

1922

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Recommended Citation

Julian P. Alexander, Philosophy of Punishment, 13 J. Am. Inst. Crim. L. & Criminology 235 (May 1922 to February 1923)

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THE PHILOSOPHY OF PUNISHMENT

JULIAN P. ALEXANDER¹

If justification be required for continued discussion of the punishment of criminals it may be found in the consideration that the solution of the problem is an ever-present challenge to society, whose loftier purposes are so readily thwarted by human frailties. At a time when the existence *vel non* of a general crime wave is being pressed for popular adjudication, a further consideration of so closely allied a topic as the proper punishment for crime should not be destitute of popular appeal. Yet the question—what is proper punishment?—is met at the threshold of our discussion. Then follow basic queries whose proper answer has engaged the thought of scientists, jurists, and criminologists everywhere. What standards should be applied to gauge its propriety? Is society or the criminal the ultimate aim of punishment? Why punishment at all?

A modern, legal definition of punishment is "pain, suffering, loss, confinement or other penalty inflicted on a person for an offense by the authority to which the offender is subject." Such definition is not satisfying in a discussion as to the reason and theory of punishment, and exhibits the usual defects of a definition in terms of effects and incidents, to the exclusion of causes and purposes.

It is inevitable that an analysis of the function of punishment of criminals should lead back through the gradual evolutionary processes to primitive man whose punishments were largely instinctive rather than rational.

With prehistoric man, whose security and rights were protected without the co-operation of an organized society, punishment (as such) for crime had a distinct significance. Self-preservation being a first law of his nature, primal man's instincts led him toward an immediate destruction of those things or persons which harmed or threatened him or his property. However, the human quality of resentment led him to even greater lengths than mere animal instincts would tend. Revenge bulked large in the mind of the savage. The sense of loss or wrong occasioned by acts which constitute latter-day crimes was appeased only by a vengeance which demanded immediate and summary reprisal. Left by an unorganized society to right his own wrongs, the savage forthwith yielded to an outraged passion which was satisfied with nothing short of complete annihilation of his wrongdoer. This

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germ of retributive justice involved the elements of protection and prevention of wrong. But an uncurbed anger demanded more than a guaranty against other or further wrong. There was the instinct of retaliation, which demanded not only a restoration in kind where possible, but a sacrifice or punishment in kind where the loss, as in the case of homicide, was irremediable. Thus grew up the "lex talionis" or the law of punishment "in kind." Such, for example, was the underlying principle of the Visigoths.

Even yet, however, society, as such, vouchsafed to the individual not only broad powers, but imposed upon him the responsibility of dealing with the malefactor, resting upon the rather secure assumption that the injured man or his family, impelled by a fierce resentment, would not fail in such assignment. So that the personal motive of vengeance dominated all treatment of the wrongdoer. This spirit, uncurbed, manifested itself in the most savage cruelties. The effect was a punishment in its strictest and most barbarous sense. Its purpose, however, was largely subjective, being the indulgence of an insatiate blood-lust fired by a sense of personal loss or insult. Even later, when men recognized a collective responsibility, the right of individual reparation was not denied. The social group, of which the wrongdoer and his victim were a part, soon recognized its relation to the wrong and retained a supervisory authority over the punishment for crime. This authority was potent enough to sanction and sustain a custom whereby the culprit was delivered to the victim's family to be by it disposed of. It fostered a theory of crude retributive justice whereby one was allowed to kill his adversary. It was the principle of an "eye for an eye" which gained the sanction of the ancient Hebrew law.

It was but a step to the doctrine which visited upon the culprit's family equal responsibility, even as rights of punishment had been extended to the victim's family. Under this doctrine, in remote parts of China, relatives to the ninth degree were subject to the same punishment as the malefactor. So, too, the husband could be made to suffer for the guilt of his wife. This custom stressed the theory of compensatory punishment and demonstrated its falsity through its failure to deal directly and solely with the offender himself. Such custom sanctioned the act of Achilles, who, for the death of Patroclus, exacted the lives of twelve Trojans.

It is significant that the "Goel" of the ancient Hebrews was not only an avenger of blood, but is translated "next of kin." His mission was "the balancing of a blood account," but his motives were more

equity than vengeance. Likewise was the idea of mere punishment as such subordinated.

The responsibility of the wrongdoer came to be measured in terms of the gravity of his offense, which in turn involved the standing and position of the victim. Among a few of the tribes of Africa there is still some latitude allowed the murderer and the victim's friends in adjusting the extent of satisfaction required. This may be measured in terms of the lives of several lesser subjects or in consideration of more practical or intrinsic value. Among the early Teutons the *wergild* was a sort of sliding scale whereby the responsibility for the death of all from the king down to the meanest churl might be gauged. The most iniquitous phases of this custom seem to have persisted unto this generation and are recognized in the extreme case where the murderer is led to his act by the promise of a bonus by the enemies of the deceased. The *wergild* involved the theory of compensation and the modern theory of a money fine retains this element.

Ultimately, society, which fostered and conserved the theory of compensation, claimed the fines itself as its just toll. Offenses were considered as being against the victim not only, but also against the clan, even as today our statutory offenses are all in theory and in fact "against the peace and dignity of the State of Mississippi." The satisfaction of the feelings of resentment in the victim or his family were to a large extent put aside. The motive of vengeance, at last recognized as a dangerous justification, was quelled by the denial to the individual of the right to inflict punishment. All crimes were against the clan or the ruler and as such were dealt with by the king. Offenses violated the peace of the clan and the dignity of the ruler. In dealing with offenses society gradually eliminated not only the idea of vengeance but to no little extent the idea of strict retribution and began to consider means of rendering the criminal harmless. He was a menace to society; his criminal act evidenced this. He must, therefore, be cast out.

"In dealing with offenses within the clan vengeance seems never to have been prominent. There punishment as rendering the criminal harmless soon passes into punishment as elimination of a degenerating element. First the man is cast out, then by various processes the wickedness is cast out of the man. There may have been a period when this conception of punishment was the dominant one—the period when clan organization was beginning to sink into the background before central authority. From this source the idea of the king's peace was readily evolved." In the popular mind the preservation of the public

peace seems to be the ruling explanation of punishment today. Even Plato justified punishment solely upon the grounds that the criminal was thereby through a severe chastening made better and the example of his extreme punishment acted as a deterrent to others. He had before him the unwise theories of the ancient Greeks, who conceived that exact justice demanded a punishment literally "in kind." Thus one who committed arson was burned to death and he that killed with a stone was likewise stoned to death.

As far into modern times as the eighteenth century we find Béc-
caria, a noted student of sociology, advancing the theory that the "treatment of the criminal is to be determined by the crime committed and not by the nature of the criminal." Uniformity of punishment was confused with exact justice. It is to be examined later whether we are entirely free of this popular misconception. Yet at common law all felonies were punishable by death. The nature of the crime determined its punishment.

When the law came to be respected as the vindicator of society's rights it developed that infractions must of necessity be punished. The law denounced an act as wrong; therefore it must be punished. The criminal would not repeat the wrongful act and others would be deterred by fear of similar punishment. The reasoning was not wholly sound. In the first place, it is being today recognized that the criminal is different from the normal. He is rarely deterred by punishment, for his criminal act is frequently repeated. As soon as his defective nature receives the same impulses, the same effects will again follow. The criminal learns little at the feet of experience. Too often he considers punishment as the collecting by society of his dues as a member and he practices its evasion as a necessary if not a fine art. He lacks foresight and lives only in the present; hence his experience is of little benefit to him.

Not only has the idea of deterrence by example not been vindicated by experience, but from the standpoint of exact justice, it is doubted whether the criminal should be punished in excess of his just deserts merely for the benefit of those potentially criminal who, in the absence of such extra punishment, might themselves commit crime. This makes every punished criminal a martyr. The potential criminals in society have no right to expect a vicarious atonement by him who is in the toils. This idea was carried to a similar extreme in the request made by a modern German mother to the keeper of her boy. "If Fritz is bad," she wrote, "you need not whip him. Spank the boy next to him and it will scare him to death."

It is found, then, that the earlier theories of punishment for crime involved the motives of vengeance, retaliation, retribution or compensation—at first “in kind” or at a fixed scale—and of deterrence against repetition by the criminal or imitation by others. As these motives in their several combinations have moved society in its treatment of criminals, we find that the punishments have varied in kind and severity. The impulse of vengeance demanded death or destruction; retaliation demanded a punishment “in kind”; compensation required satisfaction according to will of the injured party or in accordance with a fixed scale. Considered as a deterrent, the clan or society consistently made large use of the opportunity for public display. Considered in the light of a violation of the sovereign’s will, the opportunity and incentive for extensive public display and disapproval was fully improved. Since such motives standing alone furnish an unsound basis of punishment and are purely subjective, it is found that their uncertain guidance has led men back and forth between the extremes of barbarous physical tortures and of ignominious exposure in the public squares; between the cruelties of the Spanish Inquisition and the merely humiliating rigors of the ducking stool. All of these methods possess germs of rational punishment, but the very complexity and inconsistency of their application suggest erroneous hypotheses.

The treatment of criminals today is and must be a scientific and psychiatric as well as a legal question. Lombroso first attracted the public generally to the conception of the criminal as a subnormal or abnormal man. Considered as such, society owes to him a very positive duty. True, this duty may involve the right and necessity of punishment, but the chief consideration is a protection by society of itself. The state, even as its component individuals, has a right to self-preservation and defense. Inasmuch as the state exists for the good of its citizens, they must subordinate to the general good all those rights which as isolated individuals they might have exercised. In turn the state protects the individual and exists for his good. By punishing the individual criminal the state is acting in the interest and to promote the welfare of all its members, hence for the criminal himself. Exercising its right of self-protection, the state can and should isolate the criminal in lawful self-defense. The criminal must be considered a menace in greater or less degree and proper measures taken to protect society against him. As Lombroso originally pointed out, the criminal is a man of diseased mind or morals. His malady is a real one and demands thoughtful and positive treatment. Experience proves that nearly ninety per cent of all criminals are sick or diseased in body and

a large proportion of crimes are attributable to physical causes. (Modern society treats the body of the criminal and deems its duty fully done.)

The criminal must be isolated and his case carefully diagnosed. If incurable, society must be quarantined against him; if curable, he must be detained and treated. The method of treatment should at least tend toward reformation. Pursuing the parallel of the hospital, this treatment may be both external and internal. Such theory is not to be undermined by the assumption that a reformation is to be effected in any particular or uniform manner. It must be adapted to the needs of the individual—such needs to be determined by a scientific psychoanalysis of the patient. This view does not abandon the original idea of punishment. The inexorable laws of nature and divinity may well be imitated by a system that indissolubly links infraction with penalty or pain. Law-breaking must be made unpopular and unprofitable.

Modern ideas have crystallized into the truism that men are deterred from crime not by the severity but by the certainty of punishment. Scriptural authority for this truth is found in Solomon's wisely observant commentary upon human nature—"Because sentence against an evil work is not executed speedily, therefore the heart of the sons of men is fully set in them to do evil." Punishment must punish, of course, but the extent of the punishment is to be determined by the nature of the criminal and not—as Beccaria urged—by the nature of the crime. What is punishment to one may not at all be so to another. The object of punishment is no longer revenge; it is only to protect society. "The law does not seek a victim, but to reform the offender and set an example." The state says to the criminal, "If you cannot control yourself, we can." Some men are extremely sensitive to humiliation, others only to physical pain, another to confinement, and yet another to pecuniary loss. The spirit of some men can be broken eternally by the turning of a bolt between him and society. To such a one it is a symbol of perpetual ostracism from honest men and a permanent exile from domains of decency. His hand is thereafter likely to be continually raised in retaliation against an unjust society. To the old tendency to crime is this added impulse of revenge. The writer was told by a criminal of international notoriety that he had spent twenty-five years of his life in jails and penitentiaries all over the world. He was wanted in several other jurisdictions at the time to answer for other offenses. "Everywhere," he confided, "I am catalogued as a social outcast, and am lawful prey for any officer of the law. All my relations with society impress me with the fact that I am

outside the pale of decency. The language, manners and acts of those who deal with me are voiced in a single monotonous accusation: 'You are a bad man and we hate you.' I am slapped in the face by society. I am not human if I fail to hit back." To some, mere confinement may be a boon. One of many instances may be furnished by an inmate of Ludlow jail in New York City, who was serving a six months' sentence for contempt. He wrote: "Since April 1st I have read Balzac and all the Elizabethan dramatists and many of the latest books and magazines. I could not have accomplished this under any other circumstances. I would recommend it to anyone desiring an opportunity for unmolested self-improvement." His case may be contrasted with one with which we are intimately acquainted. From one of the many letters received in the district attorney's office from criminals there appeared this note of genuine disappointment: "Dere sir, I ben sentenced to this here jail for six months. Here I'se ben here nigh on to two weeks and sir I'se plum dissatisfied." What's sauce for the goose may likewise prove sauce for the gander, but not necessarily for the crow.

The interesting English case of the *Crown v. Titus Oates* illustrates the injustice of adapting the punishment solely to the offense committed. Oates was convicted upon two indictments for perjury. The court was so engrossed in its effort to display cleverness in its sentence that it overlooked other and more fundamental considerations. The sentence of the court is appended hereto as an illustration of how little removed we are from the period of irrational and arbitrary punishment for crime. (See page 250.) The pillory and the ducking-stool—whatever else may be said—have features that find place in modern theories of punishment. Humiliation involves the elements of personal shame and chagrin and is itself a punishment and to many a safe deterrent. They, too, may be misused or abused. When, in one of the last states to abandon the ducking-stool, it was reported that a popular public character had received a sentence of twelve immersions by this uneasy seat, a local spokesman for public opinion observed with true philosophy, albeit ambiguously, that "it occurred to him that the judge had soaked her pretty hard," thus presaging the modern theory of fitting punishment to the criminal instead of to the crime.

The original conception of the penitentiary was a place where those who menace society may be restrained not only, but also where deliberate punishments may be supplemented by that consciousness of mortification and repentance which are the bases of true penitence. "No longer is proportionate punishment to be meted out to the criminal

measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state as a sort of penitential ward to be restrained so far as necessary to protect the public from recurrent manifestations of the criminal tendencies with the incidental warning to others who may be criminally inclined or tempted, but, if possible, to be reformed, cured of his criminality, and finally released, a normal man and a rehabilitated citizen."

Punishment as such merely is no specific for crime. The only possible justification for physical punishment is its value as a deterrent; thus the fear of punishment is of far greater practical value than the punishment itself. In New Jersey, one of the last states to retain the whipping-post, the reports indicated doubts as to the practical efficacy of whipping as deterring repetition. The statistics showed in one penal institution a great number of men who had been whipped twice, three and even seven times. Yet in South Carolina before the whipping-post was abolished, thieves consistently omitted that section from their itinerary. First hand evidence was abundant that this form of punishing larceny was a potent deterrent. As members of the gang naively observed, "They whip a man there for stealing, and that's one thing a gentleman won't stand for."

The diverse experiences with the many methods of punishment all illustrate the fallacy of measuring criminal responsibility by statutes. The methods of punishment must be collateral, but subordinate to the motive for punishment. Once a proper theory of punishment is evolved, the methods will readily suggest themselves. Unless a prisoner is to be held as a perpetual menace to society we should regenerate rather than ruin or degrade him. Statutes should be referred to merely as furnishing limits within which an enlightened court may exercise a wise discretion. No legislature can anticipate the moral responsibility of those who are to violate its laws. Yet we stumble along, meting out formal sentences at pre-arranged prices for various crimes, upon the vague theory that an even handed justice demands a policy of "one price to all." Well may Justice in weighing the scales of guilt or innocence be kept blindfold against possible bias. Once guilt is established, however, the same lofty motives demand that she lift her blinding bandage that victims of her judgment may be intimately scrutinized. We must study the accused, his history, his associates, his environment and his physical, moral and mental equipment. Men are more or less alike. When a man "goes to the bad" there is usually a particular reason for it, peculiar to him. The state cannot afford to adopt the ancient motives of vengeance, since the injustice of this very motive

had led it in earlier times to assume control over the punishment of its citizens as offenders against the state itself.

Another anachronism appears in the still existing tendency to measure punishment by the harm actually done or amount stolen or the dignity of the statute violated. Thus the offender's punishment has a direct bearing upon the success of the unlawful enterprise in which he is apprehended. If the thief rob a man and discover only a few pence he is punished with a view to the statutory limitations of petit larceny, whereas had he discovered his victim's estate in more favorable circumstances his punishment would be increased by the letter of a more rigorous statute. Thus if the pickpocket invade the recesses of the plumber's garb he commits grand larceny, whereas if his hand had explored the waistcoat of the lawyer, an arbitrary jurisprudence must hold him merely for an attempt. The murderer is not one who "so thinketh in his heart." The scriptural standards lose popularity and caste in the presence of a system devoted to mathematical criteria. So that the better the criminal's aim the worse his criminality. Thrice blest is he whose aim is poor, for he is accounted the better citizen, albeit the poorer marksman.

To what extent, then, is the criminal to be punished? Crime in the abstract cannot be punished. Therefore, the answer must be—to the extent of the criminal's responsibility. It is by this standard that we gauge the responsibility of children or the insane. The latter classes are distinguished from the average only by considerations of inexperience and mental capacity at variance with the normal. The acts which they commit and can commit are equally as serious, damaging and irreparable to the victim. When the offender's age is observed, tender years create an immediate and accepted presumption against criminal capacity. The child is excused upon this ground. The age is evidence no doubt, but the actual experience and capacity are fundamental. Why should the adult criminal be deprived of the right to an examination as to his responsibility merely because his age denies him a presumption of incapacity?

Yet the most of our punishments leave the offender with a well-founded impression that the state is "hitting him back." I should not suggest that any system be endorsed that wholly eliminates the element of personal suffering, whether physical pain or mental distress, it does not matter. However, this should be considered as an incident, not an end. As already adverted to, the criminal must be chastened by experiences that associate wrong and pain indelibly in his mind. "Modern notions respecting the treatment of lawbreakers abandon the theory

that the imposition of the sentence is solely to punish." Even a proper treatment of the criminal under the modern criminological theories visits upon the criminal, as an inseparable incident, no little suffering, sacrifice and practical punishment. "Of course in every case where punishment is inflicted for the commission of crime, if the suffering of the punishment by the wrongdoer be alone regarded, the sense of compassion aroused would mislead and render the performance of judicial duty impossible." It must not be overlooked by those who characterize modern scientific diagnosis of crime as a coddling of prisoners that many men suffer immeasurable distress before they enter upon the sentence of the court. A criminal "trial" is far short of a misnomer. Some cynic, evidently misguided, is responsible for the observation that were it not for what his lawyer does to the criminal many guilty men would go unpunished. This consideration in its more serious aspects is not overlooked by the criminal. It suggests the report made by an old family servant regarding the outcome of his trial. "Well," he figured, "the judge found me \$25 and my lawyer found me \$75."

Those who charge that a scientific classification of criminals is a false altruism overlook the important fact that what is for the welfare of the individual—whether criminal or not—is for the benefit of the state. If the criminal act is an affront to society the removal of the man or his reformation is by the same token a benefit to the state. It is not a false sentimentality, it is economic good sense. On the other hand, punishment as an end is an artificial and sentimental conception, wholly illogical and indefensible. A well-known writer has said: "It is highly desirable that crime should be hated, that the punishment inflicted should be so contrived as to give expression to such hatred and to satisfy it so far as the public means for gratifying a natural healthy sentiment can justify it."

It is not given to me to see a complete consistency between the treatment of those diseased in body and those whose criminal acts manifest a diseased moral constitution. A modern altruism has erected asylums with wide open doors where tender hands minister to stricken bodies and minds, and aching wounds are bathed with sympathetic tears. Yet aside in the shadows there are other groups huddled within walls where steel-barred doors are forever closed and the dim light that filters through barred casements reveals men stricken in character and morally diseased. And in the eyes of their keepers are flashes of hate, and men draw aside from them with averted head. The modern Samaritan, as he goes about making clean the tenement, combating disease, and lifting up the fallen, begins to look with tenderness and

sane sympathy upon those stricken with vice and prejudice as with a plague. For the healing of the body is a doubtful service to society if it is thus to be restored to vigorous criminality.

The plain truth is that we are concerned more with the bodies of men than with their immortalities. If an offender be taken unharmed in an unlawful act, he is usually tried, convicted, and sentenced pursuant to a statutory formula to undergo experiences which tend to make him an even greater menace. If, on the other hand, he be mortally wounded in his arrest, he is placed by tender hands in an orderly hospital, where modern science is employed to restore his body to normal. (Some sheriffs, it may be added, have a prejudice against the hanging of a sick man.) It would appear that we have proceeded upon the rather original and unorthodox assumption that a man is a living body, with or without a brain. That he has a personality or a conscience or a thing known as an immortal seems to have been at least temporarily overlooked.

A proper treatment of crime must, of course, carefully consider the causes of crime. These often lie outside the criminal; not infrequently they lie in conditions and defects that are ameliorable, even tangible. Mere mention will be made here of some of the most usual causes so that the problem of crime prevention and cure may appear a practical one. These are heredity, physical and mental abnormality, drugs, disease, alcoholism, vicious and social and home conditions, the lure of newspaper and public notoriety, and the more debasing influences of the motion picture. This phase of our subject cannot be enlarged here. Let it suffice that these causes are real and controllable, and that underlying them all run the substratum of educational and religious irresponsibility.

Our new penology must consider the causes of crime, the criminal in his physical and mental aspects as a product of such causes, and punishment as a means to an end. Thus the severity of punishment must be acknowledged to be inefficient. Experience has demonstrated that crime is not less where punishments are more severe. Modern criminologists in examining into criminal responsibility ask not What did he do? but Why did he do it? Dodge the issue as we may, the truth will not down that the question is at its root a scientific and moral question. Recently a notorious criminal was effectually reformed by removal of a piece of bone which pressed against his brain. It may be observed that a great host of criminals have recently been reformed by the removal of the pressure of a brass rail against the instep.

True punishment considers the offender as a patient of society. Its primary function is to cure, not castigate; to heal rather than to hurt. Unless he is turned back to society a better man, then society has failed. It is true that pain may be caused as an incident to his treatment, his liberty restrained, or perchance his blood be let, yet, even so, his experiences are but those which attend every surgical operation for the alleviation of physical derangement.

At the risk of precipitating a babel of confused tongues, it must be observed that in our adherence to capital punishment are still preserved some of the ancient theories regarding the severity of punishment, the "lex talionis," and the "blood revenge." At the risk of the charge of radical propaganda, I would invite a momentary consideration of capital punishment as a last stronghold of many ancient doctrines of punishment elsewhere discarded. It may be considered an impiety to doubt that capital punishment is an asset to our social institutions; therefore let us measure it briefly with reference to the theories laid down in *Ex Parte United States* (242 U. S., 27, 38). These are: (1) Punishment; (2) Reform, or the effect upon the criminal; (3) The effect on others as a deterrent and on society as a vindication of the law.

The proponents of capital punishment urge it as the "extreme penalty" for the gravest crimes. It is argued that a man's life is his most valuable possession and to deprive him of it is to exact the severest punishment possible. The severity is thus emphasized. Yet hanging, as a physical punishment merely, lacks many of the tortures exacted by the rack or the whipping-post. There are many punishments more severe. Hanging is judicially declared not to be "cruel and unusual punishment." Many an unfortunate victim of the Spanish Inquisition would have welcomed hanging as a sweet relief. Boiling in oil, flaying alive and vivisection provide thrills of excruciation unknown to the electric chair. If the advocates of severity as a feature were more logical they would abolish capital punishment as grossly inadequate. If the efficacy of punishment be found in its severity, such severity must be increased until it results in minimizing crime. Our data fails to sustain a contention that crime is more frequent in those states which have no death penalty. We exhibit no faith in our advocacy of severity if we stop short of its limits.

From the standpoint of reformation the apologists for the extreme penalty must concede obvious imperfection. If we subscribe to the doctrine that his soul, thus abruptly released, joins that of John Brown and keeps its onward march, we merely insure that by summary execu-

tion the soul of the criminal, jeopardized by his own act, be guaranteed certain damnation by an immediate entry upon its eternal sentence.

Its value as an education to the criminal may likewise be grossly overestimated. The darkey who reassured the judge who had just sentenced him to be hanged that this would certainly be a lesson to him displayed an unwarranted hopefulness.

As a deterrent against repetition, hanging, it must be admitted, is ideally effective. Pursuing the modern analogy of a sick man, the summary removal of a diseased corporosity is open to the same legal and moral criticisms applicable to Euthanasia—or the painless dispatch of the incurable.

As a deterrent to others there are apparent defects of reason. But a moment's analysis of the value of capital punishment as an example is productive of illuminating results. If it has any value as an example, this value must necessarily be multiplied by publicity. This reasoning lacks genuineness unless the horror and dread of the gallows be exhibited to the public and to potential criminals. Yet we illogically conduct executions within closed walls and in the restricted presence of official witnesses. The Roman emperor was more consistent when he exhibited the heads of his enemies upon the spears of his marching soldiers, or dragged his victims at the wheels of his chariot. Those states which retain capital punishment seem gradually to have come to a realization that public executions were brutalizing; "they engendered sentiments more barbarous than those it was intended to suppress." In other words, public executions did more harm than good. The value as a warning has gradually been more than offset by the degenerating effect of unlimited publicity. If public executions are debasing it must follow that private executions cannot be justified as a beneficial expedient, because the very demand for privacy is an admission that if such execution exerts any influence at all it must be debasing or positively harmful. As far as its influence goes it is therefore conceded to be bad. If it have no influence, then its justification as an example is untenable.

Unless justified by these accepted theories of punishment, justification must be sought in the ancient theories of retaliation, compensation and vengeance, motives whose serious discussion cannot be allowed to cumber this discussion. An attempt to justify it merely upon the basis of prior sanction calls to mind the significantly ambiguous defense of a modern adherent. "Hanging," he explained, "was good enough for my ancestors, and it's good enough for me." For one with

such dangerously defective reasoning powers, it is possible that hanging was a trifle too good.

Under its own definition, society may be said to commit murder at every execution. The sheriff acts for each citizen and commits an act which, done by the individual, would constitute murder. It is "lawful" when done by the sheriff because a majority of society has vouchsafed to him an immunity from liability when his act is done under such circumstances. It may not be the will of the individual, or the hangman himself—it is safe to assume that it has not the sanction of the condemned. It is "lawful," therefore, because a majority is willing to waive the criminal's rights and the hangman's responsibilities. Yet moral questions are not subject to nor adjudicated by popular vote. There is recalled the colored revival meeting at which an outstanding sinner was beset by the church officers with a view to conversion. He was obdurate. After vain persuasion, entreaty, prayer and material inducement, an impatient deacon rose and moved that the sins of the recalcitrant be considered forgiven. The motion was duly seconded, put, and the brother's sins were unanimously forgiven.

In conclusion I may be permitted to redeem the deficiencies of a necessarily general discussion by a more definite constructive suggestion, even though such suggestions, to economize time, must be stated merely.

The Indeterminate Sentence. There is no reason or logic in compelling an estimate by way of judicial forecast by the court as to what will be adequate punishment. A doctor may with similar reason provide his patient with a definite number of pills with instructions to take up his bed and walk when the last pill is consumed.

A Perfected Parole System. This would contemplate a retention of jurisdiction over the case by the trial court. Recent decisions indicate the necessity for special and careful legislation.

The *right of suspension of sentence* in a proper case. The Supreme Court of the United States has recently denied the right in the absence of statutory authority.

The *pardonning power*, while it should always exist, should be limited and the occasion for its exercise minimized by imposing upon the courts broader rights and responsibilities as to the individualization of punishment, with power to suspend sentence or parole as above suggested.

The establishment of an *Administrative Board*, or body equipped to make expert study of and report upon the individual criminal, both adult and juvenile. We need no longer blind ourselves by the violent

presumption that the court or the governor is qualified to make a psycho-analysis of the individual offender. It has elsewhere been suggested . . . that punishment being an extra-judicial function, the province of the court should be merely to determine guilt.

A more rational *treatment of those in confinement*. This involves more sanitary quarters, beneficial labor, instruction and betterment. A jail is nothing but a place for the detention of a "penitential ward" of the state. It is merely the place of "treatment." It is not the treatment itself any more than is the hospital. There are many crimes which are related directly and causally with physical and moral defection. In these the physical and more delinquency are inseparable. Sane treatment is imperative. Delinquent women must be considered as presenting a unique and special problem. No treatment or punishment can be considered too severe the end of which is the protection of the offender against herself and of society against physical or moral contagion.

A sense of responsibility for the *family of the convict*. The state feeds, clothes, and houses the man who has offended against it, and takes no thought of the innocent and dependent members of his family whose suffering and want are the direct result of the state's act in attempting to protect society, of which they are still a part. The state should acknowledge its obligation to the convict's family or dependents by a deliberate assumption of a part of its burden—even as it now does indirectly. Such provision should be made either as a direct expense of the state or may be supplemented by earnings of the convicted man upon a fair wage scale.

Finally, as intimated above, the treatment and prevention of crime is a moral question. It can be prevented and cured only by those things that are inconsistent with crime. These are, and will ever be, better education and religious training.

In ancient days the fleeing felon found asylum in cities of refuge where he was secure against the injustice of summary and arbitrary punishment. When pressed by unjust avengers he instinctively sought with confidence the sanctity of the sanctuary. Its sanctity was his security and protection. Let us hope that we may tend through an enlightened attitude toward a system of administration whereby our courts may become citadels of exact justice through sane and equitable punishment, and havens of refuge against men's ignorance, indifference and arbitrary standards. And may we confidently hope that the citizen himself, conscious of the nemesis of self-accusing ignorance and in-

difference, will seek enlightenment, security and guidance in the ancient teachings of the sanctuary.

“Judgment against Titus Oates upon conviction upon two indictments for perjury, as announced by the court (10 Howell’s State Trials, col. 1316-1317 & 1325).

“First, the Court does order for a fine, that you pay 1,000 marks upon each indictment.

“Secondly, . . .

“Thirdly, . . .

“Fourthly, . . .

“Upon Friday, you shall be whipped from Newgate to Tyburn, by the hands of the common hangman.

“But, Mr. Oates, we cannot but remember, there were several particular times you swore false about; and therefore, as annual commemorations, that it may be known to all people as long as you live, we have taken special care of you for an annual punishment.

“Upon the 24th of April every year, as long as you live, you are to stand upon the Pillory and in the Pillory at Tyburn, just opposite to the gallows, for the space of an hour, between the hours of ten and twelve.

“You are to stand upon, and in the Pillory, here at Westminsterhall gate, every 9th of August, in every year, so long as you live. And that it may be known what we mean by it, ’tis to remember, what he swore about Mr. Ireland’s being in town between the 8th and 12th of August.

“You are to stand upon . . .”