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I. WHY DO WE PUNISH CRIME ?

Vacationing at Saratoga one summer, I saw bulletined for a hearing at one of the sessions of the American Social Science Association, there holding its annual meeting, this topic: "The punishment of crime. Is it for reformation or retribution?" I dropped in to hear the discussion. The paper was by a New York lawyer of repute, and it was an enthusiastic advocacy of the reformatory idea in the administration of law. The topic has had wide attention in recent years. The right understanding of it is of vital concern to good government and public weal. The principles involved concern all government, human and divine. Why do we punish anywhere? Why does a parent punish in the family, or an officer in the State? And if God punishes, why does he punish?

Let us first define some terms, common to this discussion. Justice, in the exact formula of the ancients, is *sum cuique*—to each his own. The figure representing it is the scales held in perfect balance. It is exact requital of desert.

Law, in brief and apart from a mode of procedure, is command imposed by authority. Essential to the idea of law is sanction. Without penalty, or punishment for disobedience, law sinks to the level of mere advice. It is no longer law, but counsel.

Punishment is inflicted for the violation of law ; penalty, pain, penal sanction. Grotius defines it, "the evil of suffering, inflicted on account of the evil of doing." It is the desert of wrong-doing.

Crime is an offence against human law. A criminal is a breaker of human law. The difference between crime and sin is this : while each is a violation of law, crime is a violation of human law and sin is a violation of divine law. It may easily come to pass therefore, that what is a sin in a given case is no crime, and what is a crime is no sin.

With these definitions in mind, let us consider the end of punishment, or the reason for its infliction.

There are three views that have had more or less of public advocacy, viz: the retributive, the protective and the reformative.

The retributive is the oldest, looking chiefly to the crime.

The protective is the second born, looking to the safety of society.

The reformative is the latest, looking to the criminal, and seeking solely his reformation.

Taking the liberty of reversing this historic order, let us give the last theory our first attention. By this theory, the prison becomes a reformatory and the prisoners are classed as lunatics and idiots are, i. e., as wards of government. The paper heard at Saratoga in advocacy of reformation as the end of punishment, distinctly and explicitly held that, "by the true psychology of crime the prisoner demands governmental care and treatment, on the same grounds with the lunatic, the idiot, the blind and the dumb." (Journal of Science, January 1894, p. 79). And further, that "prison discipline" must be therapeutic ; that "cure" must set the limit to the duration of imprisonment, and that "the incurable must be confined for life."

That this writer is not extreme in putting forth the reformatory theory, will be perfectly apparent from other

and leading advocates. Prof. Collin, of Cornell University, says: (Address before Massachusetts Prison Association, December 10, 1893) "The true conception of the functions of a prison is that it shall be a hospital for the treatment of depraved bodies and diseased souls."

Sanford M. Even, late Judge of Supreme and Criminal Courts of Michigan, in his work on "Crime" states that he was accustomed while on the bench to "advise jurors that they were summoned as a council of physicians to diagnose the prisoner's case as one alleged to be morally diseased; and if such was proven to be his condition, the proper treatment ought to be administered for his cure upon the same principle in all respects as in the case of an insane person." The report of a Committee on Prisons, 1881, to the Legislature of California, says: "All persons convicted of crime shall be deemed wards of the State and committed to a Board of Guardians." And the Michigan State Board of Corrections and Charities in their fifth biennial report, 1879-80, commenting on the fact that eight convicts were sent to prison in one year in that State for assault with intent to commit murder, 1 for 45 years, 1 for 25, 1 for 15, 1 for 9, 1 for 6, 1 for 5, 1 for 2 and 1 for 1, say, "If there were high courts or commissions in lunacy, and they were to commit eight maniacs, who had attempted murder, to an insane hospital for terms varying from 1 to 45 years, it would be at once apparent to all that the high court itself was wildly insane. If on the contrary, the would-be murderers were sent to a hospital until wholly restored to reason, the conduct would appear to be reasonable."

Clearly, therefore, the reformatory theory has this as its fundamental idea, that the criminal is a person morally diseased, whether by heredity or environment, who is to be placed in hospital or asylum for therapeutic treatment and kept there until he is cured.

This theory is certainly open to some very serious and damaging objections.

In the first place it not only plays havoc with accepted terminology, but revolutionizes some fundamental convictions, and even challenges some of our primary beliefs.

Our courts are no longer courts of justice, but courts of inquiry or commissions in moral lunacy. Juries are councils of physicians. Prisons are hospitals. Prisoners are patients. Nay, more than this: there can be no crimes and no criminals, for there is no law. There can be no law, for there is no punishment. Law is mere opinion until a penalty is attached for its violation. There can be no punishment, for "by the true psychology of crime (although there can be no crime, for crime implies responsible violation of law) the criminal (so called) demands governmental care and treatment, on the same grounds with the lunatic and the idiot." We do not inflict penalties on lunatics and idiots. We put them under restraint, so that they may not do harm. And then we treat them, but we do not punish them.

Thus the theory degrades human nature. For it assumes that man is not responsible for his evil action. Law and punishment recognize free agency, are based upon voluntariness, and therefore honor human nature. This curative theory makes man a victim of circumstances, environment, heredity; and robs him of his peculiar glory, viz: the endowment of free will—the self-election of the right and the wrong. If immorality is a mere disease to be cured in hospital by physical and mental discipline, then human freedom is a delusion. But that theory flies right in the face of the conscience of the race. It is guilt we punish, not misfortune. "The thief doth fear each bush an officer." "Conscience doth make cowards of us all." "It mutinies in a man's bosom." "Out damned spot." "What, will these hand's ne'er be clean?" "Here's the smell of blood still. All the perfumes of Arabia will not sweeten this little hand." "Which way I fly is hell. Myself am hell."

These whips and stings of conscience prove that the trouble is too deep for hygienic treatment.

The reformatory theory is also in contravention of the deep-rooted belief of man, that there are degrees of guilt. This theory recognizes no gradation of offences. Its provided discipline, both as to its nature and its duration, is wholly independent of the character of the crime. Cure determines when release shall be given. And cure is to be effected by physical training, healthful diet, a work shop and a school. This is the one sovereign panacea for "depraved bodies and diseased souls." And it is applied in every case, in utter disregard of the magnitude of the crime. Hobbes says of the Stoics, "They held it as great a crime to kill a hen as to kill a father." But their blotting out all gradation of offences came from their condemning so immeasurably all wrong doing. This modern theory of reformation blots out all gradation of offences because in treating criminality as a disease it really condemns no wrong doing. A man commits a petty theft, and he is to go to a prison hospital until he reforms; a man commits a brutal murder, and he is to go to a prison hospital until he reforms! The prescription is exactly the same. But therapeutic treatment like this is sheer quackery. Blackstone well says, "It is a kind of quackery in government to apply the same universal remedy to every case." (iv: 17). And he further impressively says, "When men see no distinction made in the nature and gradation of punishment, the generality will be led to conclude there is no distinction in guilt." (iv: 17). Let that doctrine prevail and life will be cheap indeed.

If it be said the unlawful taking of human life is an exception to the reformatory rule, then the theory breaks down with homicide. And it breaks down just at the point where it is most needed; for if any man on earth needs this moral therapeutic, this process of treatment for reformation, before he goes to judgment (if there be any judgment) it is the man whose hands are reddened with his brother's blood.

But another objection to the theory is that it abandons its fundamental principle in the very administration of the theory.

Let it be borne in mind that the theory is opposed to the retributive—it regards the criminal as diseased—it puts him in hospital, not as a punishment, but that he may be treated, and on exactly the same ground that the insane and the idiotic are treated; he belonging to one of the “defective, abnormal classes” which are “the wards of government.” But just so soon as he gets inside the reformatory prison, *presto*, what a change! He is placed under rigid law, with exact and severe penalties, and if he breaks a prison rule he is at once and inexorably punished to the full and the severe extent of the prison law. That I may not do injustice to the advocates of this theory, let me quote from Prof. Collin, one of the Directors of the American Social Science Association. Speaking of the criminal in the Prison Reformatory, he says, “First, last and all the time, he must obey the prison regulations. . . . must be broken to harness, and this usually means severe physical compulsion—scientifically administered corporal punishment. Physical compulsion in prisons must be. I believe in making it short, sharp and effective.” And a report of the National Prison Association’s Standing Committee on Prison Discipline, read at Chicago some years ago, says, “Penalties must fall upon infractions of prison rules invariably;” “disciplinary treatment consisting in the scrupulous exactitude of absolute obedience.” And the very severity of this punishment in the Elmira Reformatory of New York was made the occasion of a terrific assault on that institution. Thus the reformatory theory is obliged to abandon its fundamental idea in the very process of carrying it out. Outside the Reformatory the criminal is a victim of heredity and evil circumstances, and not, therefore, a subject of punishment, but of curative treatment. But once inside the Reformatory, if he break law, woe betide him.

Heredity cuts no figure now. The theory is whistled down the wind. His punishment must be instant, inexorable, severe. The Reformatory is established to avoid the infliction of punishment, and then punishment is inflicted to keep up the Reformatory ! And out of this anomalous and contradictory state of things, there grows an inevitable tendency to what, if possible, is a greater wrong, viz : a tendency to make the punishment out of all proportion to the offence. A slight infraction of prison reformatory rule is punished with fearful severity. This was the root of the trouble at Elmira. The revolt was against brutal punishment for what might be scarcely more than an indiscretion.

And this tendency to excessive severity is the direct outgrowth of the mischievous theory. The theory is reformatory and not retributive. It claims that justice has no place as a factor in determining what shall be done with an offender. And when you have taken justice away as a base of procedure, what is there to prevent the most outrageous tyranny and brutality in the interests of this process of cure ? The prison reformatory has nothing to keep it from becoming a relentless despotism, for its punishment is scaled to suit the theory and not at all to suit the offence. It has no ground in justice ; only in the exigencies of a theory. Therefore, in the long run, nothing is kinder than justice. Justice is never "seasoned" by mercy, Portia to the contrary, notwithstanding. Justice is right just as it is, for it is rightness, and can be improved by nothing. Any change from rightness is, so far, wrongness. Just so far as kindness is at the expense of justice, it is a blow at government, a blow at law, a blow at social order, a blow at every sanctity of home and altar. Consistent with justice, there may be mercy with God and man ; but never counter to justice.

There is one other grave objection to the reformatory theory. Let it be remembered, the prison discipline is to be "therapeutic ;" cure is "to set the limit of imprisonment ;"

imprisonment is to "continue until it becomes safe for the community that a convict be released." But to determine when cure has been effected; this is the transcendent difficulty. See the complications: Reformation means such a change in the criminal that he no longer has the inclination to repeat offences. The top root of crime is deeper than the body—deeper than the mind. Diet and education, work and school, cannot kill it; may not even touch it. It has struck through and through the man's moral nature. Where is the mental necromancer who can tell when that is changed? Who can certainly know all the subjective and psychological elements involved in determining when prisoners are so far reformed as to make their discharge safe to society? The Fifth Biennial Report of the Michigan State Board of Corrections, already referred to, anticipates this objection, and replies to it by saying, "It cannot be certainly known, but it can be known at least equally well in this case as in the case of insanity." *Mirabile dictu!* As if insane people were as conscious of their insanity as criminals are of their crimes, and sane enough to conceal their insanity as criminals are sane enough to conceal their criminal disposition; and as if both could be equally and mightily influenced to deception by the prospect of freedom!

Let "cure" set the limit of imprisonment, and the biggest rascals would often be the first to take the easy doses of reform, and to exhibit the magic transformations of the prison panacea.

"When the devil was sick, the devil a monk would be.
When the devil got well, the devil a monk was he."

It is said the devil can "clothe himself as an angel of light." If there be doubt as to the personality of the devil, no one will deny that the devilish can effect that change of apparel. And if men will "steal the livery of heaven to serve the devil (or the devilish) in," they will certainly be willing to don that livery to get out of prison.

And thus we might easily, we would almost inevitably, be faced with this strange travesty of justice: a petty thief imprisoned for life, and a damnable villain, guilty of some brutal crime, out of jail in a twelve-month. The mighty words of Blackstone may well be heard again: "It is indeed a kind of quackery in government to apply the same universal remedy to every case."

Let us now briefly consider what we have termed the protective theory, which makes the end of punishment the protection of society.

Here we shall be obliged to make some large concessions. That the protection of society is very closely connected with our laws, and their penalties cannot be a matter of question. We are ready to affirm that the legal prohibition of any act whatever is solely on the ground of its evil effects upon society, and not at all on the ground of the inherent evil of the act itself. Public law does indeed make a distinction between the things it prohibits, classifying them as evils in themselves (*mala in se*) and evils prohibited (*mala prohibita*): but the ground of their prohibition is exactly the same. Ten thousand things are wrong in themselves that the law never touches, and never ought to touch; while things right and innocent in themselves, the law often prohibits. The law does not prohibit my swearing to a lie with my hand on a Bible when I am on the street, but it thunders prohibition against my doing that same thing on the witness stand in a court of justice. Why? Because government must have a place where truth shall be told. Swearing falsely is just as much a wrong *per se*, in one place as in another. But it is prohibited in a court of justice, solely to protect society. The law will punish me if I attempt homicide. In most states the law will not punish me if I attempt suicide. Yet each is *malum in se*. The law prohibits my destroying my house by fire, but not by pick and crowbar. Yet neither is *malum in se*. In a densely populated city driving a horse over six

miles an hour is a crime; building frame houses in the fire district is a crime; following some useful, but offensively odorous trade, is a crime. Why all this? There is but one answer. The protection of society; and not at all the inherent rightness or wrongfulness of the thing prohibited.

But conceding this to be the ground of all prohibition by human law, when it comes to the adjustment of the penalty in connection with the crime, is it still exclusively the protection of society that is had in view? It is at this point that the theory is inadequate as a full statement of the truth. Punishment that is regulated with no reference to inherent guilt, but with sole reference to supposed public advantage, has lost its basis of justice, and become a matter of expediency.

Hence the multiplication of capital crimes. When Blackstone wrote, there were upwards of a hundred and fifty actions declared by Act of Parliament to be worthy of instant death. Offences against property were expiated by human life. And the statutes weighed out a man's blood against dollars and cents. As if the public good could ever be promoted by such an outrage on justice. When any act made punishable by law is inherently and flagrantly wrong, what is the swift judgment of one witnessing the wrong act? Why, that the guilty doer ought to be punished; and this without any reference whatever to the good effect of the punishment, either on the criminal or on society. Such judgment is instinctive, founded in the very constitution of the human mind. The criminal who is made to suffer the penalty solely for the public good is made thereby what any inanimate thing is when put to good use. He is punished for the sake of others as a matter of expediency, and not because it is just and right that he should be punished. The reason for his punishment is found wholly outside of himself; and this is treating him not as a responsible being guilty of voluntary wrong, but as a dog might be treated—that for the benefit of society. The oft quoted remark of

the English judge to the horse-thief, "You are not hung because you have stolen a horse, but that horses may not be stolen," instead of involving a sound principle of law, involves a two-fold absurdity; for in one breath it makes nothing of horse stealing, and yet makes a horse of more value than a man. It belittles the crime, yet hangs the criminal. The improvement of the criminal classes is not along that road.

There is hardly need of an extended discussion of the third, or Retributive theory, as indicating the reason for punishment; for already and necessarily it has had our thought, in considering objections to the Reformative and Protective theories. Some further word, however, seems important in order to a full presentation of the case, and especially do some of the objections urged against it deserve reply.

The principle that underlies and pervades this theory is justice, the demand for which is "mortised into the moral constitution of man," as shown by the prevailing sense of guilt and of fear where wrong has been done. Justice Lilly, out of a wide experience of criminal magistracy, says, "Resentment at wrong, and desire of retribution upon the wrong doer are primordial principles, as deeply implanted in our nature as pity, or the desire of self-preservation." Just because Socrates was right in saying, "the greatest of evils is for a guilty man to escape punishment"—for that very reason, the greatest good that can be rendered to the unjust is justice. The first and vital step in any true reformation is for the criminal to see and admit that his punishment is deserved. How can punishment have any beneficial effect whatever, either on the criminal or on society, except the punishment be just and right in itself.

In society and under government, the personal redress is transferred to the State. Personal revenge is forbidden. But the very end of government is justice. It is organized

to protect and vindicate rights. He who planted in the human bosom the instinct of self-preservation, and its corollary, resentment at wrong, in setting the solitary in families and constituting society and government, ordained expressly that the sense of justice in all men should find its expression through rulers and law, making the powers that be "an avenger for wrath to him that doeth evil." So that that sagacious, far-sighted statesman, Alexander Hamilton, was in harmony with the power that makes for righteousness, when he said, "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued, until it is obtained, or until liberty be had in the pursuit." But how is justice possible, how is government possible, with no punishment for crime? It can neither be founded nor administered, unless the power to punish crime is conceded. The actual infliction of punishment, therefore, has its root in justice, and is retributive.

Moreover, it is the most effective restraint upon crime. Fear is a potent element in preserving the peace and good order of social and civic life. Multitudes are kept obedient to law through fear of its penalty. The oft quoted sneer about making people good by law, as if morality and decency were a matter of thumb-screws and the lash, loses all its sting here, because of the utter irrelevancy of its application. Men are not made good by law, but they are restrained by law from letting a good deal of their badness out upon others. What imagination can conceive the horrors we should be plunged into, if once it came to be understood that rulers were no longer to execute wrath upon evil doers, but only to seek reformation. We must have short memories if we have forgotten the long hush that came upon lawlessness when we hanged the anarchists at Chicago. Let it be once made clear that no retribution waits these fellows, and who dare predict how soon they would be at our throats?

It is objected that the retributive system breeds crim-

inals. But this is a fault of administration, not of system itself. That there are glaring evils connected with our management of criminals goes without saying. The herding them together without careful classification, the leaving them in confinement without occupation, the discharge of them with no preparation whatever for their freedom, are inconceivably bad, and cry aloud for remedy. But those are incidents and attendants, not vital to the system in any way. They could, and they should, all be swept away, and yet the retributive element be left intact, making the prisoner still feel the weight of the vindication of the majesty of law, and facing him still with the fact that he is punished for his violation of law, and that his punishment is just.

But it is further objected that this retributive theory hawks crime at a price. The New York lawyer, in his paper at Saratoga, said, "If a crime can be expiated by suffering the prescribed penalty, that penalty marks the cost price of the crime." And he further said, "that the penal code presents a price list of crimes, and that, so far as the State is concerned, one can commit any crime, the fixed penalty for which he is willing to pay." But clearly, this is a misapprehension of the province of penalty. Penalty does not pay debts. Penalty shows an outstanding obligation. It does not discharge it. Penalty is pain. If I recklessly break my limb, the pain of it does not mend the break. If I am criminally wronged by another, the wrong is not righted by his suffering a penalty for it. The State, in the punishment of the criminal, expresses its sense of the injury done by the crime, but this does not repair the injury. Nothing can repair it in human jurisprudence. The *quid pro quo* is impossible. The reasoning that would make penalty a warrant for crime, would make hell a warrant for sin.

Instances of injustice are cited, as another objection to the retributive theory. A man steals a watch. If the

watch is worth only \$24, the crime is petit larceny, and the penalty is imprisonment for not more than one year. But if the watch is worth \$26, the penalty is imprisonment for not less than five, nor more than ten years. Well, of course, this presents a difficulty—just as fixing an age when a minor may vote, presents a difficulty. It works hard on some minors, who can vote more intelligently at eighteen or twenty than others can at any age. Shall we therefore seek no equitable adjustment of the right of suffrage? Because justice cannot be properly administered, is certainly no reason for not trying to administer it. Rigorous and exact justice, owing to the subtleties of motive, the influence of environment, the possibilities of deception and concealment, is impossible in human jurisprudence, but its approximation is nevertheless to be sought.

Nor need it be denied that the three ideas, viz., the reformative, the protective and the retributive, may each have their place in the treatment of the criminal. Certainly the protection of society should be kept in view. And to be indifferent to reformation in the criminal, would be to have a prison discipline through which a prisoner might pass without any care on the part of society and the State, whether he grew human or beastly, divine or devilish, in the process. The consequence of prison discipline should be the making, if possible, invariably a better man. His better nature should be constantly appealed to. Inducements should be held out for fidelity. Severity of treatment might be relaxed in view of desert. Classification of criminals should be a *sine qua non* in every prison. Provision should in some way be made, so that the prisoner's discharge would not be an open and almost overwhelming temptation to new crime. But all this and all else beside, of civil expediency and social utility, is not the purpose of punishment or retribution. Let justice be done though the heavens fall. The heavens will not fall. They will be all the more stable for the justice done.

Now, if we carry these changeless and vital principles of government over into the realm of divine government, we shall be able thereby to correct some very prevalent and pernicious notions.

Justice is not changed by the transfer. It remains immutably the same: "to each his own." Law is also immutably the same: "command imposed by authority, and necessarily involving punishment for disobediences." And punishment is still what it is everywhere and always: "penalty, penal sanction, the desert of wrong doing." The sinner is a breaker of law, and sin is lawlessness.

Hell, therefore, cannot be a reformatory. Whether a place, or a condition, or both, it is punishment. And punishment never reforms. It may restrain from wrong doing, but there is nothing in it or of it, to change the wrong doer, and put him in love with righteousness.

But neither is hell a dead level of penalty for sin—an equal amount and desert of suffering for any and every kind of wrong doing. This would be characterizing God's moral government as an infinite quackery. Surely there are different heights of heaven, and just as surely there are different depths of hell. This the Scriptures do most plainly declare. There is "an abundant entrance" into heaven, and a being "saved so as by fire." Paul and the dying thief passed "through the gates" alike free from sin, but in capacity for joy, and sources of joy, what a difference! "Thy pound hath gained ten pounds; have thou authority over ten cities." "Thy pouud hath gained five pounds; have thou authority over five cities."

Equally clear is the Word of God as to the other of the two eternal conditions: "As many as have sinned without law shall also perish without law; and as many as have sinned under law shall be judged by law." (Rom. 2:2).

'The servant that knew his Lord's will and did it not, shall be beaten with many stripes; but he that knew not his Lord's will and did unworthy things, shall be beaten with

few stripes." (Luke 12:47). And what tremendous emphasis Christ himself gives to this principle of gradation in guilt and punishment, by his words to privileged Capernaum: "It shall be more tolerable for the land of Sodom in the day of judgment than for thee." (Matt. 11:24).

Is there no mercy with God? There is infinite mercy. But it is not the mercy that is counter to justice. This would be injustice. It is not the mercy represented by the yarn and tow and wish-wash of sickly sentimentalism. This would be lawless license. It is the mercy whose sublime and culminating exhibition is seen at the Cross of Christ. That remedial agency, with its measureless wealth of pathos and entreaty, of tenderness and tears, is from the innermost heart of God. But the pillars of divine government do not tremble—they are made firmer by its exhibition. The tables of the commandments lean against the cross. Beneath the mercy seat God places his holy law. And the sinner knows as he looks up into the face of the crucified that there is a divine *ὀργή* as well as a divine *ἀγάπη*, and that this remedial and reformatory agency is consistent with law, and maintains the sovereignty and the majesty, as well as the tenderness, of love; and instead of issuing a license of lawlessness and making the gospel an eternal lullaby, it gives a deeper meaning to that most terrific thing of Scripture, "the wrath of the Lamb."

HERRICK JOHNSON.

Chicago, Illinois.