

4-1-1939

# Punishment for Crime in North Carolina

Albert Coates

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

## Recommended Citation

Albert Coates, *Punishment for Crime in North Carolina*, 17 N.C. L. REV. 205 (1939).Available at: <http://scholarship.law.unc.edu/nclr/vol17/iss3/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

# PUNISHMENT FOR CRIME IN NORTH CAROLINA

ALBERT COATES\*

When Charles II in 1663 gave the province of Carolina to eight of his favorite friends, he gave them power to execute the laws "upon all people within the said province . . . by imposition of penalties, imprisonment, or any other punishment; yea, if it shall be needful, and the quality of the offence requires it, by taking away member and life, either by them [the Lords Proprietors] or their deputies, lieutenants, judges, justices, magistrates or officers whatsoever." He went further and gave them the added power "to remit, release, pardon and abolish (whether before judgment or after) all crimes and offences whatsoever, against the said laws."<sup>1</sup> Beginning with this grant of power, this article undertakes to outline North Carolina's penal policy from colonial beginnings to the present day, as it is recorded in constitutional provisions, legislative enactments, judicial decisions, and departmental rulings.

## I. CHANGING TYPES OF PUNISHMENT

"It is manifest," said the General Assembly of North Carolina in 1715, "that the laws of England are the laws of this Government, so far as they are compatible with our way of living and trade."<sup>2</sup> The types of punishment authorized by the laws of England were, according to Blackstone's *Commentaries*:<sup>3</sup> (1) death, (2) exile or banishment, (3) imprisonment, (4) confiscation of property and disability of holding offices or employments, (5) mutilation or dismemberment by cutting off the hand or ears, slitting the nostrils, branding on the hand or cheek, (6) whipping, hard labor in the house of correction or otherwise, the pillory, the stocks, and the ducking stool, and (7) fines. Criminal court records show that most, if not all of these types of punishment were imposed during the early years of North Carolina's history.

*Death.* "It is a melancholy truth," said Blackstone in 1765, "that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of Parliament to be felonies without benefit of clergy, or, in other words, to be worthy of instant death."<sup>4</sup> The available records do not permit an accurate computation of the number of crimes that have been punished with the death penalty in North Carolina; but the number had diminished to less than thirty listed in the REVISED STATUTES OF 1836-37,<sup>5</sup> to less than

\* Professor of Law, University of North Carolina; Director, Institute of Government.

<sup>1</sup> 1 COLONIAL RECORDS (1663) 23, 24.

<sup>2</sup> N. C. LAWS 1715, c. 31, §5.

<sup>3</sup> 4 BL. COMM. \*375.

<sup>4</sup> *Id.* at \*19.

<sup>5</sup> N. C. REV. STAT. (1836-37) c. 34.

twenty listed in the REVISED CODE OF 1854,<sup>6</sup> to four in the constitution of 1868.<sup>7</sup> The General Assembly in 1868-69 reduced the number to two,<sup>8</sup> but it soon returned to and has since stuck to the constitutional four, despite repeated and still continuing efforts to abolish capital punishment altogether. These four crimes, murder, arson, burglary, and rape, have claimed eighty-five victims in the last five years; and others are waiting on death row as these words are written.

*Corporal punishment* in North Carolina, short of death, has taken the varied forms of (1) mutilation and dismemberment, (2) public whippings, and (3) confinement before the public gaze in the pillory and stocks.

Mutilation and dismemberment were administered with varying severity. As late as 1771 His Majesty's Chief Justice for the province of Carolina pronounced in open court the sentence: ". . . that you [Captain of the Regulators] be drawn . . . to the place of execution, where you are to be hanged by the neck; that you be cut down while yet alive, that your bowels be taken out and burnt before your face, that your head be cut off, your body be divided into four quarters, and this to be at His Majesty's disposal."<sup>9</sup> An early court record indicates the cutting off of the hand of a notorious felon;<sup>10</sup> the risk of blood did not absolve the pound of flesh. As late as 1836 at least one crime was punishable by nailing the convict's ears to the pillory and the cutting off of the right ear, or the left ear, or both; at least two crimes were punishable by branding the cheek or the hand; fifteen crimes were punishable by public whippings with not exceeding thirty-nine lashes on the bare back; and nine crimes were punishable by confinement in the pillory and stocks.<sup>11</sup> These forms of corporal punishment were steadily restricted throughout the first half of the nineteenth century and altogether disappeared by constitutional fiat in 1868.<sup>12</sup> A committee of the constitutional convention in that year informed the state that "the barbarous punishments of whipping, branding, cropping will be hereafter unknown."<sup>13</sup>

*Attainder and forfeiture; loss of vote, office, and right to hold office.* "It cannot be denied," said Justice Hall in *White v. Fort*, "but that forfeiture for felony was part of the laws of England; and that the law in that respect, except so far as related to suicide, has not been altered by the laws of this state; but I believe there is no instance where the state has ever availed herself of the right which accrued by forfei-

<sup>6</sup> N. C. REV. CODE (1854) c. 34.

<sup>7</sup> N. C. CONST. (1868) art. XI, §2.

<sup>8</sup> N. C. Pub. Laws 1868-69, c. 167, §§1, 2.

<sup>9</sup> NORTH CAROLINA HISTORICAL COMM. BULL. (1916) 80.

<sup>10</sup> CAPITAL PUNISHMENT IN NORTH CAROLINA (Special Bulletin No. 10, North Carolina State Board of Charities and Public Welfare, 1929).

<sup>11</sup> N. C. REV. STAT. (1836-37) c. 34.

<sup>12</sup> N. C. CONST. (1868) art. XI, §1.

<sup>13</sup> CONSTITUTIONAL CONVENTION JOURNAL (1868) 187.

ture. . . ."<sup>14</sup> Certainly the property of a convicted felon was subject to forfeiture; for in 1771 the Captain of the Regulators, under sentence of death, ". . . made earnest appeal to have his wife and children spared the forfeiture of his property, and Governor Tryon was pleased to make a recommendation to that effect to the crown";<sup>15</sup> and in 1782 a committee was appointed to prepare and bring before the General Assembly a bill of attainder which was introduced and passed to attain certain persons therein named of treason.<sup>16</sup> But by 1824 the court was of the opinion that this law had disappeared from practice,<sup>17</sup> and in 1868 the constitution provided that "no conviction of treason or attainder shall work corruption of blood or forfeiture."<sup>18</sup>

Modern equivalents of the loss of property through attainder and forfeiture as methods of punishment may be found in loss of vote, loss of office, and loss of the right to hold office. *Loss of vote.* From early colonial days persons convicted of any infamous crime lost the right to vote. The constitution, in 1835, prohibited the General Assembly from passing *private* laws restoring "to the rights of citizenship, any person convicted of an infamous crime";<sup>19</sup> and in 1876 it provided that "no person who has been convicted, or who has confessed his guilt in open court upon indictment, of any crime, the punishment of which now is, or may hereafter be imprisonment in the state's prison shall be permitted to vote unless the said person shall be restored to citizenship in the manner prescribed by law."<sup>20</sup> The latter provision is in force today. *Loss of office.* The constitution in 1776 provided for impeachment of "the Governor, and other officers, offending against the state by violation of any part of this Constitution, mal-administration, or corruption";<sup>21</sup> in 1835 it more specifically defined those subject to impeachment as "the Governor, Judges of the Supreme Court, and Judges of the Superior Courts, and all other officers of this state (except Justices of the Peace and militia officers)";<sup>22</sup> and further redefined the causes for impeachment as "wilfully violating any article of the Constitution, maladministration, or corruption", and specifically provided for removal from office.<sup>23</sup> Removal from office is still a constitutional consequence of impeachment, and it has been from early days a consequence of conviction of certain crimes. The constitution of 1835 provided for the vacation of the commission of a justice of the peace upon his conviction "of any infamous crime, or of corruption or malpractice in office";<sup>24</sup> the constitution of 1868 specifically provided for

<sup>14</sup> 10 N. C. 251, 265 (1824).

<sup>15</sup> NORTH CAROLINA HISTORICAL COMM. BULL. (1916) 81.

<sup>16</sup> N. C. Laws 1782, c. 6.

<sup>17</sup> N. C. CONST. (1868) art. IV, §5.

<sup>18</sup> N. C. CONST. (1876) art. VI, §2.

<sup>19</sup> N. C. CONST. (1835) art. III, §1.

<sup>20</sup> *Id.* art. III, §3.

<sup>21</sup> *White v. Fort*, 10 N. C. 251 (1824).

<sup>22</sup> N. C. CONST. (1835) art. I, §4.

<sup>23</sup> N. C. CONST. (1776) §23.

<sup>24</sup> *Ibid.*

"removal from office" as a type of punishment to be imposed at the will of the General Assembly;<sup>25</sup> and, pursuant to this provision, the General Assembly has provided for removal from office for certain crimes. *Loss of right to hold office.* In addition to the loss of office in all the foregoing cases the convicted person lost the right to hold office. From early days persons convicted of certain crimes were disqualified from holding office. The constitution in 1868 disqualified "all persons who shall have been convicted of treason, perjury or of any other infamous crime, since becoming citizens of the United States, or of corruption, or malpractice in office, unless such persons shall have been legally restored to the rights of citizenship";<sup>26</sup> it later restated and extended the terms of this provision to include persons who had confessed their guilt on indictment pending whether sentence had been imposed, not imposed, or suspended.<sup>27</sup> The constitution likewise prohibited from holding office any person who engaged in duelling.<sup>28</sup>

*Imprisonment.* In the early days practically all serious crimes were punished by death or some form of corporal punishment as indicated heretofore. Imprisonment as a form of punishment was first limited in the main to small and trifling breaches of the law. The prison sentence was served in the county jail unless otherwise specified; later the town and city jail or lockup developed for a limited class of offenders against municipal ordinances. Throughout the early part of the nineteenth century the prison sentence steadily grew in favor—first as an alternative to, and later as a substitute for, various forms of corporal punishment and for the death penalty. In 1854 punishment by pillory was limited to "crimes that are infamous, or done in secrecy and malice, or done with deceit and intent to defraud", and all other statutory misdemeanors and felonies where no specific punishment was prescribed might be punished by imprisonment.<sup>29</sup> The decisive turning point in the state's penal policy came in 1868. The constitution in that year abolished corporal punishment in all forms, limited the death penalty to four crimes, and further limited other types of punishment to "imprisonment with or without hard labor, fines, removal from office and disqualification to hold any office of honor, trust or profit under this State." It further directed the General Assembly to "make provision for the erection and conduct of a state prison or penitentiary";<sup>30</sup> and a subsequent amendment interpreted "the foregoing provision for imprisonment with hard labor . . . to authorize the employment of such convict labor on public works or highways, or other labor for public.

<sup>25</sup> N. C. CONST. (1868) art. XI, §1.

<sup>27</sup> N. C. CONST. (1876) art. VI, §8.

<sup>29</sup> N. C. REV. CODE (1854) c. 34.

<sup>26</sup> N. C. CONST. (1868) art. VI, §5.

<sup>28</sup> N. C. CONST. (1868) art. XIV, §2.

<sup>30</sup> N. C. CONST. (1868) art. XI, §3.

benefit, and the farming out thereof, when and in such manner, as may be provided by law."<sup>31</sup>

Pursuant to these constitutional requirements the Public Laws of 1868-69 provided that all crimes theretofore punishable by death, excepting murder and rape (later adding arson and burglary), should thereafter be punishable by imprisonment in the state's prison;<sup>32</sup> and that all crimes theretofore punishable by "public whippings or other corporal punishment", should thereafter be punishable by imprisonment in the state's prison or county jail.<sup>33</sup> Thus began the modern development of imprisonment—first within prison walls, then within prison bounds, and later in chain gangs working on city streets, county roads, state highways, and in private industries. This development has continued until today practically all crimes are punishable by imprisonment in penal or correctional institutions. Further expansion of the system of imprisonment came with the establishment of the Jackson Training School in 1907 for children under sixteen years of age,<sup>34</sup> the State Industrial School for Women in 1917,<sup>35</sup> the Morrison Training School for Negro boys in 1921,<sup>36</sup> with the Eastern Carolina Training School in 1923 for white boys under eighteen,<sup>37</sup> and the Industrial Colony for Women in 1937.<sup>38</sup>

*Fines and costs.* "A fine imposed for an offense against the criminal law . . . is a punishment . . ." said Justice Gaston in *State v. Manuel*;<sup>39</sup> and he further added: ". . . the sentence pronounced on a convicted criminal that he pay the costs of prosecution is as much a part of his punishment as the fine imposed. . . ." In the beginning the fine was imposed for only the most trifling offenses. Like imprisonment, it came into the penal picture as corporal punishment went out. Forty-two crimes were punishable by fine in 1837;<sup>40</sup> sixty-five in 1854;<sup>41</sup> eighty in 1873;<sup>42</sup> and practically all of them are so punishable today.<sup>43</sup>

*Avoidance of Punishment.* From the beginning legal methods have existed for reducing or avoiding penalties imposed by law. In cases involving the death penalty, the benefit of clergy (extended first to the clergy, then to men, and finally to women who could read) considerably reduced the number of executions otherwise exacted by the law. From colonial beginnings, however, many crimes were ousted of the benefit of clergy, and it was abolished altogether in 1854.<sup>44</sup> Even where prior

<sup>31</sup> N. C. CONST. (1876) art. XI, §1

<sup>32</sup> *Ibid.*

<sup>33</sup> N. C. Pub. Laws 1917, c. 255.

<sup>34</sup> N. C. Pub. Laws 1923, c. 254.

<sup>35</sup> 20 N. C. 144, 154, 159 (1838).

<sup>36</sup> N. C. REV. CODE (1854) c. 34.

<sup>37</sup> N. C. CODE ANN. (Michie, 1935) c. 82.

<sup>38</sup> N. C. REV. CODE (1854) c. 34.

<sup>39</sup> N. C. Pub. Laws 1868-69, c. 176.

<sup>40</sup> N. C. Pub. Laws 1907, c. 509.

<sup>41</sup> N. C. Pub. Laws 1921, c. 190.

<sup>42</sup> N. C. Pub. Laws 1937, c. 219.

<sup>43</sup> N. C. REV. STAT. (1836-37) c. 34.

<sup>44</sup> BATTLE'S REVISAL (1872-73) c. 32.

to 1854 it had lingered on, the judge was in most cases authorized in his discretion to inflict some punishment less than death such as branding, whipping, imprisonment, or fine.<sup>45</sup> Around the year 1800 the device of suspending sentence for the lesser crimes, on various conditions less onerous than the punishment prescribed, brought considerable relief to many convicted persons otherwise liable to the severe forms of corporal punishment, imprisonment, and fine. This form of tempering the wind to the shorn lamb was first condemned,<sup>46</sup> then endured,<sup>47</sup> then pitied, and then embraced; for juveniles in 1919,<sup>48</sup> and for adults in 1937.<sup>49</sup> Pardon and parole have from the earliest days afforded their share of relief from punishment.

*Summary.* Thus we have shifted types of punishment: from death (except for four crimes) to corporal penalties in the form of mutilation, branding, cropping, whipping, pillory and stocks; to imprisonment and fine; to loss of vote, loss of office, and loss of right to hold office as the modern successors of forfeiture and attainder; to suspended sentence under a supervision more exacting if less confining than prison bounds. We have shifted the methods of inflicting punishments: from the amputation knife, to the branding iron, to the whipping post as methods of mutilation, and not being satisfied with any, we have abandoned all. We have shifted from the pillory and stocks as methods of detention for periods short if not sweet to the jail, the chain gang, the state penitentiary, and the prison camp. We have shifted the methods of inflicting death by due process of law: from burning to hanging, to electrocuting, to gassing, and now comes the suggestion that the visitation of official death should be timed so as to permit the state to slip up on the convict in the dark.

## II. CHANGING CONTROL OF PUNISHMENTS

### A. Legislative Control Within Constitutional Limits

"The right of the legislature to prescribe the punishment of crimes belongs to them," said Justice Gaston in *State v. Manuel*, "by virtue of the general grant of legislative powers"<sup>50</sup> unless they be restricted and so far only as they are restricted, by constitutional prohibitions.

As already indicated, the constitution (1) limits the General Assembly to four types of punishment for crime, (2) expressly imposes certain consequences for conviction of certain types of crime, and (3)

<sup>45</sup> N. C. REV. STAT. (1836-37) c. 34, §26.

<sup>46</sup> *State v. Bennett*, 20 N. C. 170 (1878).

<sup>47</sup> *State v. Hatley*, 110 N. C. 522, 14 S. E. 751 (1892).

<sup>48</sup> N. C. CODE ANN. (Michie, 1935) §5050.

<sup>49</sup> N. C. CODE ANN. (Michie, Supp. 1937) §4665(3).

<sup>50</sup> 20 N. C. 144, 159 (1838).

expressly prohibits certain other consequences, such as attainder, forfeiture, and corruption of blood. To these limitations may be added the further constitutional prohibitions of excessive bail, excessive fines, cruel and unusual punishments,<sup>51</sup> and *ex post facto* laws.<sup>52</sup> The origin and development of the first of these constitutional limitations in North Carolina has already been indicated. *The prohibition of excessive bail, excessive fines, and cruel and unusual punishments* came into the constitution in 1776 and is in force today.<sup>53</sup> The court in *State v. Driver*<sup>54</sup> quotes from an opinion of the House of Lords in explaining the reason for this provision: "But if the judge may commit the party to prison till the fine be paid, and withal set so great a fine as is impossible for the party to pay, then it will depend upon the judge's pleasure whether he shall ever have his liberty, and thus every man's liberty is wrested out of the dispose of the law and is stuck under the girdle of judges." The same reasoning explains the prohibition of excessive bail; and certain brutal sentences imposed prior to the Revolution underlie the prohibition of cruel and unusual punishments. *The prohibition of ex post facto laws* came into the constitution in 1776 and is in force today.<sup>55</sup> It prohibits punishment for an act committed before a law is passed making that act a crime.

Subject to these constitutional limitations the General Assembly is free to prescribe punishment for crime with the assurance of liberal interpretations of its power from the courts. "But when the legislature," said Justice Gaston,<sup>56</sup> "acting upon their oaths, declare the amount of bail to be required, or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime, as the reasonableness or excess, the justice or cruelty of these are necessarily questions of discretion, it is not easy to see how the discretion can be supervised by a co-ordinate branch of the government. Without attempting a definitive solution of this very perplexing question it may at least be safely concluded that unless the act complained of (which it would be almost indecent to suppose) contains such a flagrant violation of all discretion as to show a disregard to constitutional restraint it cannot be pronounced by the judiciary *void* because of repugnancy to the constitution." And be it noted that the court has been guilty of no such indecent exposure of the legislature on this particular point from the beginning to this day.

*Power to classify crimes.* From colonial days the General Assembly has exercised the power both to fix the punishment for specific crimes

<sup>51</sup> N. C. CONST. (1868) art. I, §14. <sup>52</sup> *Id.* §32.

<sup>53</sup> N. C. CONST. (1776) §10; N. C. CONST. (1876) art. I, §32.

<sup>54</sup> 78 N. C. 423, 429 (1878).

<sup>55</sup> N. C. CONST. (1776) §24; N. C. CONST. (1876) art. I, §32.

<sup>56</sup> *State v. Manuel*, 20 N. C. 144, 162 (1838).



and to class them as felonies or misdemeanors. Prior to 1891 if it called the crime a misdemeanor, the name of the crime determined the class to which it belonged even though the punishment was of a degree ordinarily applied to felony.<sup>57</sup> In 1891 the General Assembly exercised the power to classify crimes according to punishment rather than according to name, by providing: "A felony is a crime which is or may be punishable by either death or imprisonment in the state's prison."<sup>58</sup> This classification was upheld in *State v. Mallett*<sup>59</sup> where the court said that crimes formerly designated as misdemeanors done "in secrecy and malice and with deceit and intent to defraud" were now felonies, since they might be punished by imprisonment in the state's prison as well as in the county jail. The court went further in *State v. Hyman*,<sup>60</sup> where the crime of perjury was specifically called a misdemeanor but was made punishable by imprisonment in the state's prison. "But calling an offence a petty misdemeanor does not make it so," said the court, "when the punishment imposed makes it a felony." The court has also upheld the General Assembly in classifying all misdemeanors as "petty misdemeanors";<sup>61</sup> in classifying certain "crimes" of juveniles as "delinquencies";<sup>62</sup> and relieving them from the normal incidents of criminal law, procedure, and punishment.

### B. Judicial Control Within Legislative and Constitutional Limits

From colonial days to near the middle of the nineteenth century the punishment for all of the more serious crimes was death;<sup>63</sup> and, in imposing sentence, the judge acted as little more than the legislative mouthpiece. But the judge was released from this legislative strait-jacket and given considerable discretion as to the amount and type of punishment to be imposed for the lesser crimes.

In the year 1800 a bill introduced in the General Assembly sought to extend the judicial discretion by changing the penalty of death for the more serious crimes, excepting murder in the first degree, to imprisonment for a period to be fixed by the judge within limits prescribed by the General Assembly.<sup>64</sup> This bill failed of passage; in

<sup>57</sup> *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905).

<sup>58</sup> N. C. CODE ANN. (Michie, 1935) §4171.

<sup>59</sup> 125 N. C. 718, 34 S. E. 651 (1899).

<sup>60</sup> 164 N. C. 411, 414, 79 S. E. 284, 285 (1913).

<sup>61</sup> *State v. Lytle*, 138 N. C. 738, 51 S. E. 66 (1905).

<sup>62</sup> N. C. CODE ANN. (Michie, 1935) §5039, *State v. Burnett*, 179 N. C. 735, 102 S. E. 711 (1920).

<sup>63</sup> N. C. REV. STAT. (1836-37) c. 34.

<sup>64</sup> Printed in N. C. LAWS 1800, 46. To illustrate: murder in the second degree, 5 to 15 years imprisonment; rape, 8 to 21 years; arson, 5 to 12 years; robbery or burglary, 3 to 10 years; horse stealing, 3 to 7 years; larceny, 2 to 5 years; petty larceny, 6 months to 2 years; receiving stolen goods, 1 to 3 years; counterfeiting, 4 to 16 years; perjury, 8 to 15 years; malicious maiming, 2 to 10 years and fine; voluntary manslaughter, 3 to 10 years and security for good behavior for 7 years

succeeding years its principle was adopted in particular cases by slow degrees; but not until 1868 did the principle involved in this proposal become the settled policy of the state. In that year the General Assembly fixed the limits of punishments at not less than four months nor more than ten years in the state's prison or county jail for crimes theretofore punishable corporally, and at "not less than five nor more than sixty years in the state prison" for crimes theretofore punishable by death (with a few exceptions).<sup>65</sup> Today, with the exception of murder, arson, burglary, and rape, there is hardly a crime in which the legislature does not give the judge a wide discretion as to punishment.

*To what extent is the judge free to act within these bounds?*

(a) *Where the legislature fixes limits.* For driving while intoxicated the legislature fixed only the lower penal limits which were not less than a fifty-dollar fine, or thirty days imprisonment, or both. The court upheld a sentence of two years on the public roads as not excessive, cruel, or unusual but indicated that there were upper limits beyond which the court could not go even if the legislature had not fixed them, and that these upper limits would be similar to those where the punishment was left expressly to the court's discretion.<sup>66</sup> Where the maximum limit is fixed or there are both minimum and maximum limits, the trial court may impose a sentence within the statutory limits and still exceed its powers if it appears that the sentence is arbitrary. In *State v. Lee*<sup>67</sup> the accused, on conviction, was sentenced to imprisonment for nine years and six months under a statute fixing the punishment for robbery at imprisonment for not less than four months nor more than ten years. The court said: "While we will not hold, therefore, that as a matter of law the punishment was in excess of the powers of the judge [because a new trial had been granted on other grounds such holding was unnecessary], we are frank to say that it does not commend itself to us as being at all commensurate with the offense even if the defendant was properly found guilty on the facts. There were neither aggravation nor circumstances which tended to show that the punishment should approximate the highest limit allowed by the law in such cases. It was evidently intended that where there was no aggravation the punishment should approximate the lower limit allowed, and only when

thereafter. This bill, although rejected by the General Assembly, was considered of such significance that a resolution was passed to have it printed and bound up with the laws passed.

<sup>65</sup> N. C. Pub. Laws 1868-69, c. 167.

<sup>66</sup> *State v. Jones*, 181 N. C. 543, 106 S. E. 827 (1921).

<sup>67</sup> 166 N. C. 250, 257, 80 S. E. 977, 979 (1914).

aggravation was shown should the highest degree of punishment authorized by the statute be inflicted."<sup>68</sup>

(b) *Where the legislature fixes no limits.* The legislature may prescribe a punishment of a "fine in the discretion of the Court", or "imprisonment in the discretion of the Court", or "fine or imprisonment", or it may simply prescribe "punishment in the discretion of the Court" without specifying any particular type or amount. In these cases the discretion of the trial court, like the discretion of the legislature, is subject to constitutional limitations. ". . . it appears," said Justice Reade in *State v. Driver*,<sup>69</sup> "both by precedent, and by the reason of the thing, and by express constitutional provision, that there is a limit to the power of the Judge to punish, even when it is expressly left to his discretion. What the precise limit is, cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it and it ought not be fixed. It ought to be left to the Judge who inflicts it under the circumstances of each case, and it ought not to be abused, and has not been abused (grossly) in a century, and probably will not be in a century to come, and it ought not to be interfered with, except in a case like the present where the abuse is palpable. And when that is the case, then the sleeping power of the Constitution must be waked up to protect the oppressed citizen. The power is there, not so much to draw a fine line close up to which the Judges may come, but as a 'warning' to keep them clear away from it." In applying this standard the court has upheld sentence for as much as two years in the county jail for misdemeanors,<sup>70</sup> and has intimated that it might uphold higher sentences,<sup>71</sup> but has held that a five year sentence in the county jail was cruel and unusual punishment.<sup>72</sup>

<sup>68</sup> In applying this standard the court has since upheld a sentence of: four months on the county roads where the punishment for carrying concealed weapons was fixed at imprisonment for not less than thirty days nor more than two years, *State v. Mangum*, 187 N. C. 477, 121 S. E. 765 (1924); three years in the state's prison and a \$1,000 fine where the punishment for administering a noxious drug to a pregnant woman was fixed at not less than one year nor more than ten years and a fine in the discretion of the court, *State v. Shaft*, 166 N. C. 407, 81 S. E. 932 (1914); nine years and even the extreme limit of twenty years in the state's prison where the punishment for manslaughter was fixed at imprisonment for not less than four months nor more than twenty years, *State v. Lance*, 149 N. C. 550, 63 S. E. 164 (1908); thirty years in the state's prison where the punishment for malicious castration was fixed at not less than five years nor more than sixty years, *State v. Griffin*, 190 N. C. 133, 129 S. E. 410 (1925), even though imprisonment for the other defendants in the case ranged from six to ten years.

<sup>69</sup> 78 N. C. 423, 429 (1878).

<sup>70</sup> *State v. Apple*, 121 N. C. 584, 28 S. E. 469 (1897).

<sup>71</sup> *State v. Smith*, 174 N. C. 804, 807, 93 S. E. 910, 912 (1917).

<sup>72</sup> *State v. Driver*, 78 N. C. 423 (1878). In further applying this standard the court has held that the constitutional prohibition of "excessive fines" and of "cruel and unusual punishments" was not violated: by a sentence of thirty days

*C. Judicial Escape from Legislative Limits*

*Suspended Sentence and Probation.* By the early part of the nineteenth century trial courts were trying to escape legislative limits by the device of suspending sentence altogether upon certain conditions. ". . . we can find no authority in law for this practice," said Justice Gaston in 1838, "and feel ourselves bound, upon this first occasion where it is brought judicially to our notice, to declare it illegal."<sup>73</sup> The trial courts, however, persisted in the practice until in *State v. Crook*, the North Carolina Supreme Court approved it in language as follows: ". . . it must be admitted that its adoption has proven very salutary, both in bringing about the reformation of petty offenders and in the suppression especially of certain classes of offences . . . the beneficial effects of its judicious use have been made so manifest as to commend it both to the judges and the people."<sup>74</sup>

Having been sustained in this escape from legislative limits, the trial courts began to invoke this new device in punishing for misdemeanors and, perhaps, the lesser felonies. The plan was used in punishing for keeping a disorderly house,<sup>75</sup> affray,<sup>76</sup> assault with deadly weapon,<sup>77</sup> trespass,<sup>78</sup> drunkenness,<sup>79</sup> violation of the prohibition law,<sup>80</sup> and slander.<sup>81</sup> But the judiciary apparently placed no limit on the type of crime in which it might be invoked. The *period of suspension* usually ran for two years or less, and, though the court did not fix any definite limit to which suspension might go, it did hold that suspension

---

in jail for carrying concealed weapon, *State v. Woodlief*, 172 N. C. 885, 90 S. E. 137 (1916); two years in the county jail for selling liquor in prohibited territory, *State v. Dowdy*, 145 N. C. 312, 59 S. E. 112 (1907); two years in the county jail for assault and battery by husband on wife, *State v. Pettie*, 80 N. C. 368 (1879); one year on the county roads for retailing liquor without license, *State v. Farrington*, 141 N. C. 844, 53 S. E. 954 (1906); two years on the county roads for assault and battery and highway robbery, *State v. Apple*, 121 N. C. 584, 28 S. E. 469 (1897); one year in the county jail and a five hundred dollar fine for assault and battery with a knife by a white man on his negro paramour, *State v. Reid*, 106 N. C. 714, 11 S. E. 315 (1890); thirty days in jail and a two thousand dollar fine for operating a gambling house within the city limits, *State v. Miller*, 94 N. C. 902 (1886). But the trial judge was ruled to have exceeded his discretion in *State v. Smith*, 174 N. C. 804, 93 S. E. 910 (1917), where four years in the state's prison was held to be cruel and unusual punishment for aggravated assault; and in *State v. Driver*, 78 N. C. 423 (1878), where five years in the county jail was held to be cruel and unusual punishment for an aggravated case of assault and battery by husband on wife—the court intimating that it would reach the same result in the case of any misdemeanor.

<sup>73</sup> *State v. Bennett*, 20 N. C. 170, 178 (1838). See also *State v. Warren*, 92 N. C. 825, 827 (1885); *State v. Hatley*, 110 N. C. 522, 524, 14 S. E. 751 (1892).

<sup>74</sup> 115 N. C. 760, 763, 20 S. E. 513, 514 (1894).

<sup>75</sup> *State v. Hatley*, 110 N. C. 522, 14 S. E. 751 (1892).

<sup>76</sup> *State v. Crook*, 115 N. C. 760, 20 S. E. 513 (1894).

<sup>77</sup> *State v. Hardin*, 183 N. C. 815, 112 S. E. 593 (1922).

<sup>78</sup> *State v. Griffis*, 117 N. C. 709, 23 S. E. 164 (1895).

<sup>79</sup> *State v. Phillips*, 185 N. C. 614, 115 S. E. 893 (1923).

<sup>80</sup> *State v. Shepherd*, 187 N. C. 609, 122 S. E. 467 (1924).

<sup>81</sup> *State v. Sanders*, 153 N. C. 624, 69 S. E. 272 (1910).

for an indefinite time was invalid.<sup>82</sup> The accused did not have to accept suspension of sentence;<sup>83</sup> but if he did accept it he thereby waived his right of appeal, and, on a determination by the judge on hearing in open court that the conditions were violated, he began to serve the sentence that had been suspended.<sup>84</sup>

From the beginning the conditions for suspending sentence have been determined by the judge. Sentence has been suspended on the following conditions: good behavior,<sup>85</sup> no violation of the law in any respect,<sup>86</sup> refraining from selling liquor,<sup>87</sup> refraining from libel and slander,<sup>88</sup> refraining from use of intoxicating liquor,<sup>89</sup> restitution of property,<sup>90</sup> leaving the county,<sup>91</sup> and not talking about "young girls in any way except complimentary remarks."<sup>92</sup> For violation of the "peeping Tom" law, sentence was suspended on condition that the accused "should not go down town at night for six months except in the company of his wife."

Within twenty-five years after this escape from legislative limits had won approval, the legislature took the suspended sentence device as its own and expanded it into a system of probation for juvenile delinquents less than sixteen years of age;<sup>93</sup> and sixteen years later it extended the probation scheme to adults guilty of "any offence except a crime punishable by death or life imprisonment."<sup>94</sup> Under these acts, a juvenile may be placed on probation for any time during his minority, and an adult for any period in the discretion of the court not exceeding five years. In 1937 the conditions of probation for adults were specified as follows:<sup>95</sup> "That the probationer shall: (a) avoid injurious or vicious habits; (b) avoid persons or places of disreputable or harmful character; (c) report to the probation officer as directed; (d) permit the probation officer to visit at his home or elsewhere; (e) work faithfully at suitable employment as far as possible; (f) remain within a specified area; (g) pay a fine in one or several sums as directed by the court; (h) make reparation or restitution to the aggrieved party for the damage or loss caused by his offense, in an amount to be determined by the court; (i) support his dependents."

<sup>82</sup> *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011 (1909).

<sup>83</sup> *State v. Webb*, 209 N. C. 302, 183 S. E. 367 (1935).

<sup>84</sup> *State v. Burnette*, 173 N. C. 734, 91 S. E. 364 (1917).

<sup>85</sup> *State v. Johnson*, 169 N. C. 311, 84 S. E. 767 (1915).

<sup>86</sup> *State v. Hardin*, 153 N. C. 150, 69 S. E. 14 (1910).

<sup>87</sup> *State v. Tripp*, 168 N. C. 150, 83 S. E. 630 (1914).

<sup>88</sup> *State v. Sanders*, 153 N. C. 624, 69 S. E. 272 (1910).

<sup>89</sup> *State v. Shepherd*, 187 N. C. 609, 122 S. E. 467 (1924).

<sup>90</sup> *State v. Schlichter*, 194 N. C. 277, 139 S. E. 448 (1927).

<sup>91</sup> *In re Hinson*, 156 N. C. 250, 72 S. E. 310 (1911).

<sup>92</sup> *State v. Smith*, 196 N. C. 438, 146 S. E. 73 (1929).

<sup>93</sup> N. C. CODE ANN. (Michie, 1935) §5039.

<sup>94</sup> N. C. CODE ANN. (Michie, Supp. 1937) §4665(1).

<sup>95</sup> *Id.* §4665(3).

To enforce these conditions and to supervise the conduct of juveniles and adults on probation, the legislature provided for a new link in state penal policy consisting of probation officers; for, though these officers work under the supervision of the court, the administration of probation is their responsibility and they have developed professional techniques and standards of their own in the performance of specific duties set forth in the statute.

#### *D. Prison Boards, Officials, and Employees*

The pronouncement of the sentence, as we have seen, has always been the judge's task. He retains control over this sentence until the end of the term of court at which it is pronounced.<sup>96</sup> The administration of the sentence caused little trouble as long as the accused was killed and buried, or mutilated, branded, whipped, or pilloried and turned loose without delay—frequently on the day the sentence was imposed and almost always on the courthouse square. But as corporal punishment gave way to imprisonment, and as imprisonment became less and less a method for holding men for trial, and more and more a method of punishing men for crime, the administration of the prison sentence had to be entrusted to officials and employees not officers of the court and beyond the court's control.

This problem of administration began with the county jail, which in the early days amounted to little more than an expanded cage. Complications developed and began to be reflected in statutes providing for separate compartments in the jail for the sexes, then for the races, then for the younger offenders, the hardened criminals, those imprisoned for debt, and the criminal insane. The administrative task expanded as old jails filled and individual counties began building systems of jails, then work houses, then prison camps. It had so far outgrown county jails and city lockups that, when the first state's prison was opened shortly after 1868, the General Assembly directed that it receive transfers of prisoners then serving twelve months or more in county jails and that in the future it receive all persons convicted of crimes for which theretofore the death penalty (four crimes excepted), or public whipping, or other corporal punishment had been imposed.<sup>97</sup> Thus the administration of prison punishment, borne almost entirely by counties prior to 1868, with some help from cities and towns, began to shift to the state. The shift continued as the state prison system expanded with separate plants and buildings for separate classes of offenders from 1907 to 1937. It reached the all time high in 1933 when the state prison system was required to receive all prisoners from

<sup>96</sup> *State v. McLamb*, 203 N. C. 442, 166 S. E. 507 (1932).

<sup>97</sup> N. C. Pub. Laws 1868, c. 85, §§42, 43.

all local units sentenced to prison for thirty days or more and to build nearly a hundred prison camps to house them.<sup>98</sup> The burden upon the state continues to increase as economic factors inform the conscience of the court that sentences of less than thirty days become a financial burden to the locality, which a slight increase in stringency may easily remove.

The state soon found that these state and local prison systems could not be operated according to legislative fiat alone, as problems of administration unforeseen and unprovided for by specific enactments clamored for solution at the hands of jailers who had often been employed only for their capacity to turn keys. Thereupon, city councils, county commissioners, and state boards and commissioners were authorized to make rules and regulations within the limits of the law for the conduct of prisons and prisoners in penal and correctional institutions.<sup>99</sup> They in turn employed superintendents, directing personnel, and guards to enforce these rules and regulations. The making and the application of these rules and regulations inevitably becomes part and parcel of the system of punishment. The classification of prisoners with privileges and penalties attached to the classes, the promotion or demotion from one class to another and the proportionate cutting down of the length of sentence for good behavior, the methods of maintaining law and order within prison walls, restrictions for safe keeping, and regulations for the prevention of escapes and discipline of those who attempt them—all have their influence upon the severity of the criminal's punishment. Thus, a great and growing host of penal and correctional institutional officials play their parts in a new and increasingly significant development in the administration of the penal law, bringing added problems of keeping administrators of the law within lawful limits. Out of public sight too often has meant out of public mind until damage suits for a prisoner's injured health and scandals of frozen feet, falling on cities, counties, and the state alike, have rung the courthouse bells to bring the people back to sit in judgment on themselves and force a cleaning of the prison house.

### *E. Pardon and Parole*

Only one power can rescue men from prison walls short of the expiration of the sentence, and that is the power of pardon and parole. From colonial beginnings to the present day this power has been exercised by the governor of the state. At first, he could pardon the accused at any time after the offense was committed—before conviction and even before trial.<sup>100</sup> But in 1868 the power of pardon was limited to par-

<sup>98</sup> N. C. Pub. Laws 1933, c. 39.

<sup>99</sup> N. C. Pub. Laws 1871-72, c. 202.

<sup>100</sup> 1 COLONIAL RECORDS (1663) 24.

dons after conviction,<sup>101</sup> "conviction" being construed to mean the verdict of the jury.<sup>102</sup> Rendition of judgment and pronouncement of sentence by the court are unnecessary to constitute a conviction for this purpose. Thus the pardoning power may intervene as soon as the verdict is in and at any time thereafter while any portion of the sentence may remain unserved.

A pardon may do away with the punishment altogether or only in part, as where a sentence is commuted from death to life imprisonment, or from life imprisonment to a term of years, or from fine and imprisonment to fine or imprisonment only.<sup>103</sup> The acceptance of a commuted sentence operates as an abandonment of any appeal the defendant may have taken.

"The power of the Governor to grant conditional pardons . . . is undoubted," said the court in *In re Williams*,<sup>104</sup> subject to the limitation that the conditions imposed must not be illegal, immoral, or impossible of performance.<sup>105</sup> This decision is the basis for paroles, which are nothing more than conditional pardons. The convicted person cannot be compelled to accept the pardon, but if he accepts it he is subject to its conditions and on breach of these conditions the pardon is avoided and he is subject to arrest even though the time for the original sentence has expired. This power likewise extends to reprieves. The power to grant absolute pardons, conditional pardons or paroles, commutations, and reprieves, extends to "all offences except impeachment."<sup>106</sup>

In the beginning the governor relied on his own investigations and the recommendations of interested persons in exercising this power. In 1925 he was provided with the assistance of a full-time pardon commissioner.<sup>107</sup> In 1933 this full-time pardon commissioner developed into a parole and pardon commission with an increasing full-time staff charged with the responsibility of systematic investigation of the records of all persons eligible for parole or pardon without waiting for the convicted person to make the first move.<sup>108</sup> With this systematic investigation of each prisoner's case, starting as soon as he begins to serve his sentence and continuing periodically throughout his prison term as a basis for gubernatorial action, the parole commissioner and his in-

<sup>101</sup> N. C. CONST. (1868) art. III, §6.

<sup>102</sup> *State v. Alexander*, 76 N. C. 231 (1877).

<sup>103</sup> *State v. Mather*, 109 N. C. 815, 13 S. E. 917 (1891); *In re McMahon*, 125 N. C. 38, 34 S. E. 193 (1899).

<sup>104</sup> 149 N. C. 436, 438, 63 S. E. 108, 109 (1908).

<sup>105</sup> See *State v. Yates*, 183 N. C. 753, 756, 111 S. E. 337, 338 (1922).

<sup>106</sup> *State v. Caldwell*, 95 N. C. 644 (1886); *Herring v. Pugh*, 126 N. C. 852, 36 S. E. 287 (1900).

<sup>107</sup> N. C. Pub. Laws 1925, c. 163.

<sup>108</sup> N. C. CODE ANN. (Michie, 1935) §7757(a).



vestigating staff constitute a final link in the machinery of punishment for crime.

*Summary.* Thus the extensive machinery controlling punishment for crime has developed: from the day when legislative action within constitutional limits fixed the exact punishment for the more serious crimes and made the judge an automaton to pronounce it, to the day when legislation first fixed the limits only and left the judge free within those limits to exercise his own discretion, to the day when the judge escaped these legislative limits through the suspended sentence and probation, to the day when a growing prison officialdom has largely replaced the judge in controlling the administration of punishment and is limited only by the power of pardon and parole. And with all this machinery of control by law, individuals break through all lawful bounds and take the law into their own hands just often enough to remind us that we are still the lineal descendants of men who a thousand years ago took the law into their own hands when they caught a criminal "red handed", "backbearing", or "hand having" and killed him on the spot; and that the hue and cry of a thousand years ago may be the lynch law of today.

### III. CHANGING PHILOSOPHIES OF PUNISHMENT

The changing types of punishment imposed in North Carolina from 1663 to 1939, and the changing control of these changing types of punishment, indicate changing philosophies of punishment in all the agencies engaged in the formulation and administration of our penal policy.

#### A. *Constitution and Legislatures*

*Clashing Philosophies.* "The object of punishments being not only to satisfy justice, but also to reform the offenders, and thus prevent crime," says the North Carolina constitution, "murder, arson, burglary, rape and these only may be punishable with death if the General Assembly shall so enact"<sup>100</sup>—carrying the connotation that persons convicted of murder, arson, burglary, and rape are beyond the reaches of reform, and leaving them room only for repentance in this world with whatever guarantee that might bring of salvation in the world to come. Looked at from the vantage point of today the philosophy of this constitutional provision may seem archaic and even obsolete. But looked at from the vantage point of 1868, it represents a reduction of crimes punishable by death from nearly twenty to a possible four. The very phrasing represents a compromise of clashing notions as to the place of punishment in the criminal law.

From the closing years of the eighteenth century until 1868 the fight

<sup>100</sup> N. C. CONST. (1868) art. XI, §2.

to civilize the criminal law centered upon the abolition of the death penalty and all forms of corporal punishment, and the substitution of imprisonment in a state penitentiary. *Opponents of this change attacked its lack of humanity.* "I cannot," said Theophilus Lacey of Rockingham, "believe this Penitentiary is calculated for humane purposes; since it proposes that an unfortunate criminal shall drag out, in some cases ten or twenty years, and in others the whole of his life, in prison."<sup>110</sup> *They attacked it as a breeder of crime.* "When a man commits murder . . . hang him; when he swears to a lie, crop him; when he steals, whip him. . . . But do not put him in a penitentiary, with a crowd of the worst of mankind, that he may there study villainy, and graduate proficient in every species of crime."<sup>111</sup> *They attacked its expensiveness.* "When the taxes now proposed to be laid, are collected and expended in building the Penitentiary, then a further and a heavier tax will be laid for the completion of the plan. Before we proceed to levy a tax on the people, we ought to have good reason for so doing."<sup>112</sup> Francis Hawks summarized their case in 1868.<sup>113</sup> "In their [our fathers'] day," he wrote, "there had been no development of that equivocal philanthropy and doubtful benevolence of modern times, which, under the names of 'penitentiary' or 'state prison' erects costly colleges wherein to educate crime, and surround the felon with comforts greater than he ever had industry enough to obtain for himself, by honest labor, among his fellow-men. 'The way of transgressors is hard,' says the highest authority. We confess, we think it ought to be hard. . . . The whipping post and gallows may be antiquated institutions, unworthy of the modern 'march of mind'; but we are old-fashioned enough to prefer them to penitentiaries . . . costly edifices, reared, as we are told, for reformation and penitence. The reformation lasts until a pardon is thereby obtained, and the penitence is for the consequences rather than the cause of sin. . . . We believe the stocks, the pillory, the whipping post, and even the gallows, to be much wiser and better institutions." It remained for William Watts Jones of Fayetteville to apply the clincher:<sup>114</sup> "I hold it to be my duty to oppose the passage of any bill which would be attended with so many evil consequences, and hope to strangle in its infancy this darling child of the Gentleman from Hillsborough." And when the people completed the strangulation by popular vote in 1846, the Raleigh Register wrote:<sup>115</sup> "The Penitentiary

<sup>110</sup> Raleigh Register, Jan. 5, 1802. Those interested in this phase of this topic should consult the excellent chapter on crimes and punishment in JOHNSON, ANTEBELLUM NORTH CAROLINA (1937).

<sup>111</sup> Fayetteville Observer, April 25, 1859.

<sup>112</sup> House Journal, Nov. 18, 1818.

<sup>113</sup> 2 HAWKS, HISTORY OF NORTH CAROLINA (1858) 128-29.

<sup>114</sup> Raleigh Register, Jan. 5, 1802.

<sup>115</sup> Raleigh Register, Oct. 12, 1842.

has been voted down by such a vote in this state, that it may be said to be dead and buried, never again to have a resurrection."

But the opponents of reform did not reckon on the tenacity and zeal of the reformers. "I pledge myself, as long as I have a seat on this floor, this subject shall neither sleep nor slumber," said Frederick Nash in the General Assembly in 1817.<sup>116</sup> "I will continue to raise my voice in behalf of justice and humanity; I will not cease to display before gentlemen the black catalogue of sanguinary punishments which disgrace our criminal code—to urge them to rescue our common country from the foul reproach of being the last of her sister states in laying aside that sanguinary code which we inherited from our Mother Country. . . . True it will be expensive—And is North Carolina too poor to be just? Must she hang her citizens as being not able to bear the expense of saving their lives?"

Nash's followers rallied to his support. "North Carolina has the bloodiest Code of laws of any state in the union,"<sup>117</sup> they said. "We have this day witnessed the most humiliating scene that has ever been exhibited," wrote one of them in 1846. "Two white men were, by order of the court, led to the public whipping post, there stripped and fastened, and lashed with nine and thirty, until their skin was rough with whelks and red with blood. We have never beheld a scene more degrading to the noble sentiments that should be nurtured and cultivated in the breast of every freeman. It makes us almost hate ourselves, to think that we are of their kind—yea, their fellow-citizens. . . ."<sup>118</sup> *The severity of the existing code defeats its own purposes, they argued.* "While doubts so widely prevail upon the right to take life, perhaps, it were well to inquire if such severe, indefinite and final punishments as yet disgrace our law do not increase, instead of diminish the number of offenders. . . ."<sup>119</sup> In support of this argument they pointed to the preamble to an act of the General Assembly in 1786:<sup>120</sup> "Whereas from the punishment [for horse stealing] in its nature and gradation bearing no proportion to the guilt, the persons injured from compassion forbear to prosecute, juries from the same motive, too often acquit and if convictions are had, pardons are extended to the guilty, whereby the present mode of punishment is found inadequate to the evil." A member of the General Assembly in 1818 took up the refrain in open debate:<sup>121</sup> "The present criminal code of this State . . . is dead; for, through the humanity of the Juries and the Governor, it has become a mere nullity."

<sup>116</sup> Raleigh Register, March 21, 1844.      <sup>117</sup> Hillsboro Recorder, March 21, 1844.

<sup>118</sup> Raleigh Register, April 7, 1846.

<sup>119</sup> CANTWELL, NORTH CAROLINA MAGISTRATE (1856) 227-28.

<sup>120</sup> 24 STATE RECORDS (1786) 795.

<sup>121</sup> Raleigh Register, Feb. 10, 1815.

*The severity of punishments is no deterrent to crime, they continued.* The Raleigh Star "on reviewing the whole scene" was "impelled to the conviction, which seems to prevail very generally among our contemporaries, that public executions do not tend to promote either the peace and harmony of society, or morality among the people. . . . [on the very day of a public hanging] many thefts were committed on our merchants, while their stores were crowded with buyers; counterfeiters seized upon it as a favorable time to pass their counterfeited money; and our streets at night presented a scene of disorder and drunkenness at once shocking to the feelings of humanity, and disgraceful to a civilized community."<sup>122</sup> But it was not until the constitutional convention of 1868 that the reformers won the fight to reduce the death penalty and to substitute imprisonment for corporal punishment in all its forms.

The enduring contribution of this long fight for reform was the philosophy of punishment behind it. "The principle will be conceded," said Governor Miller in his annual address to the General Assembly in 1815, "that the end of punishment is the prevention of crimes. If that end can be attained by a system which substitutes the reformation of the offender in place of frequent capital punishments, there certainly is room for a change. . . ."<sup>123</sup> And further expression of the reformers' aspirations was given by the address of a committee from the constitutional convention to the state in 1868: "The barbarous punishments of whipping, branding, cropping, will be hereafter unknown. Crime is as often the result of an ignorance of the means of getting an honest living as of a criminal disposition. Hereafter a penitentiary will be at once a place for the repression of crime, and a school for teaching the useful arts, to those who are more unfortunate than criminal."<sup>124</sup> Constitutions and legislatures had broken through the notion of the criminal as a type and discovered the criminal as an individual at last.

### *B. Judicial Discretion, Suspended Sentence, and Probation*

Judges, like legislators, have differed as to the purpose of punishment. As late as 1885 Chief Justice Smith complained of the "unusual exercise of judicial power employed not to repress crime but to reform the moral habits of the convicted party."<sup>125</sup> Such a course "is not unfrequent," said the court in 1892, "and though dictated by the best intentions . . . is not to be commended."<sup>126</sup> But this strain of thought

<sup>122</sup> Raleigh Star, Nov. 11, 1830.

<sup>123</sup> House Journal, 1802, p. 3.

<sup>124</sup> CONSTITUTIONAL CONVENTION JOURNAL (1868) 292 *et seq.*

<sup>125</sup> State v. Warren, 92 N. C. 825, 827 (1885).

<sup>126</sup> State v. Hatley, 110 N. C. 522, 524, 14 S. E. 751, 752 (1892).

was not so strong in the court as in the legislature. As early as 1838 Justice Gaston rejected the notion of punishment as an "atonement" or expiation and accepted it as an effort "to correct the offender and as a terror to evil doers."<sup>127</sup> Later judges built from this beginning and expressed a variety of objectives: retribution, deterrence, reformation, and the protection of society.<sup>128</sup>

In the effort to attain these ends the trial court in fixing the punishment in particular cases, has taken into consideration: the nature of the criminal act, the motive behind it, the provocation for it, repeated criminal acts, instigation or acquiescence, open and deliberate flouting of the law, the possible effect of the sentence on the offender, and all the circumstances of the case. "It is hardly possible, by any fixed arbitrary rule, to apportion with exact precision, punishments for offenders, for there are almost as many shades of guilt, and of aggravation or mitigation, to be considered in passing sentence as there are offenses committed."<sup>129</sup>

In the effort to find the facts through which to fit his sentence to the criminal, the judge in the past was hampered by his forced reliance, in the main, upon investigations by prosecution and defense, made for the purpose of proving innocence or guilt and not at all concerned with the infinitely more complicated question: Granting the guilt, what is to be done about it? In addition to the lack of fact finding machinery to aid the exercise of his discretion he has been hampered by tradition. Nowhere is this more apparent than in the shift from legislative fiat to judicial discretion in the control of punishment in our own history. The lawyers who, as judges, controlled the courts were of the same background, training, and perspective as the lawyers who, as legislators, controlled the General Assembly. It was, therefore, natural that notions controlling in legislative halls should continue to influence strongly the pronouncements from the bench. And they did. In 1878 our supreme court announced the doctrine that the trial court judge in fitting penalties to offenders should be governed in the exercise of his discretion by the penalties previously prescribed by legislative fiat; that if two years had been the maximum penalty imposed before the days of judicial discretion no circumstances could justify a higher penalty afterward; that if the judge in his discretion should go beyond the previous legislative chalk line it was "excessive, cruel and unusual punishment" contrary to the constitution.<sup>130</sup> Thus the dead past refuses to bury its dead. Thus the great hand of the past reaches out of the unknown through kingly council chambers and legislative halls

<sup>127</sup> *State v. Manuel*, 20 N. C. 144, 154 (1838).

<sup>128</sup> *State v. Swindell*, 189 N. C. 151, 155, 126 S. E. 417, 419 (1925).

<sup>129</sup> *State v. Reid*, 106 N. C. 714, 716, 11 S. E. 315, 316 (1890).

<sup>130</sup> *State v. Driver*, 78 N. C. 423 (1878).

into the courtroom and rests a moment on the shoulder of the judge with an arresting power. Thus a residuum of truth carries over from one notion to another and the interlocking experiences of successive generations lengthen into the continuity of a tradition which casts its subtle spell upon us yet.

In its efforts to steer a middle course between the one extreme of arbitrary and erratic punishments and the other extreme of slavish adherence to the legislative patterns of the past, and in its efforts to adapt sentences to criminals rather than to crimes, the judiciary, too, has slowly struggled through the notion of the criminal as a type and discovered the criminal as an individual at last.

### *C. Prison Boards, Officials, and Employees*

The constitution in 1868 directed "that the structure and superintendence of penal institutions of the state, the county jails and city police prisons, secure the health and comfort of the prisoners";<sup>131</sup> it also authorized the General Assembly to "provide for the erection of houses of correction, where vagrants and persons guilty of misdemeanors shall be restrained and usefully employed,"<sup>132</sup> and further to provide houses of refuge "whenever the public interest may require it, for the correction and instruction of other classes of offenders."<sup>133</sup> To this end the various governmental units and agencies were authorized to make rules and regulations.

All too often these regulating bodies had their private and personal notions of the purpose of a prison— notions in line with those of a pioneer of the prison movement who in 1800 sponsored a prison bill in the General Assembly, saying:<sup>134</sup> "The intention of putting convicts into these cells, is to punish them for misbehaviour; they should, therefore, be as dark and dismal as possible. I have been in those of the Penitentiary House at Philadelphia, and to be sure they are horrid places; but after criminals have been there two or three days, they generally come out sufficiently corrected and reformed." For years after the constitution of 1868, the condition of the local prisons was such that judges hesitated to use them for more than short confinements. ". . . a county jail," said Justice Reade in 1878,<sup>135</sup> "is a close prison, where life is soon in jeopardy, and where the prisoner is not only useless, but a heavy public expense." And in another case the court opposed long terms in "the county jail, where it is strongly probable that confinement and foetid air would cause a lingering death."<sup>136</sup> Prison records reveal with all the stinging freshness of

<sup>131</sup> N. C. CONST. (1868) art. XI, §6.      <sup>132</sup> *Id.* §4.

<sup>133</sup> *Id.* §5.

<sup>134</sup> Raleigh Register, Dec. 22, 1801.

<sup>135</sup> *State v. Driver*, 78 N. C. 423, 427 (1878).

<sup>136</sup> *State v. Miller*, 75 N. C. 73, 77 (1876).

demonstrated truth that for nearly half a century after imprisonment became a major part of penal policy, prisoners were looked on as a type of creature a little less than human. Courts and legislatures were continually called upon to protect the prisoners against inhuman treatment, assaults and batteries, and even killings from their keepers.<sup>137</sup>

As late as 1923 a state prison superintendent found it necessary in his official report to state the attitude of the slowly changing order: "It is my observation that the first principle for disciplining prisoners is to get it into the minds of those employees in charge of prisoners that insofar as possible prisoners should be accorded the same treatment as any free worker. Prisoners are merely ordinary human beings, just as you and I, they have temperaments, inclinations and aspirations, just as other human beings. . . . It is necessary to have the prisoners realize they have trust and dependence within themselves."<sup>138</sup>

Thus, prison officials have slowly broken through the notion of the criminal type as a less than human type and even as a type at all, as they have divided the type into classes, decreed the beginnings of vocational training in prison industries to fit persons in the classes for return to their communities, and, thus, discovered the individual at last.

#### *D. Pardon and Parole*

The exercise of the power of pardon and parole has always been a highly individual process—the personal prerogative of the governor of the state. In the early years of the state's history there is evidence that from time to time it was at the mercy of whim, fancy, or caprice. Later it was visualized more as a related part of the machinery of the criminal law and was administered less and less as the governor's personal prerogative or as an act of grace without reference to merit. Even then only special cases reached the governor's ear as pressures and pulls were utilized to force a case on his attention. It was only with the provision of investigative assistants to seek out each prisoner as he comes into the prison walls, study and appraise him on the merits of his case, issue paroles accordingly, and follow the course of the paroles for a time after he regains his freedom, that the governor was able to see through the forgotten criminal mass and discover the criminal as an individual at last.

*Summary.* Thus have our changing philosophies worked in mysterious ways their wonders to perform. For three quarters of a century the reformers worked to rescue the criminals from the death penalty and corporal punishment and put them into prisons in the name

<sup>137</sup> *Lewis v. Raleigh*, 77 N. C. 229 (1877); *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695 (1899); *State v. Revis*, 193 N. C. 192, 136 S. E. 346 (1926).

<sup>138</sup> Recommendations, Superintendent of State Prisons, May 10, 1923.

of humanity; then they worked three quarters of a century more to civilize the prisons into the reforming influences their sponsors originally intended them to be; then they started out to cut down by legislative fiat and systematic executive parole the length of time the accused persons might hope to spend under the reforming influences created for their benefit; then they began to build a system of probation to keep as many as they could from coming under these reforming influences at all.

#### IV. RETROSPECT AND PROSPECT

Thus, changing philosophies of punishment have brought the separate agencies charged with the administration of penal policy face to face with the individual human being committed to their care. And now that they have found him, they are at a loss to know what to do with him. They find themselves baffled by the man as they were never baffled by the mass.

*Fitting punishment to the crime.* With all its efforts to fit punishment to the crime, the legislature was never satisfied with the fit. To illustrate: it changed the punishment for counterfeiting from hanging, to cutting off the ears, to forty lashes on the bare back, back to hanging again, and then in addition to hanging to the added forfeiture of goods and chattels, lands and tenements. From this extreme the penal pendulum swung back to three hours in the pillory, to the cutting off of the right ear, to thirty-nine lashes on the bare back, to branding in the right and left cheek, and back to hanging again. From this extreme it swung to fine, to imprisonment, to fine and imprisonment, to fine, imprisonment and pillory, to fine, imprisonment, pillory and whipping post, and back to fine and prison again.

The weakness of legislative control of punishment was that it stood too far back of the scenes to see the differences which make men different, to see the circumstances which alter cases. The Goddess of Justice was blindfolded, literally groping in the dark in her efforts to fix the punishment for a crime before the crime was committed, before the criminal was caught, before the circumstances surrounding the crime or criminal were known. The shift to judicial control carried the Goddess of Justice from the legislator's seat to the judge's bench. It gave her a chance to get acquainted with the crime, the criminal, and the circumstances before she pronounced her judgment. It allowed her to look through the judge's eyes into the face of the prisoner at the bar. In short, it pulled the blindfold off. It was only natural perhaps that for a season she should be a little blinded by the light, as within legislative limits she undertook to fit the punishment to the criminal.



*Fitting punishment to the criminal.* In their efforts to fit punishment to the criminal, judges have not always been satisfied with the fit. The criminal court record of one young white man, beginning at the age of twelve and ending at the age of thirty-three, shows eighty-six convictions for eleven different types of criminal offenses. For these offenses he drew thirty-three prison and road sentences ranging from fifteen days to eighteen months; ten fines, ranging from \$1 to \$25; ten costs; eight fines and costs; eight sentences suspended without payment of costs; seventeen sentences suspended on condition he leave the county. In this case all the types of punishment allowed by law were imposed, as well as varying amounts of each type, and varying combinations of all types and amounts, and they did not work. If these punishments were imposed on the theory of individual reformation, they failed to reform. If on the theory of social protection, they failed to protect. If on the theory of deterrence, they failed to deter. If on the theory of retribution, they failed to bring remorse. If on the theory of satisfying public justice, there seems to be no end to satisfaction. If on the theory of vengeance, then vengeance costs too much. Society in getting even gets behind. The only theory on which these penalties may be justified is the theory of the license tax. There are enough criminal court records of repeating offenders in North Carolina today, sufficiently approximating this record, to create a suspicion that the shift from legislative to judicial control of punishment did not solve the problem, but only passed the buck.

*Reforming the criminal.* In their efforts to reform the criminals committed to their care, penal and correctional officials are not yet satisfied with the results they have achieved. Counties, cities, and towns have so completely lost their reforming enthusiasms that they have largely passed their prisoners to the state. After half a century of much trial and many errors the state system of penal and correctional institutions contained last year a total of from fifteen to twenty thousand people from practically every county, city, and town, for practically every type of crime. We can no more than guess the extent to which these institutions are reforming their charges, deterring them from continuing in crime, deterring others, protecting society, wreaking vengeance, or satisfying public justice.

The legislature when it gave the judges their discretion did not prescribe the factors which should guide them in its use. In the absence of a common law to go by each judge is perforce a law unto himself. The lawyers know it, and on this knowledge try to pick the judge before whom their case is tried. The records show it. A study of the disposition of criminal cases in the superior courts for the

past thirty years reveals one judge giving suspended sentences in as high as thirty-five per cent of the cases before him and another in as low as nine per cent; one imposing fines in as high as twenty-six per cent of the cases before him and another in as low as eight per cent; one imposing road sentences in as high as nineteen per cent and another in as low as seven per cent; one looking on bigamy as a cardinal crime calling for the limits of the penal law and another observing that boys will always be boys and that girls will sometimes be girls.

Thus we have twenty-four superior court judges pursuing different penal policies in different parts of the state at the same time. To the twenty-four superior court judges add more than one hundred judges of inferior courts which have sprung up throughout the state in the last thirty years, and the situation becomes complex. Add at least one hundred juvenile court judges, and the complexity increases. Add the unknown hundreds of justices of the peace with limited but tremendously important criminal jurisdiction in petty misdemeanors, and complexity becomes confusion. Rotate the twenty-four judges of the superior courts throughout the state at regular intervals, and confusion itself becomes confounded. No superior court judge has a fair chance to develop a consistent and well-founded penal policy. In one county today and in another tomorrow he cannot follow up his work and study its effectiveness in terms of its results. No community has a fair chance to develop a consistent penal policy. Today its courts are held by a judge whose judgments are characterized by severity and tomorrow by a judge whose judgments are characterized by lenience. No one can say which is right, and, what is more significant, no one is likely to find out. No judge of an inferior court can develop a consistent penal policy without feeling hampering effects from the system of courts operating above his head to which offenders have free access through the medium of appeals. The net result is that our penal policy is without form, if not void. Differences in punishment are as likely to be based on differences in judges as on differences in criminals!

When the legislature gave officials, boards, and employees of penal and correctional institutions discretion in making rules and regulations governing the thousands of prisoners committed to their care, it did not prescribe the factors which should guide them in its use. And in the absence of a common standard, county jails, city lockups, state prison and prison camps too often made their laws to suit themselves. Likewise, when constitutional conventions in 1776 and in 1868 recognized and reaffirmed the governor's discretionary power in matters of pardon and parole, they did not prescribe the factors which

should guide him or his successors in its use and each governor became a law unto himself.

Not until the General Assembly gave these agencies of sentence, punishment, parole, and pardon their investigating and supervising staffs did it begin to equip them to utilize the great discretionary power it had bestowed upon them years before and make it possible for them to join hands in the development of a consistent and constructive penal policy in North Carolina; and these facilities permit them to make only a beginning in utilizing all the resources of modern science and human experience to discover in this darkened field of the criminal law the countenance of justice, to discover the differences in men which justify differences in treatment and the differences in treatment which will achieve the ends at which we aim, and so rescue this uncharted realm of official discretion from the uncertainties of chance and bring it within the great tradition of the law.

As these agencies cut through form to substance and through phrases to the facts they find the ancient problem still unsolved, the age-old question still unanswered, bobbing up through the centuries in changing form but with unchanging meaning: If the purpose of punishment is the satisfaction of private vengeance, what kind and degree of punishment will satisfy it? If the purpose of punishment is the satisfaction of public justice, what kind and degree of punishment will satisfy it? If the purpose is protection of society, what will protect it? If the reform of the individual, what will reform him?

Here are strange, perplexing questions which Blackstone does not answer, on which statute and decision throw little light. They push the limits of legal attention back of the moment when the policeman's hand falls upon the offender's shoulder and beyond the moment when sentence is pronounced upon him; back of the murder into the murderer, back of the theft into the thief, back of the violation of the liquor law into the appetite which causes it, and beyond the beginning of a prison term to the completion of the sentence and the offender's restoration to the community and to the problems of readjustment which confront him there. They bring the causes of crime and the consequences of punishment out of the shadows of sentimental speculation into the focus of pertinent legal inquiry. They bring the problem of the social control of human behavior out of the atmosphere of academic theorists and parlor sophisticates into the grim tenseness of court room scenes where in the person of the prisoner at the bar it calls insistently for answer.

Locke told us that man was purely a product of environment. Galton told us he was a product of heredity. Behaviorists tell us he is a sys-

tem of reflex mechanisms. Physiologists, that he is a series of physiochemical reactions. Psychologists, that they can read his destiny in the movements of a rat. Lombrosa thought he had found the key to criminality in the slant of the forehead and the jaw. Gall, in the bumps on the head. Schlapp and Smith, in the endocrine gland. The psychoanalyst, in infantile experiences. The meteorologist, in the state of the weather. The economist, in the condition of the market. No one of them has told us all, or nearly all. But all of them have now and then struck off a spark which for one brief moment has lit up the face of truth like a match that is struck in darkness. But despite all these discoveries discretionary punishment still presents an uncharted field where the private notions of each administrative officer hold public sway. This discretionary power at its worst abandons him to the sway of whim or fancy or caprice and at its best it offers him his conscience for his guide.

As penal officials make fresh efforts in this uncharted field they may find incentive and inspiration in allied fields. For centuries the stars spelled out the fortune teller's superstitions only. After generations of continuous observation, experimentation and analysis, astronomers today predict with a certainty approaching the absolute the actions of the stars.<sup>139</sup> The astrologer's superstition has become the astronomer's science.

For centuries men called upon the philosopher's stone to help them turn earth's baser metals into gold. But today the ancient philosopher's stone, still lingering with us in the rabbit's foot, has yielded to scientific experiment.<sup>140</sup> The alchemist's magic has become the chemist's science.

For centuries men have studied the nature and the structure of human intelligence and for nearly two thousand years men have tried to settle by disputation problems that would yield only to experiment. Within the last two centuries practical experimentation has thrown fresh floods of light on the wellsprings of human conduct.<sup>141</sup>

<sup>139</sup> Tycho Brahe began to observe the stars in their courses, to note their relative positions as they moved across the heavens, and to write down what he saw. From these recorded observations Kepler found an order in the skies and wrote down the laws by which the heavens moved. Newton found the explanation of these laws in gravitation, and Einstein is adding to the completeness of the explanation.

<sup>140</sup> From these crude beginnings of alchemy came discoveries of the differing physical properties in the make-up of the earth. Out of this jumble of elements order began to appear as men found they could arrange them in a periodic table according to their atomic weight. Dalton explained this order in his theory of the atom. On this theory of a law abiding universe men have predicted undiscovered elements where gaps existed in the periodic table and have sought and found them. Thus Madame Curie discovered radium and brought it to the bedside of cancer suffering patients. Thus the elements of the earth have been harnessed to the service of mankind.

<sup>141</sup> At the Royal Observatory at Greenwich in 1795 two men reported the

If out of astrology, astronomy could come, if out of alchemy chemistry could come, is it too much to hope that out of psychiatry with its many blind and futile gropings may come the beginnings of a science of human behavior? Is it too much to hope that out of the pioneering explorations of Sheldon and Eleanor Glueck and their companions in the field there may come new and needed light to guide officials charged with the formulation and development of penal policy in city, county, state, and nation? It is not too much to say that hundreds of thousands of human lives and millions of dollars of public monies are staked upon the outcome of their efforts as they "lay their course by a star they have never seen", as they "dig with the divining rod for springs they may never reach", as they "follow knowledge like a sinking star beyond the utmost bounds of human thought", on the trail of questions which still lie unanswered like mysterious torments against the conscience of the state.

---

occurrence of the same phenomenon at different times, noticed over a number of trials the difference was constant and found they could correct the "constant". They stumbled on the "personal equation". In 1847 Helmholtz was exploring this personal equation in experimental tests of the reaction speed of different individuals to given stimuli. In 1904 Binet began the experiments leading to intelligence tests and the concept of mental age. Today on the basis of the scores of intelligence tests and hours of study educators have predicted with 90% accuracy the grades of students in college courses in advance. The insurance companies have discovered that 20% of the automobile drivers have 50% of the automobile accidents, and they are using the theory of the intelligence tests in the effort to find out in advance the accident prone drivers so as to write their disqualifications into insurance policies. Certain street railways have cut their accidents almost in half by special training for their accident prone conductors.