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Marquis Eaton

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## PUNITIVE PAIN AND HUMILIATION.<sup>1</sup>

MARQUIS EATON.<sup>2</sup>

The Bill of Rights, in 1689, contained a clause prohibiting the infliction of cruel and unusual punishments. A provision in identical terms appears in the Eighth Amendment to the Federal Constitution. It has been adopted in the Constitutions of most of the States.

It is not my purpose to review the cases in which the phrase has been construed. The *Weems*<sup>3</sup> case (217 U. S. 349) decided in 1910 is discussed by Professor Schofield in an interesting article appearing in the fifth volume of the *Illinois Law Review* under the title "Cruel and Unusual Punishment." A note,<sup>4</sup> with the same caption, in the 35th volume of *Lawyer's Reports Annotated* satisfactorily collects the cases in the State Courts.

With these two citations I shall dismiss the law-brief aspect of this paper.

Justice White in his dissenting opinion (concurring in by Justice Holmes) in the *Weems* case criticises for its "emotional tendency" the following language in the majority opinion:

"The prohibition against cruel and unusual punishments is not fastened to the obsolete but may acquire a meaning as public opinion becomes enlightened by human justice."

The *Harvard Law Review*,<sup>5</sup> commending this interpretation and thereby disagreeing with the dissenting Justices and with Professor Schofield, thinks there is no danger of Judicial intermeddling in view of the fact that the power is to be exercised only when the punishment "shocks public feeling."

The allusion is to decisions to the effect that cruel and unusual punishments are "such as make one shudder with horror to read of them;"<sup>6</sup> and again "such as would shock the mind of every man possessed of common feeling."<sup>7</sup>

I submit that neither the objective test of the Judicial shudder nor the subjective test of the Judicial shock sufficiently proscribes the

<sup>1</sup>Chicago Law Club—December 10, 1915.

<sup>2</sup>Of Defrees, Buckingham & Eaton of the Chicago Bar.

<sup>3</sup>*United States v. Weems*, 217 U. S. 349.

<sup>4</sup>35 L. R. A. 561.

<sup>5</sup>"What is Cruel and Unusual Punishment" *Harvard Law Review* 54

<sup>6</sup>*Whitten v. State*, 47 Ga. 297.

<sup>7</sup>*State v. Williams*, 77 Mo. 310.

mistaken penology against which the clause in the eighth amendment is directed.

The reaction against cruelty and needless humiliation in the administration of the criminal law has its proper place in the history of penal methods. When the Bill of Rights was adopted, Lord Jeffreys was, in the popular mind, the personification of Judicial barbarity. The century intervening between the Bill of Rights and the Federal Constitution developed inhumanities which were as shocking to those who framed the eighth amendment as were the actions of Jeffreys to the patriots of 1689.

Without involving ourselves in questions of interpretation, we may be readily convinced that the clause in the eighth amendment means something quite different from what it meant in 1689.<sup>8</sup> It registered a solemn rejection of certain theories of punishment which had been applied to a modified degree among the colonists themselves; which today command support among uncivilized nations; and also, it would seem, among civilized nations when engaged in uncivilized war.

One of the rejected theories is the theory that punishment is a concession to the injured party. This was, of course, the basic theory. To wish to hurt and humiliate the man who hurts and humiliates us, is now recognized as a survival of savagery. Injuries for a time were atoned for in kind (the eye for an eye and the tooth for a tooth code). The next step was to permit the culprit, who possessed money, to buy off the injured man and his relations, and from this, inevitably, as the central government grew in power, came the practice of regarding this money-forfeit or fine as a perquisite of the crown.

Maine in his *Ancient Law* states;<sup>9</sup>

"It is curious to observe how little men of primitive times were troubled with scruples as to the degree of moral guilt to be ascribed to the wrong-doer; how completely they were persuaded that the impulses of the wronged person were the proper measure of the vengeance he was entitled to exact, and how literally they imitated the rise and fall of his passions in fixing their scale of punishment."

But even in the days when freemen began to atone with fines for their transgressions we find pain (not imprisonment) as the alternative for the indigent or the enslaved.

And just as the central government or the crown succeeded to

<sup>8</sup>See the *Kemmler* case, 119 N. Y. 569, 576.

<sup>9</sup>*Folkways*—Wm. Graham Sumner, p. 508.

the fines, so it succeeded to the practice of inflicting pain, or of causing humiliating exposures in cases wherein the culprit either was unable to pay a fine, or wherein the mere payment of a fine was deemed inadequate to appease the spirit of revenge aroused by the offense.<sup>9</sup>

When the Mayflower landed her passengers at Plymouth Rock they brought with them from the homeland a vivid recollection of the following penalties:

Poisoning since 1530 had been punished by boiling in oil, water or lead.<sup>10</sup> The first victim being a cook by the name of Cook, his execution by boiling was regarded as a capital jest.

Perjury had been punished by the pillory and by branding; seditious words by the loss of ears, sheep-stealing by the loss of hands; heresy by burning alive; disorderly conduct on the part of women by pillory, stocks and ducking. The Pilgrims had seen rogues and vagabonds of both sexes stocked, stripped naked to the waist, and whipped—scolds branked and ducked and robbers hanged on the river bank at low water to be left there for three tides. The fifteenth century had developed skillfully devised tortures to extort confessions and thereafter the rack had creaked constantly for generations.

The colonists were acquainted, to some degree at least, with the penal methods which had prevailed on the continent. They knew, doubtless, that some generations before their time the gay nobility of France, after hunting expeditions in winter, were accustomed to disembowel a peasant in order that they might warm their feet in his steaming entrails.<sup>11</sup> The criminal code of Charles the V, issued in 1530, has been described as "a hideous catalogue of blinding, mutilation, tearing with hot pincers, burning alive and breaking at the wheel."<sup>12</sup> They were aware that Louis XI had immured his favorite and counsellor, Cardinal Baluc, in an iron cage so arranged that the victim could find comfort only in a recumbent position, and that he remained the unhappy tenant, of this cage, visited and taunted by his king, for nearly twelve years.<sup>13</sup> The Pilgrims had heard, perhaps, of the Iron Maiden, sometimes called the Maiden's kiss, an iron frame in the likeness of a woman, so devised that her embrace meant painful death.<sup>14</sup> They must have known about the so called "iron coffin," wherein the prisoner saw his dungeon contracting round him day by day and hour by hour, the sides stealing up, and the roof creeping

<sup>9</sup>Folkways—Wm. Graham Sumner, p. 508.

<sup>10</sup>Besant; Mediaeval London 351, *et seq.*

<sup>11</sup>Saint-Edme; 4 Dict. de la Penalite, 21.

<sup>12</sup>Some Interesting Punishments, 46 Albany Law Journal, 285.

<sup>13</sup>Walter Scott; Quentin Durward, Chap. XXXVI.

<sup>14</sup>See 3 Green Bag 243; Also 1 Dict. de la Penalite 352.

down slowly, steadily, silently—passionless as fate and as remorseless—the dread machinery maintaining the calm monotony of its march, through lingering days and nights of horror, until the final collapse crushed him.<sup>15</sup> All these the Pilgrims must have known. They could *not* know that a century after they were dead France would torture with red-hot pincers a political criminal on his way to execution and would pour into his wounds molten wax, lead and boiling oil;<sup>16</sup> that so late as 1786 Berlin would enclose a convicted man in a cage-like frame which fastened with a door, surround him with wood and straw and burn him to death;<sup>16</sup> that in the very same year Vienna would use the red-hot pincers and would break its victim on a wheel.<sup>17</sup>

When the later horrors were taking place in the capitals of Europe, the Federal Constitution of the new Republic was declaring against the theory of *cruelty in punishment*. I have, however, already indicated that our Constitution is not simply a protest against the cruelties of other lands—it registers something of our own experience. Much of that experience will be better understood if we review certain of the punishments among the colonies. In this review let us constantly keep in mind that in determining what kind of men our fathers were, we are to compare their laws, not with our laws, but with the laws which they renounced.<sup>18</sup>

*The Bilboes.*—The Massachusetts magistrates brought bilboes (a long, heavy bar of iron, having two sliding shackles for the offender's legs) from England and they were soon in constant use.<sup>19</sup> A jail could not be built in a day and the bilboes served, doubtless, a useful purpose. They soon gave way to stocks, because of wood being so much more readily obtainable than iron. Like the stocks it was not their use but their glare of publicity that was offensive. They were not cruel, in a physical sense, but they were humiliating, and therefore would not be tolerated at the present day. It has been decided, under the present Constitution<sup>20</sup> to be cruel and unusual punishment to chain a prisoner by the neck with a trace chain and padlock so that he could neither lie down nor sit down. The fact that such a decision was necessary should silence any criticism on our part of the early use of the bilboes.

*The Stocks.*—Like the bilboes, the stocks suggest no really vital

<sup>15</sup>Punishment of Days of Old, 17 Cornhill Magazine, 558.

<sup>16</sup>Case of Damiens. See Garogals Criminology 233 (Note).

<sup>17</sup>Albert Hartshorne; Hanging in Chains, p. 27.

<sup>18</sup>See Dr. Bacon's Historical Discourse, p. 32.

<sup>19</sup>Curious Punishments of By-Gone Days by Alice Morse Earle.

<sup>20</sup>Re Birdsong, 39 Fed. Rep. 599.

question. We regard them as a fairly appropriate device for a primitive community. Our sense of humor, at least, is gratified by the knowledge that the first Puritan malefactor set in the strong new stocks ordered at Boston was the carpenter who made them. Edward Palmer charged something more than a pound for the plank and wood-work. For his alleged extortion in taking this sum he was promptly fined five pounds and was set an hour in the stocks of his own making.<sup>21</sup>

He may have found comfort in reflecting that no less a man than Cardinal Wolsey had himself graced the stocks; being found drunk at a village feast and clapped into the stocks to sober up, at the command of Sir Angus Poulett a strict moralist and local Justice of the Peace.

That equal rights for women had early recognition is shown by the record that in 1640, at Springfield, Goody Gregory profanely abused her neighbor saying: "Before God I could break thy head." She acknowledged her great sin like a woman, but it was adjudged that she pay a fine and sit in the stocks like a man since she swore like one.<sup>22</sup>

In England as late as April, 1860, one John Gambels, having stuck close to his work and gambled on Sunday was sentenced to sit in the stocks for six hours. Twelve years later, in 1872, the stocks were again employed for a culprit named Mark Tuck. The public was so disgusted with the resulting disorder that the antiquated practice was not again revived.<sup>23</sup>

*The Pillory.*—The pillory among the colonies was as inevitable as the stocks. In Massachusetts, in 1671, Thomas Withers was given two hours in the pillory for "Surreptitiously endeavoring to prevent the Providence of God by putting in several votes for himself as an officer at a town meeting." Shortly after, he was similarly punished for an irregular mode of contribution, viz.: "for putting large sums of money into the contribution box in meeting to induce others to give largely, and then "surreptitiously" taking his gift back again.<sup>24</sup> Thomas seems to have been incorrigibly surreptitious.

In England, at the same period, the learned barrister Wm. Prynne was suffering punishment for issuing certain publications opposing innovations in religious worship introduced by Archbishop Laud. He was prosecuted in 1633 and again in 1639. His first sentence was to lose both his ears in the pillory; to be degraded from the bar; to be fined three thousand pounds and to be imprisoned for

<sup>21</sup>Morse Earl, *supra*.

<sup>22</sup>See Morse Earl, *Supra*.

<sup>23</sup>By-Gone Punishments by Wm. Andrews.

<sup>24</sup>See Morse Earl, *Supra*.

life. His second sentence was to lose what remained of his ears; to pay a fine of five thousand pounds; to be branded on both his cheeks and to remain in prison for life. The sentence was rigorously executed.<sup>25</sup>

Returning to New York for another example we find that one who stole cabbages was sentenced to stand in the pillory with cabbages on his head and two dishonest bakers stood in the pillory with dough on their heads.<sup>26</sup>

Faulty as may have been the theory of punishment disclosed in the instances just cited, we find precedent for them if we digress for a moment at this point.

In old Egypt a forger was deprived of his hand, a false witness of his tongue, a spy of his ears and an adultress of her nose. A woman guilty of infanticide had to hold the little corpse in her arms for three days and three nights.<sup>27</sup>

According to the laws of Mena, if a man of the lowest class spit on one of the highest class, his lips were gashed. If he innocently placed himself on the same seat with one of the higher class, he was given a gash or a brand across the buttocks.<sup>28</sup>

Doppler informs us that under an old law a man who dug up and removed a boundary stone was buried in the earth up to his neck, and his head was then plowed off with a new plow.<sup>29</sup>

Ives in his *History of Penal Methods* lists<sup>30</sup> many of these so-called poetic punishments—the “spontaneous reprisals” with which communities have always sought to repay offenders in kind. One who reads the list will be convinced that in this as in all else the penology of our Colonial ancestors compared most favorably with that of any of their contemporaries.

Before leaving the subject of the pillory I wish to note that in England helpless culprits were seriously injured—even killed by missiles hurled by the mobs. I find no record of such outrages in America.

It should, however, be conceded that branding and maiming were not unknown to the colonists. Banished Quakers who returned had their ears cut off. Boring the tongue with a red hot iron for blasphemy prevailed in Virginia and elsewhere. In Maryland branding

<sup>25</sup>True Blue Laws by J. H. Trumbull.

<sup>26</sup>See Morse Earl, *Supra*.

<sup>27</sup>1 Divdorus, 77.

<sup>28</sup>Sir William Jones 3 Criminal Laws 251.

<sup>29</sup>Theatrum Poenarum; Doppler.

<sup>30</sup>London, 1915.

was legal and every county was ordered to have branding irons. Burglary was punished by branding in all the colonies.<sup>31</sup>

*The Ducking Stool.*—It was altogether natural that the fathers should assume that the fit way to deal with a scold was to duck her. The case of *James v. The Commonwealth*,<sup>32</sup> heard in the Supreme Court of Pennsylvania in January, 1825, reviews in a most interesting way the history of that famous engine of correction known as the ducking stool. The judgment was "that the defendant be placed in a cucking or ducking stool and be plunged three times in the water." The Court characterizes such a sentence as "revolting to humanity and of that description which could have been invented only in an age of barbarism," to be relegated, in the view of this Court, to that time when a husband might correct his wife with a stick as thick as his thumb. The Court refers to a tradition<sup>33</sup> (which I have not elsewhere noted) to the effect that at the publication of Bracton's learned work in which the dimensions of this instrument of correction were first stated, the women of the town in which he lived seized him and ducked him in a horse pond, and the Court seems to glory in the independence thus displayed to a degree not at all reflected by the vote in Pennsylvania on the suffrage issue at the late election.

It may be remarked in passing, that the *nisi prius* and reviewing courts, in the James case, were both in error in employing as synonymous the terms ducking and cucking stool—the resemblance of the names having led apparently to the idea that they meant the same thing. The cucking stool was used for the exposure of flagitious women, at their own doors or in some other public place, as a means of putting upon them a special degree of ignominy.<sup>34</sup>

In spite of this retrospective decision of the Pennsylvania Court, it must be conceded that the colonists generally brought with them the ducking stool which at the time of colonization was at the height of its English reign. It is interesting to note, however, that while the ducking stool is often referred to as a Puritan punishment, there is no authentic record of the execution of ducking in any Puritan Community, while in the "cavalier colonies" so-called, in Virginia and the Carolinas and in Quaker Pennsylvania, many duckings took place and in law survived as long as similar punishments in England. In Virginia, indeed, a slanderous woman was dragged at the stern of a boat; wherein we see the recurrence of a degrading form of

<sup>31</sup>See Morse Earl, *Supra*.

<sup>32</sup>12 S. & R. 220.

<sup>33</sup>12 S. & R. 225.

<sup>34</sup>Some Old Fashioned Punishments, 9 Am. Law Record 437.

punishment which was inflicted by certain magistrates in the Mother land.<sup>35</sup>

*Gags.*—The scold's bridle, in its English shape, was unknown in America. Andrews declares that even in England the use of the brank was not sanctioned by law, but was wholly illegal.<sup>36</sup> The fact remains that it was extensively employed. We are glad it never crossed the ocean. The Stockport brank, one of the most wicked which has survived, is built with a tongue plate about two inches long, having at the end a ball into which a number of sharp iron pins were inserted. These could not fail to lacerate in a horrible manner the tongue of the unfortunate woman whose head was clamped into the ingenious but devilish device. John Winthrop knew that a cleft stick pinched on the tongue was equally efficacious, and many a Puritan dame stood in public for an hour or more with such a stick imprisoning her unruly tongue.<sup>37</sup>

If modern woman is inclined to resent this humiliation suffered by her sex at the hands of a masculine administration, it may comfort her to know that Anne of Russia, being offended at a young prince, commanded him to become a hen. The Empress ordered a large basket stuffed with straw and hollowed into a nest with a quantity of eggs inside to be placed conspicuously in one of the principal rooms at Court. The prince was compelled, under pain of death, to sit upon this nest, where he was made to cackle and otherwise render himself ridiculous.<sup>38</sup>

*Witchcraft.*—We hear so much about the cruelty of the Puritans towards persons accused of witchcraft, that we desire, very often, to pass that chapter by, as one peculiarly discreditable to our forefathers. The truth is of quite the contrary import. We state the worst of the case when we admit that seventeen persons, all told, lost their lives in New England during the witchcraft agitation, and that many others were whipped and otherwise humiliated while the persecution was at its height. But with Palfrey we well may ask, "Was it to be expected that the Colonists of New England should be the first to see through a delusion which befooled the whole civilized world and the greatest and most knowing persons in it?" And Judge Trumbull, in his excellent discussion of the blue laws, remarks:<sup>39</sup>

"The planters of New England were Englishmen, not exempt from English prejudice, and in favor of English law and

<sup>35</sup>Besant, *Mediaeval London*.

<sup>36</sup>*Punishments in the Olden Time* by Wm. Andrew.

<sup>37</sup>Primitive Law in New England, 1 Green Bay, 278.

<sup>38</sup>Cooper: History of the Rod.

<sup>39</sup>Trumbull; True Blue Laws.

usages. They were as unconscious of the barbarism of the English law as were the parliaments which had enacted or the Courts which dispensed it. The law makers and ministers of New England were under the influence of a belief in the reality of a hideous crime called witchcraft, just as, and no more than the law makers and ministers of old England."

For be it remembered that Coke was Attorney General, and Bacon a member of parliament, when England enacted her most rabid witchcraft laws. People were hanged as witches in England before the Mayflower sailed, and in 1716 a woman and her little daughter, only nine years old, were hanged for selling their souls to the devil and raising a storm by pulling off their stockings.

In New England witchcraft persecution did not appear until nearly 1650 and then only in sporadic cases.

A recent novel opens with the following phrase: "In the days when witches were burned on the green in New England." There never were such days. No witches were burned in New England.

But in Scotland, as late as 1722, persons condemned as witches were burned at the stake, and in England, as late as 1759, an old woman was accused of bewitching her neighbor's spinning wheel. She was tried by a self-appointed jury and stripped to her shift to be weighed in the Church against the Parish Bible. Fortunately she outweighed it and so escaped.<sup>40</sup>

In a single German city they burned annually 300 witches. In Nancy 800 were put to death by order of a single Judge in the course of sixteen years.<sup>41</sup>

It has been estimated that during the sixteenth and seventeenth centuries the witch death<sup>42</sup> roll of Europe reached 200,000. According to Mackay it became a common prayer with women of the humble class that they might not live to be old. To be aged, poor or half crazed was sufficient to insure death at the stake or on the scaffold.

The persistence of such delusions is illustrated by the circumstance that less than twenty years ago at Clonmel, Ireland, a poor old woman was placed upon the kitchen fire by her own family and burned so that she died from the effects.<sup>43</sup> With respect to this singular case, we find the following comment:

"What were once pious customs and duties had at length

<sup>40</sup>Trumbull, Blue Laws

<sup>41</sup>Ives History of Penal Methods.

<sup>42</sup>Mackay.

<sup>43</sup>See Ives, *supra*.

become crimes and the chief mover in this latest witch trial got 20 years penal servitude."

Says John Stewart Mill:

"It often happens that the universal belief of one age of mankind—a belief from which no one was, nor without an extraordinary effort of genius and courage could, at that time, be free—becomes to a subsequent age so palpable an absurdity that the only difficulty then is to imagine how such a thing can ever have appeared credible." (Ives.)

I venture the prediction that a hundred years hence the arguments of Cotton Mather to prove the reality of witchcraft, will appear logical and intellectually convincing in contrast with the arguments advanced today in defense of the American saloon.

We may take time for only one other illustration of the experiences of the colonists with barbarous methods of punishment. I refer to the whipping posts. These were cherished in practically all the colonies. There was one in Queen Street in Boston, another on the Common, another on State Street, and they were in constant use in Revolutionary times. In Boston, in 1657, Mary Clark after preaching was given twenty stripes.

In Dover, in 1662, three women, for being vagabond Quakers, were very cruelly whipped.<sup>44</sup> The Quakers everywhere were the greatest sufferers. But here, too, we must remember that the civil magistrates of New England believed it to be their sworn duty to maintain as civil magistrates the order and discipline of the Churches and, as they expressed it, "the liberty and purity of the Gospel."<sup>45</sup> This point of view, so different from our own, led them into excesses which we find it difficult to understand.

But take the most extreme cases of religious persecution in New England. They are mild when contrasted with the conventional procedure in like cases in old England and on the continent.

The fact remains that women—a few—were publicly whipped in America. What were the precedents for such unchivalrous proceedings? A British clergyman named Cooper has written what he terms "A History of the Rod." One does not need to read all the fifty chapters to be convinced that corporal punishment has been in all ages a well nigh universal recourse, and that seldom have women been exempt. In Cooper's compilation it is made clear that the flagellation of Quakers was common in England before it was practiced

<sup>44</sup>Cooper: History of the Rod.

<sup>45</sup>Joel H. Eno: First Court Trials in America.

in America, and that whipping for political offenses was very rife there at the end of the seventeenth century; particularly during the rule of Lord Chief Justice Jeffrey.

The whipping act passed in 1530 required vagrants, without sex distinction, to be whipped naked at the cart's tail; the statute remaining unchanged until the 39th year of Queen Elizabeth, when it was so modified that the culprits were permitted clothing from the waist line down. In 1769 at Nottingham a young woman, 19 years of age, was found guilty of obtaining goods under false pretenses and was ordered stripped to the waist and publicly whipped on market day in the market place.<sup>46</sup> It was not until 1791 that this statute was amended to forbid the whipping of female vagrants.

It is only recently that the Dutch abolished the public whipping of women. In Russia women have been flayed to death with that infamous instrument—the knout. In Germany and Switzerland the magistrates and judges possessed almost unlimited power in this matter. There were towns in which they placed female offenders in an ingenious kind of machine wherein they could not make the slightest movement in order that the blows might fall all the more conveniently. One of these instruments may still be seen, it is said, in the old prison at the Hague. In some instances female prisoners were allowed to retain one garment and the flagellation was performed by a woman; but in general there was no idea of making any such sacrifice to decency.<sup>47</sup> It might be added that female offenders were for several centuries subjected to what the courts termed the lower discipline—it being the conclusion arrived at after learned and extended discussion that higher discipline was the more apt to endanger her health. While the terms lower and higher discipline are met with constantly, they seem simply to designate the *locus in quo*. The theory seemed to be that using the waist of the unfortunate female as an equator, higher discipline affects her north-temperate and lower discipline her south-temperate zone.

One finds it often asserted that this administration of the lower discipline (a daily occasion in the police courts of Holland and elsewhere) was considered sufficiently interesting that visitors came in groups and paid the officials for the privilege of witnessing.

So far as I have been able to note, the practice of subjecting culprits to lower discipline prevails now only in China, and the commentators or contemporary Chinese Justices draw attention to the fact that no element of humiliation is there involved. In China, we

<sup>46</sup>Andrews, *By-Gone Punishments*.

<sup>47</sup>See Cooper, *supra*.

are told, a blow is a bad thing in so far as it is painful but no further. Policemen are whipped for failing to carry out the orders of the Court. Some of them, according to Norman,<sup>48</sup> fortify themselves by wearing under the trousers a wooden guard, wherein the bamboo spends all its force; the trick being obvious, but 'winked at, apparently, by the Courts. The Judge inclines, perhaps, to avoid creating a precedent which might deprive him of the like protection in case the appellate court fails to share his view. For the Chinese Judges (or certain of them), may be whipped not only when the superior tribunal reverses his decision in a case tried before him wherein he had knowledge of the facts, but the like penalty seems to follow in some instances his erroneous conclusion on a question of law. May it not be that in the power of the higher court to direct that corporal punishment be administered to the trial Judge, we have the derivation of the phrase "Reversing the lower Court?"

Strangely enough the advocacy of flogging as a punishment persists in spite of the fact that it has been weighed and found utterly wanting in the great scale of age long experience. A Judge who would be ashamed to declare himself in favor of a return to the bilboes or the stocks, expresses regret that he cannot sentence a wife-beater to a public whipping post. In the particular case, indeed, we are all struck with the poetic justice of the proposed correction. We have seen, however, that so-called poetic justice is one of the lowest forms of penology. We should be on higher ground intellectually were we advocating a return to the days when a dishonest fishmonger was dressed, by decree of court, with a necklace of stinking smelts.<sup>49</sup>

A little volume of Collinson<sup>50</sup> summarizes as follows the results of scientific inquiry into this form of punishment.

"Its efficacy is negated by all experience. Indifference to suffering, be the victim only a brutal criminal, is injurious to the community. Flogging brutalizes. It stifles every regret or desire for amendment."

Ignoring all the evidence, those remain who deplore the receding popularity of the rod as an instrument of correction. They urge it for the larger service in the home, the school, and in institutions for education and reform. There has been published a letter recently written by an English lady—a member of a distinguished family. At the age of 80 she has dictated for the benefit of her great-granddaughter an account of her own boarding-school days. She had attended Regent House, one of the most exclusive of the girls' schools;

<sup>48</sup>Henry Norman: *The Peoples and Politics of the Far East*.

<sup>49</sup>Besant; *Mediaeval London*, 0. 354.

<sup>50</sup>Collinson: *Facts about Flogging*, p. 50.

one to which only young women of quality gained admission. She describes as follows the type of punishment which prevailed:

"I remember well the public flogging of one of the young ladies, only a few weeks before she left school to be married. Miss Pomeroy, our principal, said:

'Young ladies you will dress half an hour earlier than usual today, and be in the class room at half past four.'

We looked at one another and Miss Darwin colored a little but made no other sign that she knew anything about the matter, and we went to our rooms. Upstairs we found out what it meant, for the maid who dressed my hair had tied up new rods expressly for the coming ceremony. At the appointed time we were all in the class-room and Miss Pomeroy took her place. Miss Darwin was ordered to stand in the middle of the room and then our governess proceeded to tell us what her offense was, and what she was going to suffer. She was a very handsome girl; quite a woman in appearance and size, and she was richly dressed, but she stood there to take her whipping as a matter of course. Miss Pomeroy rang for an attendant. 'Prepare her,' was the mandate. The attendant courtesied and requested permission to remove Miss Darwin's gloves. Miss Darwin bowed (that was the formula) and the process of disrobing went on. Then the punishment blouse was put on, and then the young lady, taking the rod, presented it kneeling to Miss Pomeroy. The governess took it, and came down from the dais, while Miss Darwin, between two teachers was led to a desk, and made to stoop over it, her hands being firmly held by attendants, and her feet being fastened in stocks on the floor. Then the governess with right good will whipped her until red weals arose in all directions on her white flesh. The castigation over, Miss Darwin, trembling in every limb and with blazing cheeks and sparkling eyes returned the rod to the governess kneeling, and retired to make her toilet, a servant bearing her clothes in a basket."

The incident described took place some fifty years after England had forbidden the public whipping of women. It is safe to assert that it was never paralleled in America. It admits of no justification which does not equally apply to the brank, the bilboes or the ducking stool. Common to them all, are the elements of humiliation and pain. These are the twin servants of an utterly false penology. They are, in their very nature, associated with so-called "representative" punishment. No fact is more clearly established than that "making an example" of a representative offender is not a deterrent. Punish-

ment is efficacious, not in proportion to its cruel and humiliating aspects, but rather in proportion to its swiftness and its certainty.

Baring-Gould<sup>51</sup> states the principle in this way:

"The first requisite is certainty, for human nature is so constituted that if there be a chance of escape ninety-nine out of a hundred will run the risk. A slight punishment, if certain, is infinitely more likely to produce the required results than the imposing of an extreme penalty on a representative offender."

Let us in conclusion, consider briefly the type of punishment to which pain and humiliation are giving place.

We are today accustomed to estimate punishment as far as greater offenses are concerned, in terms of imprisonment. It is therefore difficult to realize that the practice of incarcerating offenders for a period of years in a public prison, wherein account is taken or is supposed to be taken, of their physical, educational and industrial needs, is a penal device of relatively recent origin.

If we are tempted to criticise as "soft" the discipline enforced by such men as Thomas Mott Osborn, we shall do well to remember that the transition is from a degree of hardness not at all creditable to America. Fetters, stripes, lock-steps and shaved heads, bespoke a belief in humiliation as a punitive agent. It gives us no satisfaction to recall that cell-prisons and the isolation or solitary systems are very largely American products. We first constructed (In Pennsylvania, in 1820) a penitentiary designed to enforce solitary confinement without work. A little later we tried out the so-called associated system, where men labored together, but where men if they spoke or so much as even lifted their eyes were cruelly flogged with heavy cowhide whips. Under the solitary system society added convulsions, fainting-fits and idiocy to the sentence imposed by the Court. Today, too frequently syphilis and tuberculosis are incident to prison life.

It is encouraging to note that there is at present much discussion concerning further changes in penal methods. It is a period of agitation and experiment. Since the pendulum of public opinion swings in a wide arc, it is well to remember that pain and humiliation have made their contribution to penology. Whatever else shall be determined, we should make sure that these agents of barbarism retain the discredited place to which experience has assigned them. To revive them to any degree would be to sustain Ives in his dismal conclusion that "punishment is by no means the thought-out product of modern science but is in reality a survival from savagery."

<sup>51</sup>Baring-Gould: *Curiosities of Olden Time*, p. 89.