

PUNISHMENT OF CRIMINAL OFFENDERS *

The punishment of crime and the problem of the fitting sentences which ought to be imposed by the courts is continuing to arouse wide concern. It is no exaggeration to say that it is one of the important questions of our day which no responsible citizen can ignore. That the public at large is interested is instanced by the appearance of an article in a popular magazine — *Collier's* of 19 May last, by the Honourable Mr. Biddle at that time Attorney-General for the United States which is significantly entitled *Injustice in the Court Room*. That public interest is not confined to the United States is shown by the holding of a Penal Reform Conference in this City in March last, attended by numerous delegates at which some eighteen resolutions were passed. If I discuss a few general aspects of the question this evening you will be satisfied I hope, that it is topical and of public interest as well as in the public interest.

As you know the adequacy or inadequacy of the sentences imposed by the Courts of first instance is almost constantly before the Court of Appeal for review.

Without attempting to be exhaustive, it may be said, speaking generally, that the courts in imposing sentence are concerned with the protection of the public, the reformation of the individual and punishment of the individual. I do not state these in order of importance. It may be a problem in each case — especially where youthful or first offenders are involved — to decide which consideration deserves the most emphasis. The protection of the public may often be paramount. Where a certain type of crime becomes prevalent it may be in the public interest to impose severe sentences as the most effective deterrent to others inclined to commit the same type of offence. However, this idea may be carried too far, as exemplified by the Judge many years ago, who in sentencing a man to death for sheep stealing, informed him, "You are punished, not for stealing sheep, but in order that sheep may not be stolen".

The consideration which involves the reformation of the individual opens a wide field. It is a hard task for a Judge to decide when the welfare of the offender can safely be regarded as paramount, and when the protection of the public demands

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rigorous punishment. So many of these youthful offenders are personable boys and young men, who express themselves well, give the appearance of having been accustomed to comfortable living, and show little evidence of having been trained to curb their desires for things they cannot afford or that they have been taught or have learned to restrain themselves in any way. There is undoubtedly a disposition towards leniency for the youthful offender. One may easily feel that "there but for the grace of God, go I". Shakespeare's familiar passage in the "*Merchant of Venice*" — beginning "The quality of mercy is not strained, it droppeth as the gentle rain from Heaven" reflects the ideal of leniency.

It is hard to escape the feeling that the youthful first offender may have fallen into crime through a combination of circumstances for which he may not be directly to blame, and that he will profit by his unfortunate experience. But it must be recognized that there is also another point of view, which cannot be overlooked in a discussion of this kind. Shakespeare understood the dangers of leniency when he made the first Senator say in "*Timon of Athens*" that "nothing emboldens sin as much as mercy" (Act III, Scene 5). The offender may later feel that if at first he had been given a severe lesson, it would have stopped him again resorting to crime, but having been given suspended sentence or a light punishment he was led to believe that his offence was not very serious and that it did not matter much if he did it again.

The third consideration, punishment of the individual, also requires examination. In most cases a person who commits a crime does a direct injury to another individual. It seems only right that he should make good that injury, or suffer punishment for doing it. Society demands not only that he make good the injury to the individual, but that he should be punished for an offence against society. Freud's doctrine that there is no free will, but that all a person's actions are governed by internal forces independent of the will, cannot survive a scientific, a logical or a practical experience test. Under that theory crime and criminals would henceforth largely, if not solely, be the concern of the medical profession. However it is unwise to ignore the room for difference between the legal and medical approaches to the question of self-responsibility of many individuals.

Wise punishment ought to aim not only at preventing the offender repeating his offence but to act as a deterrent to those

who hear or read of his punishment. There are those who say rigorous punishment satisfies the unconscious needs of many offenders. Some persons who have studied the question, and who are by no means sadists, go so far as to assert that offenders may even resent the denial to them of an adequate punishment, because of the strengthening moral influence which punishment by a power stronger than themselves might give them. But the Courts, unlike psychologists are concerned with the community at large and not solely with the individual delinquent. Anarchy might easily result if all delinquents were dealt with only in accord with what is individually best for them.

To my mind, it is essential, under any theory of punishment, that the convicted person shall be made fully aware not only that he has committed a crime punishable by law, but also (where such is the fact) that he has done a moral wrong which deserves punishment. If for example, a youthful offender is sentenced for theft he should be made to realize that he has done a moral wrong in taking something which does not belong to him. So many young offenders seem to have such a complete disregard for the distinction between what is thine and what is mine, one might easily conclude that in committing the offence, they had not seriously realized they were doing anything that was wrong and which deserved punishment. It seems to be axiomatic that prevalence of crime among youth betrays a correspondingly low moral consciousness. Unless the offender is fully convinced that he has done wrong, it is far from likely that he may be taught or led to prepare himself against repetition of the offence. In such a case rigorous punishment seems the most effective, and the fear of such rigorous punishment may be the most powerful, deterrent.

Hardened criminals, drug addicts, youthful offenders and adult first offenders call for separate reference. The hardened or habitual criminal class, viz., those who have been in and out of gaol and penitentiary for a long period of years, some with ten or twenty convictions present two problems to be mentioned here, one arising in the proof of the offence and the other relating to the sentence. The habitual criminal becomes quite wily and cunning in committing crime and on appeal the Court may be driven to find that his conviction when founded on purely circumstantial evidence cannot be sustained when the Hodge's principle is properly applied. The principle in the Hodge's case no doubt was evolved in order to protect the innocent man but I am afraid we must recognize that it has

been skilfully invoked by the professional criminal as a shield for crime.

When the Court sentences one whose record discloses him to be a habitual criminal, it has every reason to believe that in the light of his past performances, he will again engage in crime on his release from prison. The odds favour certainty that notwithstanding the sentence then imposed, some member of the public will be killed, injured, or robbed by this same criminal in the future and that the taxpayers will again be faced with the expense of a trial to convict him and his likely appeal or appeals. That is one of the many instances in which the power to impose an indeterminate sentence would be very useful. It is difficult to escape the conclusion that habitual criminals are a menace to society, and ought to be kept in restraint indefinitely, if they cannot be fitted to return safely to society on parole of good behaviour. But whether the habitual criminal may be thus paroled in the course of time undoubtedly could be better decided by the Court if it had the opportunity of hearing the studied views of a board consisting of a psychiatrist, a clergyman, a vocational training specialist, a criminologist and the warden of the prison in which he is confined. The foregoing would of course involve amendments to the Criminal Code.

The case of drug addicts is pitiable. Some of them are quite young. Many of these cases come before the Court of Appeal and we have expressed the opinion that the penitentiary is the best available place at present to send them. The Court of Appeal has expressed the opinion more than once (see for example *Rex v. Bourassa* decided on 15 March this year) that it is to be regretted the Courts have no alternative for a drug addict but to herd him in with hardened criminals, whereas some effort ought to be made to reclaim the unfortunate if under proper conditions he could be turned into a good citizen. There ought to be a separate sanitarium prison where these unfortunates may be sent for indeterminate periods for scientific treatment pending their conditional release upon approval of the Court after hearing the studied views of a board of competent and trained persons. The sanitarium prison ought not to be near a large city, and care would have to be exercised that on their conditional release they are not permitted to go to a city where they may again succumb to the wiles of the drug peddler who may be keeping them in mind for prospective business. In this connection many people think that peddlers

and distributors of drugs ought on conviction to receive additional punishment by way of lashes.

The youthful offender is one of the great problems of our time. Generally speaking physical, intellectual and emotional maturity is seldom reached before the age of 24, and the years of restless instability between 16 and 23 are the focal source of crime and infection. In the United States it is said that while this group constitutes 13% of the population, it is responsible for 26% of all robberies, 40% of all burglaries and 50% of all motor-car thefts. We have the two classes in this group, the first offender and the offender with one or more prior convictions. In the opinion of many who have studied the question, the youthful first offender (except in the case of the graver crimes) ought to be treated as an erring or misguided youth and not as a criminal. In their opinion he ought to be sent for an indeterminate period to a Borstal Institute where he would qualify for his release by progressive stages as his conduct justified diminishing restraint. Confined to a steel cell on entry, upon good behaviour he would graduate to a dormitory, and if his good conduct continued he would be permitted finally to live in an "Honour room" with doors unlocked and windows unbarred. Educational and vocational training ought to be available as well as training in farming, dairying and animal husbandry, in order to train the young man to make a living when freed.

It would appear that a Borstal Institute of this type to be effective ought to be Dominion-wide in its scope and operation. It would be a national investment in good citizenship. It would be interesting to learn the value of property stolen and destroyed by the youthful offender group in Canada during the last ten years and the cost to the public of their convictions. We are told that the Borstal system operated successfully in England before the war. The British Prison commission reported before the war that only 8% of England's adult prison population were "Borstal boys". In contrast we were told on a recent visit to Oakalla prison, that much more than 50% of the first offender group there came back again on other convictions.

But the effectiveness of what is attempted to be done for the first offender group at Oakalla is seriously hampered by the general prison atmosphere and surroundings essential for a prison of that type. The Warden and his staff may be doing their duty well and faithfully, but they are gravely handicapped in respect to youthful first offenders by the system under which

they must carry on. A serious attempt ought to be made to do what English experience has proven may be accomplished under the Borstal System proper. But it is gravely to be doubted if that can be done without the introduction of a Dominion wide Borstal system.

One of the problems of a Borstal System is the selection of staff. They are to be found among those rare people who have the genius to stir the hearts and guide the minds of rebellious youth. To them the rebellion of youth is evidence of the fitness of youth to be led. Their wisdom and understanding arouses the obedience of youth in whom growth stirs, but a youth who knows not yet what stirs them.

Then there is the youthful offender (also between 16 and 23) who has been convicted previously of the same or another offence. If the Borstal System were in operation, and a "Borstal boy" were again in trouble the causes of the repetition of the offence could be examined. As it is today a second or third offender is given a more severe sentence on the ground he has not shown himself responsive to leniency. Some people are of opinion that whipping (lashes) in some cases may be more effective than a prison sentence. For example a young man aged 19 takes a motor-car for a joy-ride, and is given two months under Code s. 285 (3). Within a week or so after his release he takes a car again for a joy-ride, but this time is convicted of theft under Code s. 377 for which the minimum sentence is one year's imprisonment. One body of opinion asserts that if he had been given a whipping (so many lashes) at first instead of two months' imprisonment it would have been more likely to deter him from committing the second offence. However, that is a matter of opinion.

In recent years, before the War at least, some opposition arose in Canada to the whipping of convicted persons. But there are those who support the view that in respect to certain types of offences whipping has proven more than once to possess both reformatory and deterrent value to a convincing degree. Any committee which examines the subject of punishment of youthful offenders, cannot be said to have exhausted its studies, until it has fully explored the reformatory and deterrent values of whipping for certain types of offence.

The last class to which I will advert is the adult first offender, viz., aged 24 and upward. He may be the victim of economic conditions, of family troubles, or of other conditions which have weakened or strained his moral consciousness. On the

other hand perhaps the law has finally caught up with him. It may be of interest, if I refer to the Federal Corrections Act introduced in the United States Congress. It is stated to have the approval of many Judges including the Chief Justice of the United States, of Bar Association and Prison wardens. It proposes that the Court reserve final sentence until six months after the offender has been found guilty. Its operation is thus described by the Honourable Mr. Biddle in the Collier's article, which I mentioned at the outset.

John White aged 26 has been convicted with others of robbing a bank. The Judge determines he must go to gaol, but remands him for six months to a correctional institute where he is studied by psychiatrists, a doctor, a clergyman, a vocational training expert and the warden. They probe his family back-ground, observe his actions and study his needs. They prescribe medical care and dentistry, psychiatric treatment for neuroses and he is given occupational training as soon as he is adjusted to his new environment.

All the facts relating to the prisoner's personality, his attitude and behaviour are then reported to a Board of Corrections which the bill proposes.

This Board, composed of lawyers, criminologists and others skilled in understanding human behaviour, has been gathering information concerning the circumstances of White's offence including the opinion of the police, the prosecuting Attorney and White's neighbours. White is interviewed by one or more of the Board members who report their impression of him. Finally three members of the Board discuss the case with the Judge and recommend the sentence they deem appropriate. The Judge can conform to or reject the recommendation of the board as he pleases. The bill does not propose to deny the ultimate responsibility of the Judge, but it gives him an opportunity to act not in comparative ignorance, but with all available pertinent information before him.

But the place where the convicted person is imprisoned—and particularly with whom he is imprisoned—may be more important than the term of his sentence. The more one studies the matter, the more important does it appear (a) that youthful first offenders ought to be kept by themselves in an entirely different place and building, (b) that youthful offenders who have been in prison before ought to be kept separate not only from the habitual criminals but also from adult first offenders and (c) that adult first offenders ought to be kept separate from

the habitual criminals. Every effort ought to be made to prevent a prison becoming a school for crime. There are of course other aspects of punishment and sentence I have not touched on in these general remarks, but I hope I have said enough to invite your interested further examination of the subject matter.

I ought not to close without reference to the crime of murder as it is treated in the Criminal Code. There are those who think that our Code ought to be amended to acknowledge degrees of murder, as is done in some other countries. To illustrate: if the evidence is entirely circumstantial, it is said the jury ought to be instructed they may find the accused guilty of murder in the first degree or murder in the second degree, but that if they find the latter, the death penalty is excluded, and a life sentence is the maximum: if *A* shoots at *B* and kills *C* instead, or if in a struggle between *A* and *B* a revolver is discharged and a bystander *C* is killed, it is said the jury ought to be instructed that at most it is murder in the second degree with life imprisonment as the maximum sentence.

Again, if *A* kills *B* in the course of a medley brawl, it is said the jury ought to be instructed they may find *A* guilty of first degree murder carrying the death penalty or guilty of second degree murder carrying life imprisonment as the maximum. Also, if *A*, *B*, and *C* (or others) agree together to hold up *X*, in the course of which *X* is killed by the hand of *A*, then it is said the jury ought to be instructed (subject to Code s. 69 (2)), that they may find *A*, *B*, and *C* all guilty of first degree murder carrying the death penalty or they may find *A* guilty of first degree murder carrying the death penalty, and *B* and *C* guilty of second degree murder carrying a maximum penalty of life imprisonment.

The illustrations just now given are concise examples only and are not intended to be factually exhaustive. They point to what is believed reasonable analysis must establish as an incontrovertible conclusion that there are really degrees of murder and that the distinction between those degrees can hardly fail to be recognized by a jury in the evidence before them. In the opinion of some at least they reflect more justly and accurately than the present statutory law of murder, the correct thinking and mental re-actions of those whose duty it is to sit on juries.

I have refrained from referring to the causes of delinquency and crime. Even general reference thereto would unduly prolong those remarks, and very likely distract attention from the aspects of punishment I have endeavoured to place before you. It must

be emphasized, however, that an informed knowledge of the direct and indirect causes of delinquency and crime is fundamental to the formation of an intelligent opinion upon what constitutes curative or adequate punishment. The experience of history leads us to reflect that to make man reasonable it is not enough to educate him, and that it is not enough for justice to be proclaimed for everyone to support it. To my mind curative punishment is foredoomed to failure in the individual case unless that individual comes to appreciate that he has done wrong and sincerely repents his wrong-doing and becomes animated by a desire to do what is right.

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