroled shall be involvent and unable to either pay said costs or furnish security for the same. In the latter case the costs shall be paid by the state or county as in other cases without such persons being required to serve any time in jail for nonpayment of fine or costs. Such payment of costs by the state or county shall not relieve such person from liability for the same, but if at any time before his final discharge he shall become able to pay said costs, it shall be the duty of the court to require said costs to be paid before granting a discharge, and said costs when so paid shall be turned into the state or county treasury, as the case may require. (R.S.1899, Sec.2824.)

"Sec.5373. Trial for offense committed while under parole.- Any person who shall commit any offense while at large under parole may be arrested and tried in the same manner as if he had not previously been convicted or paroled. (R.S.1899, Sec.2825.)

"Sec.5374. Final discharge - citizenship restored.- Any person who shall receive his final discharge under the provisions of sections 5363 to 5375, inclusive, shall be restored to all the rights and privileges of citizenship. (R.S.1899, Sec.2826.)

"Sec.5375. Parole not to be granted while appeal is pending.- No parole shall be granted in any case while an appeal is pending, nor shall the action of any court or judge in granting or terminating a parole be subject to review by any appellate court. (R.S.1899, Sec.2827.) "

This law has been in effect about eight years, and as in the case of many other laws was preceded by a breaking away from former laws undesirable by resorting to technicalities. Judge Latshaw was preceded by Judge Wofford, a man on whom the reform movement in criminal and penal procedure had evidently made considerable impression. He saw coming before him constantly first offenders, occasional criminals, who had been sufficiently punished by mere arrest,- men whom arrest and arraignment had brought to their senses. Judge Wofford knew that to rigidly apply the law and send such to jail or prison under definite sentence would result in making hardened criminals of them in many instances. A good judge of human nature Judge Wofford would recognize which of the offenders held out promises and probability of reform and readjustment to society, and in such cases he would continue the case and admit the defendant to bail; and if on reporting at next term he found the once offender doing right and well, he would continue the case and finally dismiss it. The judge in this way had the present "parole" law practically in effect before it became a law. Doubtless Judge Wofford's attitude and official influence had much to do with putting the present law on the statute books. His official work demonstrated the necessity for and the good to be derived from such paroling of first offenders.

It will be noticed that the law provides for a bond to be furnished by the accused desiring parole. Judge Latshaw soon saw that one of the purposes of the law was being defeated by this provision. Some of the first offenders coming before him were not able to furnish bail in any sum of money even if it were made purely nominal. Being strangers and having neither relatives or acquaintances in Kansas City, that provision of the law requiring bail if rigidly enforced would

keep them in jail. Judge Latshaw recognized the difficulty, and remembering the example of his predecessor he broke with old precedents and established a necessary new one by laying emphasis on that part of the provision requiring bail which the judge would deem adequate. So the bail he demands in many cases is "personal bail," as he terms it,- the word of honor of the offender. And this is proving good; for if the prisoner is worthy of parole the given word is sufficient bond; if not, then the "police soon get him again anyway."

Judge Latshaw is enthusiastic as to the efficacy of the law, making the statement (which we have not been able to verify by statistics) that before the law became operative 50% of the inmates of the penitentiary were first offenders whereas now they constitute only about 10% or 15% of the inmates at Jefferson City prison.

At present there are on paroles issued by Judge Latshaw's court about 200 men who make regular reports to the court direct in person or in writing. The judge does not believe in probation officers and is strongly opposed to even making the police aware of who are on parole. This lack of surveillance or absence of true probation work will we fear prove a source of weakness in the present system. The judge devotes all his time to the workings of a very busy court. The docket is always crowded and so long as he refuses to use probation officers it means that real probation work is not done. We are aware that public opinion is divided on the question of tracing the discharged prisoner or keeping close watch over one on parole; but after all is said and done, it cannot but be recognized that the greatest test by which the paroled or discharged prisoner is confronted is immediately after returning to his home or usual abode. Frequently if not generally the occasional offender has become such because of associations; and on his release he is at once confronted with the problem of mastering his surroundings. At no time does he need friendly assistance, moral support more than then; and proper probation work is calculated to furnish it. De Quiros in his work on "Modern Theories of Criminality" <sup>1</sup> discussing the American method of probation quotes a writer, Bortolotts, as follows:-

"In the probation system we must distinguish two distinct aspects and periods: a preliminary one which we may call the period of investigation, and a supplementary one, that of surveillance, also of great importance on account of its highly philanthropic and efficacious nature."

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#1. "Modern Theories of Criminality," by C.B.DeQuiros, pp.155-158.



He then discusses the importance of investigation by a special officer to aid the judge in forming the proper estimate of the accused; then he passes to a discussion of surveillance and says:

"If environment and vicious and corrupted associations cause and determine the offense, regeneration cannot be attained except through a persistent contact with honesty and righteousness. This, then, is the mission of the officer, who needs to proceed with tact, prudence and courage, that the nature of the delinquent may require, until the aim that society has in view is happily attained."

And he thinks with Hughes<sup>1</sup> that upon the individuals who act as such probation officers does the "permanent and complete success" of the system depend. To effect or make permanent the work of reformation, the friendly surveillance just after release should be almost if not quite constant, and a busy judge with his hands full of the details of a congested docket certainly cannot give such attention to a dozen paroled offenders, to say nothing of 200 as Judge Latshaw has from his court.

Perhaps the objections urged against probation work of the kind mentioned is due to a wrong view point. Surveillance of any kind suggests to some minds police surveillance. Without doubt police surveillance of probationers or paroled prisoners is wrong. The surveillance must be friendly, and training such as makes policemen does not develop the attitude of friendly assistance to reformed criminals; for all policemen come to look per force of training, with suspicion upon anyone once an offender. The probation officer by training and instinct must look at things from another attitude entirely, must in fact have little or nothing in common with police or jailers.

So far as Missouri is concerned, little real probation work is done among her adult offenders, either before or after conviction-

It will be seen from the foregoing that in the so-called Missouri "parole law" there is somewhat of a mixing and confusing of parole, suspension of sentence, pardon, etc. Certain portions of the law are put into effect by the judges of the criminal courts, but under certain conditions they have no power to do anything other than commit to prison those convicted of crimes; viz., the law applies to first offenders, so that a recidivist must be committed. Furthermore, those convicted of murder, arson, rape, or robbery, cannot avail themselves of the provisions of the "parole law".

Further examination of this subject will be had under the heading of Missouri and the Penitentiary.

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#1. "The Probation System of America," Hughes,,1903.

Missouri and the Reformatory.

Were we under this heading to confine the discussion solely to what Missouri has done and is doing in the way of maintaining reformatories for adult offenders, the subject could be disposed of in few words. It is deemed important, however, that in order to set out the little Missouri has done in this direction we should glance at least briefly at some of the principles underlying what is being attempted in the United States in the way of establishing and developing reformatories, for it is a development, an evolution. It is well that a discussion thereof be introduced by the following language of Dr. Charles R. Henderson:

"The discussions of facts and experiences found in these four volumes<sup>1</sup> reveal a weak place in the administration of criminal law, not peculiar to the United States. We have no organization for the thorough and consecutive study of offenders. The trial by summary process is swift, superficial and bears on a few minor points. The trial in case of serious crime is usually too prolonged, but has no scientific method of finding out the life history of the accused. The court papers sent to the warden of the prison give him scant information on which to base his plans of education and reformation. Indeed, the assumption of the court and law is, perhaps in a majority of cases, actually contrary to facts,—the assumption that the sane man did the criminal act of his own free will. Much time is spent to little real purpose in proving or disproving "intent." Some of the most progressive judges have learned a lesson from the experience of the juvenile court where the procedure is free from these unproved and false assumptions, and where a frank patient, and sometimes expert study is made of the nature, habits, life history and surroundings of the accused." <sup>2</sup>.

It has been found even in Missouri that when we find among the juveniles those who are quite prone to become delinquent it is best to send them where they can be systematically studied and corrective measures put into operation. But if the world had waited for Missouri to establish and maintain a place where her adult offenders can be studied, classified, and the reformable ones put under a course of scientific treatment we should be many years behind where prison science is today. Missouri has no reformatory for adult offenders, the convicts being sent to jail or to the penitentiary, both of which

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#1. "Correction and Prevention," published by the Russell Sage Foundation.

#2. Introduction to "Prison Reform and Criminal Law." p. 18. <sup>XVII</sup>

we shall discuss later. To be sure the "parole" law to some extent takes the place of a reformatory; but "parole", especially when unaccompanied by efficient probation service, cannot take the place of the reformatory. The reformatory can be said to be a criminal clinic wherein the diseases of criminality are diagnosed and treated.

As has before been stated the modern idea of incarceration is not that a certain and predetermined amount of retributive justice shall be meted out to the prisoner. In olden times all kinds of torture and punishment were inflicted upon the incarcerated offender in forms so terrible that today it is difficult for one to believe that the descriptions thereof have not been greatly exaggerated. But reform came in slowly, and gradually the offender began to be looked upon as rather more of an unfortunate than the willing agent of an evil power. America seems to have early taken an advanced position in prison reform. To be sure Dr. Henderson is justified in saying as he did when speaking of the various laws on crime in the States of the Union,

"There is no great country which has tried so many experiments with the retributive principle;" <sup>1</sup>

Yet because of the advancement in reform made by this country McClain is also justified, while discussing the sanction of punishment in speaking of the

"American theory of criminal law, that punishment is to be inflicted for the protection of the people against the repetition of similar wrongs on the part of the criminal himself or others,"

and also saying that the American system has gone further than the English in its treatment of all men as equals before the law,

"recognizing that even the criminal shall not be unjustly, unfairly and unequally dealt with, and the adjustment of the punishment to the nature of the act and the moral capability of the actor is made a prominent consideration." <sup>2</sup>

But just as in nearly all things "the law" lags behind public sentiment and opinion, so prison reform has lead the reforms in criminal law and procedure. And the change in the attitude towards the criminal has demanded a change in his treatment. It has been seen that Missouri has attempted such change in

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#1. Introduction to "Prison Reform and Criminal Law," p. 15. XIII.  
#2. "Criminal Law," p. 2.

her "parole law," but between this and the penitentiary there is something lacking which we think will become apparent on further discussion.

Major R.W. McClaughry in 1898 read a paper before the National Prison Association in which he held that

"a successful parole system must (1) discover the first offender and treat him so that rehabilitation follows and (2) discover the habitual or professional criminal, or the one who refuses to reform, and incarcerate him so long as he remains in such class. To accomplish this it is necessary to have (1) adequate facilities, (2) complete knowledge of the personality of the criminal and (3) complete statistical record of his history." <sup>1</sup>

It is quite apparent that our present Missouri procedure does not "discover" all these things. It requires a criminal laboratory, such as is furnished by <sup>the</sup> reformatory.

Dr. F.H. Wines holds that the underlying and fundamental principles of every reformatory system are: (1) It must work with nature rather than against it. (2) It must gain the will of the convict. (3) It must supply a system of reliable tests to guarantee the genuineness of the reformation claimed for the liberated prisoner. <sup>2</sup>

"The most formidable obstacles to the successful application of these principles," says he, "are found not so much in the character of the subjects of reformatory discipline as in that of the officers by whom it is administered; disbelief in the possibility of reformation, lack of interest in the work, want of adaptation to it, and non-conformity to a sufficiently high standard of moral character and conduct." <sup>3</sup>

He thinks that the agencies of reformation are religion, education, and labor, which correspond to the moral, intellectual, and physical development of man, the simultaneous three-fold development being necessary to the perfectly balanced individual.

We have previously spoken of the functions of the indeterminate sentence in penology, especially in looking to the reformation of the criminal. The indeterminate

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#1 See report, also "Penal and Reformatory Institutions," p.182.  
 #2. "Prison Reform and Criminal Law," p.18  
 #3. "Prison Reform and Criminal Law," p.19.

sentence presupposes an effective and complete reformatory system of penology,- an efficient criminal hospital, in other words. Missouri has neither but great need for both.

The effectiveness of corporal punishment to insure discipline so much used under the old system of penology, is fear. Fear is the antithesis of hope, and when corporal punishment was abandoned in penology as an agency of discipline, it became necessary to replace it by something equally effective. The new agency was found in hope. It is brought about by placing the determination of the sentence in the prisoner's own hand, by making it contingent upon the readiness with which he yields to criminal therapeutics. The therapeutics demanded is such as will strengthen the power of self-control thereby placing within reach of the convalescent criminal the means of properly adjusting his conduct towards his fellow-men.

"The criminal," says Dr. Wines, "is a man with a weak, an abnormal, or a perverted will. Shall we deprive him of the power of resistance? or shall we seek to develop in him the power of self control? That is the problem of the prison." 1.

"It [the reformatory system] seeks the public protection through the reformation of criminals, and counts it of small moment whether the prisoner undergoing the reformatory process is pleased or displeased thereat." 2.

One of the last arguments used by the protagonists of the "retributive justice" principle in opposing some of the radical penal reforms and insisting that for every crime certain punishment should be inflicted upon the perpetrator thereof is that the principle of deterrence must be recognized; therefore against every crime for which a person might be convicted there should be set a certain punishment which would engender within man a fear greater than any pleasure which might be derived from perpetrating the crime. But this is met by the argument that the criminal lacks foresight; in the instinctive criminal because of congenital defectiveness, in the occasional criminal because it has become blunted by abnormal conditions (perhaps social), in the habitual because prison and punishment is looked upon as one of the "risks of the business." The typical criminal enters crime irrespective of the fear of consequences. Hence it is that fear works as a deterrent where it is least needed.

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#1. "Prison Reform and Criminal Law," p. 12

#2. Z.R. Brackway, in "Reformatory Systems in the United States."

Besides it is generally conceded that criminal statistics go to show that more criminals escape punishment than are caught. So the criminal who really weighs the consequences will see that the chances of not being caught by the hand of the law are greater than those of detection. Distant evil is outweighed by imminent pleasure. Furthermore, the element of deterrence presupposes that crimes are always premeditated by the perpetrator, when as a matter of fact they are frequently sudden, committed in the heat of passion or even in the confusion caused by the sudden converging of a number of previously separated trains of events.

As for protection to society, that is afforded as well by a complete readjustment of the offender to society as would be afforded by his continual incarceration or his elimination. And this rectification of the maladjustment which has superinduced the crime is the object of the reformatory system.

"The reformatory system," says Boies, "is based upon the demonstration of the science of criminology that the character of the person who commits a crime is different from that of an honest person."<sup>1</sup>

James A. Leonard sets out "certain great truths" which he thinks "are generally accepted by reformatory administrators:"

"(1) That improved environment, and conscience-enlightened will, may be successfully invoked to save the criminal from hereditary tendency or predisposition. (2) That the most hope-inspiring fact concerning humanity is the eternal improvableness of the individual man, as John Fiske puts it; especially if taken in hand for training when young. ... (3) That the individual in the reformatory institution should not be lost in the mass. ... (4) That the training of the individual will into wholesome subjection to the social will is a very important function of the reformatory."<sup>2</sup>

Mr. Brockway sets out the basic principles of the reformatory system as follows:

"The American reformatory prison system is based on the principle of protection in place of punishment, on the principle of the indeterminate sentence instead of the usual time sentence; and on the purpose of rehabilitation of offenders rather than restraint by intimidation."<sup>3</sup>

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#1. "Science of Penology" p.140.

#2. "Penal and Reformatory Institutions," pp.125, 126.

#3. Z.R. Brockway, in "Prison Reform and Criminal Law."

In the light of what the reformatory system is striving to accomplish for society (not forgetting even the criminal portion of it) as set out in the foregoing extracts from some of its leading protagonists, it is indeed regrettable that the great and populous commonwealth of Missouri is so slow in falling into line with the progressive reform movement. However, in the operation of the "parole law" there can be found promise of better things for the future. The devotees of the reformatory system can find some encouragement in the fact that in the last legislature a bill was presented looking to the establishment of a reformatory for youthful convicts. The bill was defeated for political reasons. The encouragement comes not from the fact that the bill failed but from the fact that at least sufficient sentiment in favor of a reformatory has been developed to get a bill into the legislature if not through it. Agitation for the purpose of generating public opinion is a requisite in every reform. A bill of an allied nature which also failed was the proposed establishment of a board of control and pardons. Its failure can also be attributed to "politics." But more of pardon boards in another place.

Missouri's backwardness in penal reforms is emphasized by the fact that fourteen states in 1910 had reformatories operating under indeterminate sentence laws.

As to what Missouri is attempting to do for the juvenile offender in the way of reform we shall not attempt to describe here, as we are chiefly concerned with the question of adult offenders. Suffice it to say that the state has introduced into its criminal code and procedure some marked and worthy changes, *relative to juvenile delinquency*

#### Missouri and the Penitentiary.

Missouri has the unenviable reputation of having one of the largest penitentiaries in the United States, if not in the world. It is located at Jefferson City, and has between 22 and 23 hundred convicts within its walls. Upon the basis of the principle that large bodies move slowly we might account for the reluctance with which the penitentiary at Jefferson City yields to reform in prison methods; but perhaps a reason nearer the truth will be found in the slowness with which the people of the state learn that the "game of politics" stands between many state institutions and efficiency. The political parties are very reluctant to let go anything the letting go of which will cut down the number of appointive offices. When popular opinion in Missouri has

grown sufficiently strong in demanding reform in prison methods that the politicians fear longer to delay satisfying the demand, then will we see the much needed reforms introduced. But until the people demand and enforce the complete divorce of such state institutions as the penitentiary <sup>from politics</sup> we shall have them marked by inefficiency. It is gratifying to note in this connection that the last legislature passed a bill abolishing contract labor at the penitentiary which has been a prominent feature of the institution heretofore. The position of warden has been a purely political appointive one,-- one which has been used as a politically remunerative scheme. Hence the securing of an efficient warden has been a matter of chance, with large probabilities of securing an inefficient one.

Add to this the fact that the contract labor system has been in vogue, and it can be readily guessed that "efficiency" in a warden was in the eyes of the legislature largely determined by the question of whether or not the penitentiary was made to show a surplus. Furthermore, with the office of warden depending upon his political qualifications rather than his knowledge and ability as a criminologist and penologist, and the further fact known that contract labor has been the chief <sup>means of</sup> discipline, it can readily be guessed the modern reformatory idea has little influence at the Jefferson City prison and that there are many things existing there which should not be and would not be if it were modern in its methods; and that such a guess is correct is easily demonstrable.

The laws relative to the penitentiary are found in Chapter 19, art.19, Revised Statutes of 1909. We shall not set out the full law here, but touch only such <sup>portions as</sup> ~~having~~ a bearing more or less direct upon the individualization of punishment. The penitentiary is placed under the

"control and direction of three inspectors [the state treasurer, state auditor, and attorney-general], with one warden, one deputy warden, one physician, one clerk, one chaplain, and one matron, with such turnkeys, guards, and other assistants as may be necessary."<sup>1</sup>

The tenure of office of warden and physician is appointive (by the Governor) the warden receiving \$2,250 per year, the physician \$2,000. The appointment of other officers is by warden, subject to approval of the inspectors. The warden has full control of the prison and prisoners.

Section 1612 provides for a kind of classification, as follows:

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#1. R.S.1909, Sections 1604, 1605.



"It shall also be the duty of the warden to classify the convicts in their labor, and shall classify them in their cells or sleeping apartments as follows: Class 1. Those who have been incarcerated for a period from two to three years. Class 2. Those who have been incarcerated for a period from three to seven years. Class 3. Those who have been incarcerated for a period from seven to fifteen years. Class 4. Those who have been incarcerated for a period from fifteen years to life sentence. And that the warden shall classify each above class with regard to reformation, according to their reputations, as made known to him."

However much modern penologists might be disposed to criticize this system of classification, it must be admitted that the general features of it have the merit of being accomplished with little pains or labor, a very desirable feature to those who are holding office by political appointment.

Sec.1617 provides that discharged prisoners, liberated at the door, shall be furnished by the warden a "suitable suit of clothes, including hat and shoes- such suit of clothes to be, if said convict be discharged between the first day of April and the first of October, of the value of eight dollars; and if such convict shall be discharged at any other time, of the value of twelve dollars." He also is to receive transportation to the county whence he was committed.

Sec.1656 establishes what is termed the "three-fourths rule," which provides that any prisoner who has served three-fourths of his sentence "in an orderly and peaceable manner, without having any infraction of the rules of the prison or laws of the same recorded against such convict shall be discharged in the same manner as if said convict had served the full time for which he was sentenced." This, too, without a pardon from the governor, with full restoration to citizenship in five years from date of discharge, provided no other indictment or information or conviction is found against him during such period.

Dr.F.H.Wines wrote <sup>1</sup> that Missouri in 1865 passed a law allowing commutation of sentence for good behavior. He says also:

"In Missouri, for faultless conduct maintained for eighteen years, even a life prisoner was entitled to release."

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#1. "Prison Reform and Criminal Law," p.14

We fear Dr. Wines must have been misinformed on this point, for according to judicial opinion duly handed down <sup>1</sup> the "three-fourths rule" above referred to cannot apply to one sentenced for life. This Missouri court opinion is in harmony with a recent decision handed down by the Attorney General of the United States relative to the application of the United States law providing that federal prisoners who have served one-third their term if they have made sufficiently worthy record <sup>may be paroled.</sup> The Attorney-General held that even in cases where the original sentence for life had been commuted to a definite term of years the one-third rule can not apply. This information was furnished the writer only recently by the parole officer at the Leavenworth Federal Prison.

The determination of the application of the three-fourths rule as established by the Missouri law is the work of the "pardon attorney," who passes upon the application, the prisoner's record, etc., and makes recommendation to the governor.)

It will again be noticed that in the case of the pardon attorney the office is appointive, hence has the coloring of "politics." And in connection with this question of pardons and parole, can very properly be brought up the question of pardons and pardon boards.

#### Pardon and Pardon Boards.

In an examination of the question of the indeterminate sentence as applied in the reformatory system we noted the fact that one of the great difficulties encountered is the question of how and by whom shall the termination of the sentence be determined. The difficulty of giving to this a generally acceptable answer has greatly hindered the popular acceptance of the indeterminate sentence.

"The correction of the delinquent is not a process of sanctification. It has more modest claims. It aims at endowing him with moral strength enough to prevent him from relapse." <sup>2</sup>

Yes, but how are we to know when the convict has gained this strength? It might be asked by way of answer, How does the teacher know when his pupils have learned their lessons, or the physician when his patient is cured? But in the case of the criminal <sup>the</sup> answer sought is more difficult of determination

#1. Ex parte Collins, 94 ~~Mo.~~ 22.

#2. De Quiros, "Modern Theories of Criminality," p.180

because the factors entering into the calculation are more numerous and more of them unknown ones. Mr. Eugene Smith calls attention to the importance of finding the answer and at the same time emphasizes the importance of probation work when he says:

"It must be remembered that the danger of a relapse into crime is most acute in the months immediately following the convict's release from prison."

Or another difficulty affecting the answer is that every practical penologist knows that where a reduction of time is allowed by reason of good behavior the most dangerous criminals are likely to become excellent prisoners. There must have been more than mere compliance with prison rules, there must have been a response to the efforts at reformation, a change indicating a strongly probable readjustment to society. Every criminologist recognized the difficulty of determining when the prisoner should be released. It is easy to say, when cured or reformed; But who knows and shall say?

The parole laws of the United States as applying to Federal prisoners is perhaps typical of advanced legislation on the subject, and that act, approved June 25, 1910, creates a parole board for each federal prison by appointing, ex-officio, the Superintendent of Prisons of the Department of Justice and the Warden and Physician of each prison. And yet, as excellent as this ex-officio board appears to be it is not free from criticism by eminent penologists. Not long since the writer had the pleasure of discussing the question of parole boards with Major McClaghry, one of the country's leading penologists, at present the warden of the United States Prison at Leavenworth, and as such ex-officio member of the parole board for that penal institution. He freely expresses the opinion that it is an error to have the warden and physician of a prison on the parole board because any officer of a penal institution, particularly the warden and physician, is almost certain to be prejudiced because of their work with the prisoners. Therefore, instead of having as now practically three United States parole boards, one for each prison, Mr. McClaghry would have one board, national in its functions, composed of the superintendent of prisons, a man of legal training, and a man of medical skill especially in mental and nervous disorders, the latter two to be men of such large public spirit as to be willing to serve without salary, their actual expenses to be borne by the United States. For states, Mr. McClaghry would have a board on which none of the prison officers would appear as members, the board to consist of one lawyer, one medical man, and a broad minded citizen, each serving without salary. And in case of both the national and the state boards each board should

sit at the prison from which parole is to be granted, and consider each case individually, seeing the prisoner if desired, and counselling with warden, physician, and chaplain. 1

Major McClaughry is not alone in this idea of boards of parole being separate from the prison management. Dr. C. R. Henderson 2, credits Judge John F. Fort, of the supreme bench of New Jersey, as having in his address to the National Prison Association of 1902 advocated a "court of discharge" to take the place of prison management in matters of parole.

### Missouri Penitentiary.

Reverting again to the penitentiary we will glance at it briefly. In physical appearance it is very similar to the usual penitentiary built seventy or one hundred years ago. It has the usual high wall around the buildings and grounds, the wall being built of stone, as are the majority of the inside buildings, though several of the factory buildings and a cell house are of brick. The cell houses are all oblong buildings, most of them built on the plan of cells in the center with corridors around cell tiers, though one of the cell houses has the central corridor, with cells against the outside walls, with outside windows in cells.

The conditions in the cell houses vary from very poor to fair. In the two older houses the cell structure is execrable. The walls are of massive masonry built in the thirties of last century. The cells are small, being about 5 X 9 X 7 feet, with small doors heavily barred with flat iron bars, hand constructed, the bars probably occupying nearly one-half the total area of the doorway. The cells are unventilated except through the doorway, and yet each small cell is occupied by two prisoners. The newer cell houses are better, so far as ventilation and sanitary equipment is concerned, though in only one of the five cell houses are running water and flushable water-closets furnished. In the other cell houses <sup>the</sup> "pestilential bucket system" is used, to borrow an expression from Major McClaughry. In the cell house with the central corridor and outside cells the cells are larger, but occupied by four men each. In none of the

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#1. So far as the parole system of the United States is concerned, it is worthy of note that parole officers are provided to supervise the paroled offenders.

#2. "Prison Reform and Criminal Law," p.17.

cell houses is the single cell idea used.

The discipline used in the prison is such as was common seventy or eighty years ago. We have not heard of corporal punishment being used, but the solitary confinement and even the wall rings are used freely. All convicts not physically unable to do so are required to labor, the majority of them at contract labor, in the shoe factory, saddle -tree factory, twine plant, clothing shops, etc. But inasmuch as the last legislature adopted measures looking to the elimination of contract labor at the prison, we will not here attempt to set out the well recognized evils of that system.

As for classification of prisoners, there is practically none which can be called scientific. First offenders and recidivists of the worst type are not infrequently to be found occupying the same cell. This classification is left to one of the under officers who in his work is governed by most anything else than a knowledge of criminology and penology. He knows his job will not last longer than a political change in the administration of the state, and therefore he does his work with the least effort necessary to draw his salary.

The prisoners all eat in <sup>a</sup> common dining hall, in strict silence. When present contemplated improvements in the kitchen and dining room shall have been completed the general conditions of those departments will be about all that can be desired other than the absence of the reformatory idea through <sup>out</sup> the whole prison.

It is also a matter of satisfaction to those who would see the conditions at the Missouri penitentiary somewhere near the standard demanded by modern penology, to know that the last legislature appropriated money to rebuild the two older cell houses, a very much needed improvement. It is expected that they will be torn down and modern ones erected.

It is not feasible within the limits of this paper to enter into an extended examination of prison discipline and methods as practiced in Missouri, further than we have. It remains, however, for us to briefly examine the condition of the Missouri jails, leaving for another paper the treatment of adult offenders in city holdovers and workhouses, and particularly in Kansas City.

The County Jail.

The county jail in Missouri is used as a place of safe keeping for prisoners committed for short terms, and for those who have been accused and are awaiting trial, and even for witnesses being held for examination. Dr. Wines in speaking of the American jail says:-

"A foul blot upon American civilization is the toleration of the association in idleness which characterizes our county jails and city lock-ups." <sup>1</sup>.

The writer has had no opportunity to examine any of the county jails in Missouri outside of Jackson County, but he has reasons to believe that the blot still exists in Missouri, if the Jackson County jails are a fair criterion, and it is to be presumed they are even better than the average.

"The imprisonment of a juvenile first offender" says Boies, "is usually a much graver crime than that of which he is accused. He should be regarded rather as a 'Presumptive' than as an actual criminal." <sup>2</sup>.

Mr. Boies <sup>3</sup> holds that any complete and effective defense of society against the criminal or crime must to be most efficient, have State execution. As the criminal procedure is determined by State laws, the penalties attached to infraction of those laws should in every case be applied by State officials. He says:-

"Much of the inefficiency of our criminal codes is due to the improper delegation of the execution of the State laws to the county officials; and to the confinement of convicts in county jails, managed by sheriffs elected for short terms, whose chief interest is in the profits to be gained from the office, and not the reduction of crime in the community." <sup>4</sup>.

This view is held by many other writers on penology and criminology. W. F. Spaulding in an address to the National Prison Association, 1898, <sup>5</sup> holds that neither city nor county should care for convicts. Indeed, the State owes it to the

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- #1. "Punishment and Reformation," by Dr. F. H. Wines, p. 313.
  - #2. "Science of Penology, p. 101.
  - #3. Ibid, p. 102, et. seq.
  - #4. "Science of Penology," p. 103.
  - #5. "Proceedings," p. 218.

convict to supply its own suitable place for his retention. He is, according to modern criminology, diseased, and should be put where he can be cured, rather than where the disease will be aggravated.

Professor Blackmar in an address before the National Prison Association, 1901,<sup>1</sup> said that statistics show that 66% of jail convicts are recidivists, hence new criminals are comparatively few, thus affording opportunity to reduce crime by proper reform methods.

To start with, then, our Missouri county jails are wrong in principle in that they are under county rather than state administration, and this evil is further aggravated by the county administration being under the control of party politics to a too great extent. Furthermore, jail methods have yielded slowly to reform. There is a mixing of prisoners, those under charge and those serving sentence.

"The general opinion of American experts in Penology," says Dr. Wines, "is favorable to the complete isolation of prisoners under arrest and awaiting trial."<sup>2</sup>

We fear that a description of the Jackson County jails would read like one we might expect from De Tocqueville or Irving in their rambles, except that the buildings may be more modern architecturally. But even that would not hold true at Independence. In the jail at Kansas City steel enters into the structure exclusively so in the cell stacks, which are four tiers high, the cells are open (barred) at each end, the doors opening on a central corridor common to two rows. Two men are placed in each cell, there being no classification other than black and white, male and female. No work is furnished the prisoners, and the only exercise they get is when for four hours each day, two in the morning and two in the afternoon, one-half the cell doors at a time are opened and the prisoners allowed to promenade up and down the corridor.

Silence is not enforced, and talking is common, even shouting from one tier to another. Special privileges are allowed some, if they can pay for them. The food is served to the prisoners in their cells in basins.

The sanitation of the jail is fairly good, being modern.

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#1. "Proceedings," p.253.

#2. "Punishment and Reformation," p.153

As in the prison, so in our jails, the reformatory idea is not prominent if indeed present. Great opportunity exists for improving the jail conditions by making them reformatory in character, introducing to this end systematic work for occupation, and moral and mental education.

#### Hospitals for Inebriates and the Criminal Insane.

It is with regret that we must say that Missouri has done nothing as a state for her inebriates or criminal insane, other than what was done one hundred years ago, except that the general treatment of the insane is better. The insane criminals are sent to the penitentiary unless their lack of mental balance becomes marked, then they are sent to the State mental hospitals. In neither place are they segregated, but mix with the other inmates.

We are treating the "drunks" in the same way in vogue for years. They are arraigned, given light fine and sentence and sent to the work house or jail to "lay out their fines." Let us hope we shall do more for them soon, give them some treatment adequate for the disease.

#### Conclusions.

From the foregoing it is quite clear what reforms are necessary in Missouri criminal and penal procedure. The parole law should be supplemented by the passage of an indeterminate sentence law and the adoption of a reformatory system for adult criminals. The penal institutions should be divorced from politics, while the jails should be under state administration.

Hospitals should be maintained for inebriates and the criminal insane.

The present parole law should be supplemented by an adequate and scientific system of probation, administered by officers in no way connected with the police.

In brief, the demands of the modern science of penology as they center in individualization of punishment, and public opinion must be created by constant agitation till such legislation as is necessary to establish them is forthcoming.