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ANGLO-AMERICAN PHILOSOPHIES OF PENAL LAW. III.¹

HERBERT SPENCER.²

THE ETHICS OF PUNISHMENT.

The two antagonist theories of morals, like many other antagonist theories, are both right and both wrong. The a priori school has its truth; the a posteriori school has its truth; and for the proper guidance of conduct, there must be due recognition of both. * * * The general reasons we gave for thinking that the ethics of immediate experience must be enlightened by abstract ethics, to ensure correct guidance, are strongly enforced by these instances of the gigantic errors which are made when the dictates of abstract ethics are ignored. The complex estimates of relative expediency cannot do without the clue furnished by the simple deductions of absolute expediency.

We propose to study the treatment of criminals from this point of view. And first, let us set down those temporary requirements which have hitherto prevented, and do still, in part, prevent the establishment of a just system.

The same average popular character which necessitates a rigorous form of government necessitates also a rigorous criminal code. Institutions are ultimately determined by the natures of the citizens living under them; and when these citizens are too impulsive or selfish for free institutions, and unscrupulous enough to supply the requisite staff of agents for maintaining tyrannical institutions, they are proved by implication to be citizens who will tolerate, and will probably need, severe forms of punishment. The same mental defect underlies both results. The character which originates and sus-

¹In this series of articles will be presented, from time to time, representative passages from the writings of those English and American thinkers who have advanced a philosophy of penal law. Only those thinkers will be selected (so far as feasible) who stand eminent in general philosophical science and have treated penal law as a part of their system. The series will be edited by Mr. Longwell, instructor in philosophy; Mr. Kocourek, lecturer on jurisprudence, and Mr. Wigmore, professor of law in Northwestern University.—Eds.

²This essay, under the title, "Prison Ethics," was originally published in the *British Quarterly Review*, July, 1860; it is sometimes and better known by the above title. It is here reprinted from the Library Edition (London: Williams & Norgate, 1901) of Spencer's "Essays: Scientific, Political, and Speculative," Vol. III, p. 152. Portions describing certain prison systems have been omitted.—Eds.

tains political liberty is a character swayed by remote considerations—a character not at the mercy of immediate temptations, but one which contemplates the consequences likely to arise in future. We have only to remember that, among ourselves, a political encroachment is resisted, not because of any direct evil it inflicts, but because of the evils likely hereafter to flow from it, to see how the maintenance of freedom presupposes the habit of weighing distant results, and being chiefly guided by them. Conversely, it is manifest that men who dwell only in the present, the special, the concrete—who do not realize with clearness the contingencies of the future—will put little value on those rights of citizenship which profit them nothing, save as a means of warding off unspecified evils that can possibly affect them only at a distant time in an obscure way. Well, is it not obvious that the forms of mind thus contrasted will require different kinds of punishment for misconduct? To restrain the second, there must be penalties which are severe, prompt, and specific enough to be vividly conceived; while the first may be deterred by penalties which are less definite, less intense, less immediate. For the more civilized, dread of a long, monotonous, criminal discipline may suffice; but for the less civilized there must be inflictions of bodily pain and death.

Thus we hold, not only that a social condition which generates a harsh form of government also generates harsh retributions; but also, that, in such a social condition, harsh retributions are requisite. And there are facts which illustrate this. Witness the case of one of the Italian states, in which the punishment of death having been abolished in conformity with the wish of a dying duchess, assassinations increased so greatly that it became needful to re-establish it.

* * *

But while we thus admit all that can be alleged by the defenders of Draconian codes, we go on to assert a correlative truth which they overlook. While fully recognizing the evils that must follow the premature establishment of a penal system dictated by pure equity, let us not overlook the evils that have arisen from altogether rejecting the guidance of pure equity. Let us note how terribly the one-sided regard for immediate expediency has retarded the ameliorations from time to time demanded. Consider, for instance, the immense amount of suffering and demoralization needlessly caused by our severe laws in the last century. Those many merciless penalties which Romilly and others succeeded in abolishing were as little justified by social necessities as by abstract morality. Experience has

since proved that to hang men for theft was not requisite for the security of property. And that such a measure was opposed to pure equity, scarcely needs saying. Evidently, had considerations of relative expediency been all along qualified by considerations of absolute expediency, these severities, with their many concomitant evils, would have ceased long before they did. Again, the dreadful misery, demoralization, and crime, generated by the harsh treatment of transported convicts, would have been impossible, had our authorities considered what seemed just as well as what seemed politic. * * *

“But how can it be shown,” asks the reader, “that these injudicious penal systems are inequitable? Where is the method which will enable us to say what kind of punishment is justified by absolute morality, and what kind is not?” These questions we will now attempt to answer.

So long as the individual citizen pursues the objects of his desires without diminishing the equal freedom of any of his fellow citizens to do the like, society cannot equitably interfere with him. While he contents himself with the benefits won by his own energies, and attempts not to intercept any of the benefits similarly won for themselves by others, or any of those which Nature has conferred on them, no legal penalties can rightly be inflicted on him. But when, by murder, theft, assault, arson, or minor aggression, he has broken through these limits, the community is warranted in putting him under restraint. On the relative propriety of doing this we need say nothing: it is demonstrated by social experience. Its absolute propriety not being so manifest, we will proceed to point out how it is deducible from the ultimate laws of life.

Life depends on the maintenance of certain natural relations between actions and their results. If respiration does not supply oxygen to the blood, as in the normal order of things it should do, but instead supplies carbonic acid, death quickly results. If the swallowing of food is not followed by the usual organic sequences—the contractions of the stomach, and the pouring into it of gastric juice—indigestion arises, and the energies flag. If active movements of the limbs fail in exciting the heart to supply blood more rapidly, or if the extra current propelled by the heart is greatly retarded by an aneurism through which it passes, speedy prostration ensues. In which, and endless like cases, we see that bodily life depends on the maintenance of the established connections between physiological causes and their consequences. Among the intellectual processes, the same thing holds. If certain impressions made on the senses do not

induce the appropriate muscular adjustments—if the brain is clouded with wine, or consciousness is preoccupied, or the perceptions are naturally obtuse, the movements are so ill-controlled that accidents happen. Where, as in paralytic patients, the natural link between mental impressions and the appropriate motions is broken, the life is greatly vitiated. And when, as during insanity, evidence fitted, according to the usual order of thought, to produce certain convictions produces convictions of an opposite kind, conduct is reduced to chaos, and life endangered—perhaps cut short. So it is with more involved phenomena. Just as we here find that, throughout both its physical and intellectual divisions, healthful life implies continuance of the established successions of antecedents and consequents among our vital actions, so shall we find it throughout the moral division. In our dealings with external Nature and our fellow men, there are relations of cause and effect, on the maintenance of which, as on the maintenance of the internal ones above instanced, life depends. Conduct of this or that kind tends to bring results which are pleasurable or painful; and the welfare of everyone demands that these natural sequences shall not be interfered with. To speak more specifically, we see that in the order of Nature inactivity entails want. There is a connection between exertion and the fulfilment of certain imperative needs. If, now, this connection is broken—if labor of body or mind has been gone through, and the produce of the labor is intercepted by another, one of the conditions to complete life is unfulfilled. The defrauded person is physically injured by deprivation of the wherewithal to make good the wear and tear he had undergone; and if the robbery be continually repeated, he must die. Where all men are dishonest a reflex evil results. When, throughout a society, the normal relation between work and benefit is habitually broken, not only are the lives of many directly undermined, but the lives of all are indirectly undermined by destruction of the motive for work, and by the consequent poverty. Thus, to demand that there shall be no breach of the natural sequence between labor and the rewards obtained by labor, is to demand that the laws of life shall be respected. What we call the rights of property is simply a corollary from certain necessary conditions to complete living. It is a formulated recognition of the relation between expenditure of force and the need for force-sustaining objects obtainable by the expenditure of force—a recognition in full of a relation which cannot be wholly ignored without causing death. And all else regarded as individual rights are indirect implications of like nature—similarly insist on certain

relations between man and man, as conditions without which there cannot be fully maintained that correspondence between inner and outer actions which constitutes life. It is not, as some moralists and most lawyers absurdly assert, that such rights are derived from human legislation; nor is it, as asserted by others with absurdity almost as great, that there is no basis for them save the inductions of immediate expediency. These rights are deducible from the established connections between our acts and their results. As certainly as there are conditions which must be fulfilled before life can exist, so certainly are there conditions which must be fulfilled before complete life can be enjoyed by the respective members of a society; and those which we call the requirements of justice simply answer to the most important of such conditions.

Hence, if life is our legitimate aim—if absolute morality means, as it does, conformity to the laws of complete life, then absolute morality warrants the restraint of those who force their fellow-citizens into non-conformity. Our justification is, that life is impossible save under certain conditions; that it cannot be entire unless these conditions are maintained unbroken; and that if it is right for us to live completely, it is right for us to remove anyone who either breaks these conditions in our persons or constrains us to break them.

Such being the basis of our right to coerce the criminal, there next come the questions:—What is the legitimate extent of the coercion? Can we from this source derive authority for certain demands on him, and are there any similarly-derived limits to such demands? To both these questions there are affirmative answers.

First, we find authority for demanding restitution or compensation. Conformity to the laws of life being the substance of absolute morality, and the social regulations which absolute morality dictates being those which make this conformity possible; it is a manifest corollary that whoever breaks these regulations may be justly required to undo, as far as possible, the wrong he has done. The object being to maintain the conditions essential to complete life, it follows that, when one of these conditions has been transgressed, the first thing to be required of the transgressor is, that he shall put matters as nearly as may be in the state they previously were. The property stolen shall be restored, or an equivalent for it given. Anyone injured by an assault shall have his surgeon's bill paid, compensation for lost time, and also for the suffering he has borne. And similarly in all cases of infringed rights.

Second, we are warranted by this highest authority in restricting the actions of the offender as much as is needful to prevent further aggressions. Any citizen who will not allow others to fulfill the conditions to complete life—who takes away the produce of his neighbor's labor, or deducts from that bodily health and comfort which his neighbor has earned by good conduct, must be forced to desist. And society is warranted in using such force as may be found requisite. Equity justifies the fellow-citizens of such a man in limiting the free exercise of his faculties to the extent necessary for preserving the free exercise of their own faculties.

But now mark that absolute morality countenances no restraint beyond this—no gratuitous inflictions of pain, no revengeful penalties. The conditions it insists on being such as make possible complete life, we cannot rightly abrogate these conditions, even in the person of a criminal, further than is needful to prevent greater abrogations of them. Freedom to fulfill the laws of life being the thing insisted on, to the end that the sum of life may be the greatest possible, it follows that the life of the offender must be taken into account as an item in this sum. We must permit him to live as completely as consists with social safety. It is commonly said that the criminal loses all his rights. This may be so, according to law, but it is not so according to justice. Such portion of them only is justly taken away as cannot be left to him without danger to the community. Those exercises of faculty, and consequent benefits, which are possible under the necessary restraint, cannot be equitably denied. If any do not think it proper that we should be thus regardful of an offender's claims, let them consider for a moment the lesson which Nature reads us. We do not find that those processes of life by which bodily health is maintained are miraculously suspended in the person of the prisoner. In him, as in others, good digestion waits on appetite. If he is wounded, the healing process goes on with the usual rapidity. When he is ill, as much effect is expected from the *vis medicatrix naturæ* by the medical officer as in one who has not transgressed. His perceptions yield him guidance as they did before he was imprisoned; and he is capable of much the same pleasurable emotions. When we thus see that the beneficent arrangements of things are no less uniformly sustained in his person than in that of another, are we not bound to respect in his person such of these beneficent arrangements as we have power to thwart; are we not bound to interfere with the laws of life no further than is needful? If any still hesitate, there is another lesson for them having the same implication.

Whoso disregards any one of those simpler laws of life out of which, as we have shown, the moral laws originate, has to bear the evil necessitated by the transgression—just that, and no more. If, careless of your footing, you fall, the consequent bruise, and possibly some constitutional disturbance entailed by it, are all you have to suffer; there is not the further gratuitous penalty of a cold or an attack of smallpox. If you have eaten something which you know to be indigestible, there follow certain visceral derangements and their concomitants; but, for your physical sin, there is no vengeance in the shape of a broken bone or a spinal affection. The punishments, in these and other cases, are neither greater nor less than flow from the natural workings of things. Well, should we not with all humility follow this example? Must we not infer that, similarly, a citizen who has transgressed the conditions to social welfare ought to bear the needful penalties and restraints, but nothing beyond these? Is it not clear that neither by absolute morality nor by Nature's precedents are we warranted in visiting on him any pains besides those involved in remedying, as far as may be, the evil committed, and preventing other such evils? To us it seems manifest that if society exceeds this, it trespasses against the criminal.

Those who think that we are tending towards a mischievous leniency, you will find that the next step in our argument disposes of any such objection; for while equity forbids us to punish the criminal otherwise than by making him suffer the natural consequences, these, when rigorously enforced, are quite severe enough.

Society having proved, in the high court of absolute morality, that the offender must make restitution or compensation, and submit to the restraints requisite for public safety, and the offender having obtained from the same court the decision that these restraints shall be no greater than the specified end requires, society thereupon makes the further demand that, while living in durance, the offender shall maintain himself; and this demand absolute morality at once endorses. The community having taken measures for self-preservation, and having inflicted on the aggressor no punishments or disabilities beyond those involved in these necessary measures, is no further concerned in the matter. With the support of the prisoner it has no more to do than before he committed the crime. It is the business of society simply to defend itself against him; and it is his business to live as well as he can under the restrictions society is obliged to impose on him. All he may rightly ask is, to have the opportunity of laboring, and exchanging the produce of his labor for necessaries;

and this claim is a corollary from that already admitted, that his actions shall not be restricted more than is needful for the public safety. With these opportunities, however, he must make the best of his position. He must be content to gain as good a livelihood as the circumstances permit; and if he cannot employ his powers to the best advantage, if he has to work hard and fare scantily, these evils must be counted among the penalties of his transgression—the natural reactions of his wrong action.

On this self-maintenance equity sternly insists. The reasons which justify his imprisonment equally justify the refusal to let him have any other sustenance than he earns. He is confined that he may not further interfere with the complete living of his fellow-citizens—that he may not again intercept any of those benefits which the order of Nature has conferred on them, or any of those procured by their exertions and careful conduct. And he is required to support himself for exactly the same reasons—that he may not interfere with others' complete living—that he may not intercept the benefits they earn. For, if otherwise, whence must come his food and clothing? Directly from the public stores, and indirectly from the pockets of all taxpayers. And what is the property thus abstracted from tax-payers? It is the equivalent of so much benefit earned by labor. It is so much means to complete living. And when this property is taken away—when the toil has been gone through, and the produce of it is intercepted by the tax-gatherer on behalf of the convict, the conditions to a complete life are broken; the convict commits by deputy a further aggression on his fellow-citizens. It matters not that such abstraction is made according to law. We are here considering the dictum of that authority which is above law, and which law ought to enforce. And this dictum we find to be, that each individual shall take the evils and benefits of his own conduct—that the offender must suffer, as far as is possible, all pains entailed by his offense, and must not be allowed to visit part of them on the un-offending. Unless the criminal maintains himself he indirectly commits an additional crime. Instead of repairing the breach he has made in the conditions to complete social life, he widens this breach. He inflicts on others that very injury which the restraint imposed on him was to prevent. As certainly, therefore, as such restraint is warranted by absolute morality, so certainly does absolute morality warrant us in refusing him gratuitous support.

These, then, are the requirements of an equitable penal system—That the aggressor shall make restitution or compensation; that he

shall be placed under the restraints requisite for social security; that neither any restraints beyond these, nor any gratuitous penalties, shall be inflicted on him; and that while living in confinement, or under surveillance, he shall maintain himself. We are not prepared to say that such dictates may at once be fully obeyed. Already we have admitted that the deductions of absolute expediency must, in our transition state, be qualified by the inductions of relative expediency. We have pointed out that in rude times the severest criminal codes were morally justified if, without them, crime could not be repressed and social safety insured. Whence, by implication, it follows that our present methods of treating criminals are warranted, if they come as near to those of pure equity as circumstances permit. That any system now feasible must fall short of the ideal sketched out, is probable. It may be that the enforcement of restitution or compensation is in many cases impracticable. It may be that on some convicts penalties more severe than abstract justice demands must be inflicted. On the other hand, it may be that entire self-maintenance would entail on the wholly-unskilled criminal a punishment too grievous to be borne. But any such shortcomings do not affect our argument. All we insist on is, that the commands of absolute morality shall be obeyed as far as possible—that we shall fulfill them up to those limits beyond which experiment proves that more evil than good results—that, ever keeping in view the ideal, each change we make shall be towards its realization.

But now we are prepared to say that this ideal may be in great part realized at the present time. Experience in various countries, under various circumstances, has shown that immense benefits result from substituting for the old penal systems, systems that approximate to that above indicated. Germany, France, Spain, England, Ireland and Australia send statements to the effect that the most successful criminal discipline is a discipline of decreased restraints and increased self-dependence. And the evidence proves the success to be greatest where the nearest approach is made to the arrangements prescribed by abstract justice. We shall find the facts striking, some of them even astonishing. * * *

And now let us try whether, by pursuing somewhat further the method thus far followed, we can see our way to the development of certain improved systems which are coming into use.

Equity requires that the restraint of the criminal shall be as great as is needful for the safety of society; but not greater. In respect to the quality of the restraint, there is little difficulty inter-

preting this requirement; but there is considerable difficulty in deciding on the duration of the restraint. No obvious mode presents itself of finding out how long a transgressor must be held in legal bondage, to insure society against further injury from him. A longer period than is necessary implies an actual injustice to the offender. A shorter period than is necessary implies a potential injustice to society. And yet, without good guidance, one or other of these extremes is almost sure to be fallen into.

At present, the lengths of penal sentences are fixed in a manner that is wholly empirical. For offenses defined in certain technical ways, Acts of Parliament assign transportations and imprisonments, having durations not greater than so much nor less than so much, these partially-determined periods being arbitrarily fixed by legislators, under the promptings of moral feeling. Within the assigned limits the judge exercises his discretion; and in deciding on the time over which the restraint shall extend, he is swayed, partly by the special quality of the offense, partly by the circumstances under which it was committed, partly by the prisoner's appearance and behavior, partly by the character given to him. And the conclusion he arrives at after consideration of these data depends very much on his individual nature—his moral bias and his theories of human conduct. Thus the mode of fixing the lengths of penal restraints is, from beginning to end, little else than guessing. How ill this system of guessing works, we have abundant proofs. "Justices' justice," which illustrates it in its simplest form, has become a by-word; and the decisions of higher criminal court frequently err in the directions of both undue severity and undue lenity. Daily there occur cases of extremely-trifling transgressions visited with imprisonments of considerable lengths; and daily there occur cases in which the punishments are so inadequate that the offenders time after time commit new crimes, when time after time discharged from custody.

Now the question is whether, in place of this purely empirical method which answers so ill, equity can guide us to a method which shall more correctly adjust the period of restraint to the requirement. We believe it can. We believe that by following out its dictates, we shall arrive at a method that is in great measure self-acting, and therefore less liable to be vitiated by errors of individual judgment or feeling.

We have seen that were the injunctions of absolute morality obeyed, every transgressor would be compelled to make restitution or compensation. Throughout a considerable range of cases, this

would itself involve a period of restraint varying in proportion to the magnitude of the offense. It is true that when the malefactor possessed ample means, the making restitution or compensation would usually be to him but a slight punishment. But though in these comparatively few cases the regulation would fall short of its object, in so far as its effect on the criminal was concerned, yet in the immense majority of cases—in all cases of aggressions committed by the poorer members of the community—it would act with efficiency. It would involve periods of detention that would be longer or shorter according as the injury done was greater or less, and according as the transgressor was idle or industrious. And although, between the injury done by an offender and his moral turpitude, there is no constant and exact proportion, yet the greatness of the injury done affords, on the average of cases, a better measure of the discipline required than do the votes of Parliamentary majorities and the guesses of judges.

But our guidance does not end here. An endeavor still further to do that which is strictly equitable will carry us still nearer to a correct adjustment of discipline to delinquency. When, having enforced restitution, we insist on some adequate guarantee that society shall not again be injured, and accept any guarantee that is sufficient, we open the way to a self-acting regulator of the period of detention. Already our laws are in many cases satisfied with securities for future good behavior. Already this system manifestly tends to separate the more vicious from the less vicious, seeing that, on the average, the difficulty of finding securities is great in proportion as the character is bad. And what we propose is that this system, now confined to particular kinds of offenses, shall be made general. But let us be more specific.

A prisoner on his trial calls witnesses to testify to his previous character—that is, if his character has been tolerably good. The evidence thus given weighs more or less in his favor, according to the respectability of the witnesses, their number, and the nature of their testimony. Taking into account these several elements, the judge forms his conception of the delinquent's general disposition, and modifies the length of punishment accordingly. Now, may we not fairly say that if the current opinion respecting a convict's character could be brought directly to bear in qualifying the statutory sentence, instead of being brought indirectly to bear, as at present, it would be a great improvement? Clearly the estimate made by a judge from such testimony must be less accurate than the estimate

made by the prisoner's neighbors and employers. Clearly, too, the opinion expressed by such neighbors and employers in the witness-box is less trustworthy than an opinion which entails on them serious responsibility. The desideratum is, that a prisoner's sentence shall be qualified by the judgment of those who have had life-long experience of him; and that the sincerity of this judgment shall be tested by their readiness to act on it.

But how is this to be done? A very simple method of doing it has been suggested.³ When a convict has fulfilled his task of making restitution or compensation, let it be possible for one or other of those who have known him to take him out of confinement, on giving adequate bail for his good behavior. Always premising that such an arrangement shall be possible only under an official permit, to be withheld if the prisoner's conduct has been unsatisfactory, and always premising that the person who offers bail shall be of good character and means, let it be competent for such a one to liberate a prisoner by being bound on his behalf for a specific sum, or by undertaking to make good any injury which he may do to his fellow-citizens within a specified period. This will doubtless be thought a startling proposal. We shall, however, find good reasons to believe it might be safely acted on—nay, we shall find facts proving the success of a plan that is obviously less safe.

Under such an arrangement, the liberator and the convict would usually stand in the relation of employer and employed. Those to be thus conditionally released would be ready to work for somewhat lower wages than were usual in their occupation; and those who became bound for them, besides having this economy of wages as an incentive, would be guaranteed by it against the risk undertaken. In working for less money, and in being under the surveillance of his master, the convict would still be undergoing a mitigated discipline. And while, on the one hand, he would be put on his good behavior by the consciousness that his master might at any time cancel the contract and surrender him back to the authorities, he would, on the other hand, have a remedy against his master's harshness, in the option of returning to prison, and there maintaining himself for the remainder of his term.

Observe, next, that the difficulty of obtaining such conditional release would vary with the gravity of the offense which had been committed. Men guilty of heinous crimes would remain in prison;

³We owe the suggestion to the late Mr. Octavius H. Smith.

for none would dare to become responsible for their good behavior. Anyone convicted a second time would remain unbailed for a much longer period than before, seeing that having once inflicted loss on someone bound for him, he would not again be so soon offered the opportunity of doing the like; only after a long period of good behavior testified to by prison-officers, would he be likely to get another chance. Conversely, those whose transgressions were not serious, and who had usually been well-conducted, would readily obtain recognizances; while to venial offenders this qualified liberation would come as soon as they had made restitution. Moreover, when innocent persons had been pronounced guilty, as well as when solitary misdeeds had been committed by those of really superior natures, the system we have described would supply a remedy. From the wrong verdicts of the law and its mistaken estimates of turpitude, there would be an appeal; and long-proved worth would bring its reward in the mitigation of grievous injustices.

A further advantage would by implication result in the shape of a long industrial discipline for those who most needed it. Speaking generally, diligent and skillful workmen, who were on the whole useful members of society, would, if their offenses were not serious, soon obtain employers to give bail for them. Whereas members of the criminal class—the idle and the dissolute—would remain long in confinement; since, until they had been brought, by habitual self-maintenance under restraint, to something like industrial efficiency, employers would not be tempted to become responsible for them.

We should thus have a self-acting test, not only of the length of restraint required for social safety, but also of that apprenticeship to labor which many convicts need; while there would be supplied a means of rectifying sundry failures and excesses of our present system. The plan would practically amount to an extension of trial by jury. At present, the State calls in certain of a prisoner's fellow-citizens to decide whether he is guilty or not guilty, the judge, under guidance of the penal laws, being left to decide what punishment he deserves, if guilty. Under the arrangement we have described the judge's decision would admit of modification by a jury of the convict's neighbors. And this natural jury, while it would be best fitted by previous knowledge of the man to form an opinion, would be rendered cautious by the sense of grave responsibility; inasmuch as any one of its number who gave a conditional release would do so at his own peril.

And now mark that all the evidence forthcoming to prove the

safety and advantages of the "intermediate system" proves, still more conclusively, the safety and advantages of this system which we would substitute for it. What we have described is nothing more than an intermediate system reduced to a natural instead of an artificial form—carried out with natural checks instead of artificial checks. If, as Captain Crofton has experimentally shown, it is safe to give a prisoner conditional liberation, on the strength of good conduct during a certain period of prison-discipline, it is evidently safer to let his conditional liberation depend not alone on good conduct while under the eyes of his jailors, but also on the character he had earned during his previous life. If it is safe to act on the judgments of officials whose experience of a convict's behavior is comparatively limited, and who do not suffer penalties when their judgments are mistaken, then, manifestly, it is safer (when such officials can show no reason to the contrary) to act on the additional judgment of one who has not only had better opportunities of knowing the convict, but who will be a serious loser if his judgment proves erroneous. Further, that surveillance over each conditionally-liberated prisoner, which the "intermediate system" exercises, would be still better exercised when, instead of going to a strange master in a strange district, the prisoner went to some master in his own district; and, under such circumstances, it would be easier to get information respecting his after-career. There is every reason to think that this method would be workable. If, on the recommendation of the officers, Captain Crofton's prisoners obtain employers "who have on many occasions returned for others, in consequence of the good conduct of those at first engaged," still better would be the action of the system when, instead of the employers having "every facility placed at their disposal for satisfying themselves as to the antecedents of the convict," they were already familiar with his antecedents.

Finally, let us not overlook the fact that this course is the only one which, while duly consulting social safety, is also entirely just to the prisoner. As we have shown, the restraints imposed on a criminal are warranted by absolute equity, only to the extent needful to prevent further aggressions on his fellow-men; and when his fellow-men impose greater restraints than these, they trespass against him. Hence, when a prisoner has worked out his task of making restitution, and, so far as is possible, undone the wrong he had done, society is, in strict justice, bound to accept any arrangement which adequately protects its members against further injury. And if,

moved by the expectation of profit, or other motive, any citizen sufficiently substantial and trustworthy will take on himself to hold society harmless, society must agree to his proposal. All it can rightly require is, that the guarantee against contingent injury shall be adequate; which, of course, it never can be where the contingent injury is of the gravest kind. No bail could compensate for murder; and therefore against this, and other extreme crimes, society would rightly refuse any such guarantee, even if offered, which it would be very unlikely to be.

Such, then, is our code of prison-ethics. Such is the ideal which we ought to keep ever in view when modifying our penal system. Again we say, as we said at the outset, that the realization of such an ideal wholly depends on the advance of civilization. Let no one carry away the impression that we regard all these purely equitable regulations as immediately practicable. Though they may be partially carried out, we think it highly improbable that they could at present be carried out in full. The number of offenders, the low average of enlightenment, the ill-working of administrative machinery, and above all, the difficulty of obtaining officials of adequate intelligence, good feeling, and self-control, are obstacles which must long stand in the way of a system so complex as that which morality dictates. And we here assert, as emphatically as before, that the harshest penal system is ethically justified if it is as good as the circumstances of the time permit. However great the cruelties it inflicts, yet if a system theoretically more equitable would not be a sufficient terror to evil-doers, or could not be worked, from lack of officers sufficiently judicious, honest, and humane—if less rigorous methods would entail a diminution of social security, then the methods in use are extrinsically good though intrinsically bad. They are, as before said, the least wrong, and therefore relatively right.