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Rehabilitation of the First Offender: Suggestions for Improvement of the Present Texas Law

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However, a failure on the part of the SEC to so act does not preclude the desired result, since the way is then left open for the states themselves to deal with the situation, either by legislation or judicial decision. Of course, a charter or by-law provision allowing such reimbursement would adequately handle the outcome, but such is an unlikely inclusion in by-laws.

In conclusion, it is submitted that litigation will be facilitated, the bench will be aided, and solidarity and uniformity will be developed in the law if the following rules are followed in the future: (1) The management group is entitled to draw on the corporate treasury to finance their proxy fight whenever the expenses are fair and reasonable, whether they win the election or not. (2) The contesting group is entitled to be reimbursed for expenses incurred in their proxy fight when they win, if their expenditures are fair and reasonable. (3) The contesting group is entitled to be reimbursed when they lose if they gather a designated percentage of the total votes cast (10%–15%) and if the expenditures are fair and reasonable.

Gerry N. Wren.

REHABILITATION OF THE FIRST OFFENDER: SUGGESTIONS FOR IMPROVEMENT OF THE PRESENT TEXAS LAW

Retribution is no longer the dominant purpose of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.[1]

This statement by Mr. Justice Black expresses the viewpoint of the modernized codes of criminal jurisprudence, and it is felt that the times and conditions have made it apparent that legislation aimed at the proper type of rehabilitation must be made effective for those deemed worthy. Texas could well follow the examples of the federal laws and other jurisdictions which have demonstrated that the proper type of probation is effective in eliminating

[1] *Williams v. State of New York*, 337 U.S. 241, 248, (1948).

the repetition of unlawful activity by the first offender, as well as preventing a useless drain on the public coffers.

Texas has in its statutes two provisions by which a convicted person may secure a suspension of the sentence imposed. First of all, there is the Suspended Sentence Law,[2] which allows the accused to request that the jury recommend to the trial judge that his sentence be suspended, and if the jury should so recommend, it becomes mandatory on the court to follow that recommendation. Upon having the sentence suspended, the convicted is once again free to engage in social intercourse, but the objection to this statute is that he is in no way required to subject himself to any guidance or counseling by the court or anyone else trained to give him advice as to his attempt to rehabilitate himself. It is submitted that this is not the proper type of statute for carrying into effect any plan by which society seeks to aid the convicted to ultimately secure his "place in the sun".

In the first place, the jury is never advised regarding the prior history and character of the defendant. All they see and know is what is displayed to them in the course of the trial, and if the accused has been properly defended, his character will not be put in issue if there are any marks upon his record which the prosecution could use for purposes of impeachment. It is only necessary to show no previous felony convictions. It is therefore easy to understand how a great number of juries have been "seduced" into recommending that a sentence be suspended when the defendant is not of the deserving variety. As will be pointed out more fully later, the mere fact that this law does grant suspended sentences to the deserving type of person is not sufficient reason to retain the statute when there exists other statutes which would grant probation to the deserving type of defendant subject to specified conditions and required counseling.

Secondly, this law places the power of granting a supended sentence in the hands of persons who know nothing about such matters. The trial judge, even though he may be advised of the record of the defendant, is powerless to prevent the sentence from being suspended when the jury has so recommended. It is not anomalous to assume that a criminal judge is far more learned

[2] TEX. CODE CR. PRO., (1925), art. 776 *et seq.*

and far more capable of dealing with such matters. I dare say that there is not a judge in this state who is not only striving to see that justice is done, but also that the defendant is given a "fair shake" and, if possible, a chance to correct his conduct and become a useful and beneficial member of society.

However, the major failing of this statute, and one that is of great importance to society, is that the convicted person, free on suspension of sentence, is not subjected to any forceful conditions, nor is he required to periodically met in counsel with an officer trained to advise him regarding any troubles that he may encounter in securing a peaceful, happy, and lawful life. His only deterrent is that if he be again convicted, his supended sentence is revived and he will have to serve his sentence. The meat of this nut is that the defendant is not guided away from a life of crime, but is put on his guard not to be caught, or better still, not to be convicted. What possible benefit can such a situation serve to society by way of aiding the convicted from becoming a repeating offender? An absolute essential to any good probation system, and what the defendant needs most of all, is a helping hand and periodic counseling with those trained in such matters. Once more, this counseling need not end with the convicted alone, but should also extend to his family, friends, employer, etc.

The second method by which a convicted person may secure a suspension of his sentence is granted by the Adult Probation Act.[3] This statute, passed in 1947, gives the trial judge of "courts of original jurisdiction" the power and discretion, upon conviction or plea of guilty, to probate the sentence for "any" offense, other than murder, rape, and offenses against morals, decency and

[3] TEX. CODE CR. PRO., (1925), art. 781b, sec. 1.

"The courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense except murder, rape, and offenses against morals, decency, and chastity where the maximum punishment assessed the defendant does not exceed ten years imprisonment, and where the defendant has not been previously convicted of a felony, to suspend the imposition or the execution of sentence and may place the defendant on probation for the maximum period of the sentence imposed or if no sentence has been imposed for the maximum period for which the defendant might have been sentenced, or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. Any such person placed on probation shall be under the supervision of such court and a probation and parole officer serving such court as hereinafter provided."

chastity, and if the sentence given does not exceed ten years. However, the sentence need not be probated unless the court is of the opinion that the ends of justice and the best interests of the public as well as the defendant will be subserved.

The act further provides that upon request of the court, a probation officer shall make a thorough investigation of the accused in such matters as his history, present physical and mental condition, criminal record, etc., and the circumstances of the offense.[4] There is also the provision that the terms and conditions of the period of probation are within the discretion of the trial judge and may be modified at anytime.[5]

After the convicted defendant has satisfactorily completed the period of probation, the court may by a duly entered order, discharge the defendant, and if there has been a plea of guilty, the court may allow the defendant to withdraw his plea and have the action dismissed.[6] The virtues of this provision are endless, for it enables the defendant's record to be expunged of the felony. Upon seeking a job, he may truthfully state that he has no felony convictions, and he is spared the embarrassment throughout his life of being deemed an ex-felon by society.

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[4] *Supra*, note 3, section 2.

"When directed by the court a probation and parole officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. If a defendant is committed to any institution the probation and parole officer shall send a report of such investigation to the institution at the time of commitment."

[5] *Supra*, note 3, section 3.

"Such court shall determine the terms and conditions of probation and may at any time during the period of probation alter or modify the conditions and may include among them the following, or any other, that the probationer shall:

a. Commit no offense against the laws of this or any other state or the United States;
b. Avoid injurious or vicious habits;
c. Avoid persons or places of disreputable or harmful character;
d. Report to the probation and parole officer as directed;
e. Permit the probation and parole officer to visit him at his home;
i. Support his dependents."

[6] *Supra*, note 3, section 4.

"... Upon the satisfactory fulfillment of the conditions of probation, and the expiration period of probation, such courts, by order duly entered, shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty, and the courts have discharged the defendant hereunder, such courts may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense."

However, if at anytime the defendant is found to have violated any of the provisions or terms of his probation, it is with the sound discretion of the court to revoke the probation order and deal with the case as if there had been no probation granted.[7] A recent case has, it is submitted, properly construed the act to provide that appeal of the conviction on its merits must be made after the order is entered and the probation granted. If and when an order of probation is revoked by the court, the only appeal that can be taken is in regard to the hearing which resulted in the revocation and an appeal at that time cannot be perfected regarding the merits of the original conviction.[8]

On the whole, the Adult Probation Act is of the type of legislation that is needed in correcting and guiding those convicted who are capable of help by society and who show an interest in trying for themselves to achieve the position of beneficial citizenship. It is a well established fact that not all persons who are convicted of a crime will become a menance to society by repeating their criminal ways. When it is possible for the first offender to be instructed as to where he has strayed from the "straight and narrow," such legislation as the Adult Probation Act enables the state to return to society the right type of citizen rather than returning one from incarceration who will exhibit a life bent upon crime.

It is immediately apparent that this legislation is far superior to the Suspended Sentence Law in that it provides for the establishment of trained personnel in the probation offices; and further, it places the discretion of whether or not the sentence is to be probated into the hands of the trial judge who, upon the investigation and advice of the probation officer, is certainly the person best qualified to determine the proper disposition of each case. The greatest advantage, however, is the provision for guidance by a trained probation officer with the requirement that the terms imposed must be adhered to.

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[7] *Supra*, note 3, section 5.

"At anytime during the period of probation such courts may issue a warrant for the violation of any of the conditions of the probation and cause the defendant to be arrested. . . . Thereupon, the court shall cause the defendant to be brought before it, after a hearing without a jury, may continue or revoke the probation and shall in such case proceed to deal with the case as if there had been no probation." *Wilson v. State*, 156 Tex. Cr. R. 228, 240 S.W. 2d 774 (1951).

[8] *Gossett v. State*, ___Tex. Cr. R.___, 282 S.W. 2d 59 (1955).

For the first offender, being incarcerated without paying due consideration to the circumstances under which the offense was committed and without regard for the individual character of the accused does not display a well considered procedure for the ultimate rehabilitation of the defendant, nor does it demonstrate a will in society to prevent the offender from repeating his unlawful activity. All too often, persons who have no criminal propensities are cast among those whose records reveal nothing but a life of crime and repeated imprisonment. The result of such a situation is that in a high percentage of the cases, the first offender emerges from the penal institution better informed as to the ways of crime and cirminals, and the adage that "you cannot run a penal institution without running a school of crime" is borne out. Even though the conscientious penal director attempts to segregate the first offender from the repeating offenders, the crowded conditions of the jails and prisons in these times simply cannot be adapted to this ideal situation in every case. It was with these situations in mind that the legislature passed the Adult Probation Act with the hope of granting the proper type of remedy and punishment for the deserving first offender.

However, it is certainly regrettable that the mere passage of the act is not sufficient to put these sociological measures into operation. Then too, it is also regrettable that the act does not cover persons convicted of *any offense,* without exception, when the particular case and defendant is deserving.

Murder and rape are specifically excepted[9] and no probation can be granted however deserving the defendant might be. These exceptions certainly exclude defendants who should be entitled to the benefits of probation. For example, the commission of an act of sexual intercourse with a female under the age of consent is rape, but should be covered by the act. Why should a young boy be sent to the penitentiary and be put to the risk of having a ruined life merely because he engaged in a natural, biological act with a female who consented, even though the act be deemed improper by society? Is such incarceration good penal philosophy? Also, what about a conviction for murder without malice where a wife has killed her husband's paramour? Is she not deserving of

[9] *Supra,* note 3, section 1.

consideration? These are but two examples of the many situations where the Act has failed in carrying out the duty of good government to the deserving ctizien. The next legislature should immediately take action to remedy this situation.

But what is of even greater importance at this time is the fact that since the passage of the Act, the legislature has not provided a single dollar for the establishment of probation officers for the various districts. The Board of Pardons and Paroles, under whose auspices the statute is to be put into effect, recommended in a budget report to the legislature in June of 1954 that sufficient funds be granted to establish a minimum number of probation offices, the number being a mere fifteen. This request was denied for economy reasons, and as a result, there most certainly have been many unfortunate incarcerations throughout the entire state due to this total failure of the necessary machinery.

However, the abrogation by the legislature of its duty has not prevented probation under the Act completely. For example, investigation reveals that the Dallas County Criminal Courts have been probating sentences under the Act for a number of years, as have been other counties in the state. A system was devised whereby each court was granted an additional bailiff, who was paid under the law as a bailiff, but whose duties were confined to those of a probation officer as provided for by the Act. These judges, confirming my previous statements regarding their conscientious attitudes, have been able to select men who have training in this field and it is pleasing to report that their progress has been very successful. While in reality they are operating outside of the proclaimed procedure, they are following both the letter and the spirit of the statute. All that is needed is for the legislature to provide the proper funds and machinery for making these offices exist as was intended by the original passage of the Act.

The need for immediate action on behalf of the legislature becomes apparent when the statistics regarding the number of probated sentences is brought to light. For example, in Dallas County there were 817 cases which were on probation as of November 30, 1955. This number is far too large for the three probation officers to handle and at the same time give each its due consideration. The essential factor in a good probation system is that the officer

must be allowed sufficient time to examine periodic reports from the probationer and to be able to spend sufficient time in counsel with him which is commensurate with his problems and difficulties. This is the only way that probation can ever become a success in this or any other jurisdiction. The officers handling probation matters under the federal probation act for the Dallas Division of the Northern District of Texas had on probation at the same time approximately 250 persons. They suggest that perhaps even this number is too large, for it is generally agreed among the authorities on the subject that approximately 75 is the ideal number of probationers per officer, but at any rate, no more than 100.[10]

Of course, all defendants do not require the same amount of time in consultation with the probation officer. A person convicted of driving while intoxicated as a second offense, which is a felony, will not require the same amount of time in conference that a young man of age twenty would require who had been convicted of a violation of the narcotic laws. However, it must be remembered that it is also essential to a good probation system that the probation officer have sufficient time in which to investigate those who are about to be sentenced in order to make the best recommendation possible as to their chances of rehabilitation should their sentence be probated.

It is also the recommendation of the writer that when the legislature does act pursuant to section 24 of the Act and establish the offices and salaries of the probation officers, that they should grant sufficient salary for these positions which is commensurate with the remuneration that is paid in other fields of endeavor. The standards of qualification for these offices demand that degrees in sociology or a period of training in this type of work, or both, be required.[11] It is absolutely essential that the system be executed by the best personnel that can be obtained, and to secure this type, it is essential that a sufficient salary be granted in order to prevent the luring away of all of the capable men to other fields of work or industry.

Another failing of the Adult Probation Act which the writer

[10] Hengerer, *Organizing Probation Services*, 1953 YEARBOOK, NATIONAL PROBATION & PAROLE ASSN. 45.

[11] *Report of the Committee on Standards of Qualifications of Probation Officers*, FEDERAL PROBATION, Vol. VI No. 4, p. 3; BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 380 (1950).

feels should be remedied by the legislature is its failure to encompass those persons who are convicted in the County Criminal Court of a misdemeanor.[12] It has been often stated that the Act was patterned and modeled after the federal act and if this is true, certainly the benefits of probation should be extended to the misdemeanant.[13]

For that matter, why should the benefits of probation be extended only to the convicted felon with society turning its back on those convicted of lesser offenses? Probation should begin at the bottom, and for that matter, so should the period of guided rehabilitation be initiated with those who may get off on the wrong foot early in life with the commission of a lesser offense.[14] No authority is needed for taking the position that those who ultimately live a life of crime and violence initiate that way of life through the commission of petty acts which the law deems misdemeanors.

It is also significant that there are a great many offenses which in reality do not place the label of "criminal" upon the offender. For example, let us suppose that a citizen has been in a minor accident after indulging in a slight way and is tried and found guilty and sentenced to six months in the county jail for driving while intoxicated. Is it sociologically right to confine him for such a period? The writer is of the opinion that in many if not most cases it would not show good judgment to confine him with those persons who may teach him something that he would be better off not knowing.

Of course, it is argued that the judge has the discretion in pleas of guilty to give either a fine or a jail sentence, and that if he be of the opinion that the defendant is the proper type, he need only give a fine. However, would it not be better procedure in the attempt to reduce the rate of crime if the court were able to impose a sentence of confinement in jail and then probate that sentence under the terms thought necessary to instill in the mind of the defendant that if he does not take the steps necessary to correct his ways that he will have to serve that time? It is only human nature

[12] *Ex parte Hayden*, 152 Tex. Cr. R. 517, 215 S.W. 2d 620 (1948).
[13] 43 STAT. 1259, 18 U. S. C. A., sec. 3651 (1925).
[14] Oldigs, *Probation in Misdemeanant Cases*, 1952 YEARBOOK, NATIONAL PROBATION & PAROLE ASSN. 146; Sanson, *Probation & Parole for the Misdemeanant*, 1949 YEARBOOK, NATIONAL PROBATION & PAROLE ASSN. 186.

to correct thyself when it is realized that "heavy, heavy hangs over thy head."

Also, with such a tremendous number of offenders being in the 19 to 25-year age bracket, it is apparent that the law should be strengthened so some punishment can be brought to bear on this type of offender. However, the probation of a jail term would in most cases be sufficient for these young people to realize that the time has arrived for them to change their ways and to guide their abundant energy into constructive and beneficial channels.

Then too, in cases where a deserving defendant has pleaded guilty, the court would be able to impose a longer sentence subject to probation rather than give a few weeks or even days in jail. The simple psychology of such a measure would certainly place the defendant's conviction in a position of more significance.

The situation as it exists at the present time in the county courts is that in contested cases where there is a deserving defendant who has been given an unusually lengthy sentence by the jury, the court has only the possibility of setting the verdict aside and allowing the defendant to plead guilty and receive a fine. This procedure shows on its face the total failure of the present situation to effectuate the ends of justice, both to the public and to the defendant. Certainly, there are those that are in need of a "spanking period" of confinement, and when such is the situation, the director of the confining institution can segregate the first offender from the hardened criminal. However, those who do not deserve this type of incarceration, yet do deserve having the importance of their offenses brought to their attention, could best be served by having a sentence imposed subject to fulfilling the terms of probation.

As the probation of felony convictions will eliminate the need for more taxpayer dollars to keep men idle, so also the probation of the proper type of misdemeanor cases will cut down the tax consequences on the local level. What is of further importance is that it will also alleviate the crowded conditions of the county jails in our more populated counties and will allow a higher degree of efficiency in those institutions. From an economical standpoint, probation can prevent the taxpayer from having to maintain the

confined in a state of idleness and will shoulder the responsibility of individual upkeep where it belongs—on the probationer.

Regarding rehabilitation, there is one other aspect that is worthy of mention in regard to those bound to confinement. The law states that only misdemeanants can be required to work, and a great step forward from our idle confinement in county jails would be the establishment of county work farms. Law enforcement officials as well as the bench and bar of Dallas County have long advocated such a measure. The food costs at the Dallas jail total approximately $120,000 annually. Of this amount, a great deal could be saved for the taxpayer if the confined could work the soil, raise swine, poultry, and milk cows, etc. However, what is far more important to the proper rehabilitation of the confined is the fact that they would be able to escape total confinement and be allowed to work at some task in the open air of an industrious nature. The old adage that "an idle mind is the devil's workshop" is plainly borne out by statistics regarding those who emerge from total confinement. Certainly no one can doubt that the benefits to the prisoner would be of the type that proper penal philosophy seeks.

In summary, what is needed is an immediate establishment under the Adult Probation Act of the offices and organization which the act was designed to effectuate. The responsibility for such action rests squarely upon the legislature and it is hoped that action will be forthcoming. Secondly, the Suspended Sentence Law could well be repealed for it is not the proper type of law for good government to use in rehabilitating the convicted, and in the light of the Adult Probation Act, it is not needed. Thirdly, the Adult Probation Act should be amended to allow probation of conviction for *any* felony or misdemeanor. When it is remembered that the final answer rests with the trial court as to whether a defendant is to be allowed probation, then it is not a drastic position or assuption to assume that the best interests of both society and the defendant will be subserved by his considered decision in the matter.

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