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BRIEFER CONTRIBUTIONS

PALEY ON THE TIME SENTENCE

THORSTEN SELLIN

In the year 1829 there appeared in the London Review an analysis of some reports on the transportation system. The reviewer was Richard Whately, Drummond Professor of Political Economy at Oxford. In his article, Whately said, among other things, "With respect to every sentence of confinement to hard labor . . . we would venture to suggest what we cannot but consider as a most important improvement, viz. that instead of a certain period of *time*, a convict should be sentenced to go through a certain quantity of work."¹ In his letter to Earl Grey written in 1832 after he had become Archbishop of Dublin, Whately returned to the idea. "It seems to me perfectly reasonable that those whose misconduct compels us to send them to a house of correction should not be again let loose on society *till* they shall have given some indication of amended character. Instead of being sentenced, therefore, to confinement for a certain fixed time, they should be sentenced to earn at a certain specified employment such a sum of money as may be judged sufficient to preserve them on their release from the pressure of im-

mediate distress; and orderly, decent, submissive behavior during the time of their being thus employed should be enforced under the penalty (besides others, if found necessary) of a proportionate deduction from their wages and consequent prolongation of their confinement."²

These opinions of Whately have been quoted by many writers as being the first to express the theory of the principle of elasticity or indetermination in the sentence to imprisonment for the purpose of taking into consideration the prisoner's desire to reform or his fitness for social life upon release. Whately's daughter, who was also his biographer, claims that her father's article in the London Review "was the first to suggest that notion of sentencing convicts 'to a certain amount of labor instead of time' which was afterward taken up by the prison reformer, Maconochie, and which is considered by some to form the basis of the much admired system of discipline of Irish prisons under Sir Walter Crofton."³ Whately himself was apparently of the same opinion,⁴ and this view has been generally

¹P. 100 of *Thoughts on Secondary Punishments, in a Letter to Earl Grey*. 204 pp. London, 1832. The London Review article is reprinted in Appendix No. 1 of this pamphlet.

²*Ibid.* pp. 36-37.

³Whately, E. J. *Life and Correspondence of Richard Whately, D.D.* Vol. 1. p. 172. London, 1866.

⁴*Ibid.* Vol. 2. p. 394.

shared by English and American scholars. F. H. Wines, who was a splendid student of historical penology, gives in his *Punishment and Reformation* (Lane's edition, New York, 1919, p. 223) first place to Whately. Harry Elmer Barnes, in his works on penal history, also accepts this view,⁵ and so does F. E. Haynes,⁶ to mention but a few of those who have interested themselves in the history of penal ideas.

This brief note cannot trace in detail the development of the concept of the indeterminate sentence. Attention will be called merely to a contribution by a man who antedated Whately by a half century, William Paley (1743-1805),⁷ lecturer on moral and political philosophy at Christ's College, Cambridge, from 1768 to 1776. Paley's lectures appeared in book form in 1785 under the title, *Principles of Moral and Political Philosophy*. The book contains a chapter on crime and punishment which shares with the rest of the work a remarkable lucidity of style and power of thought. One of its paragraphs states: "As aversion to labor is the cause from which half of the vices of low life deduce their origin and continuance, punishments ought to be contrived with a view to the conquering of this disposition. Two opposite expedients have been recommended for this purpose; the one, solitary confinement with hard labor, the other solitary confinement with nothing to do . . . If labor be exacted, I would leave the whole, or a portion, of the earnings to the

prisoner's use and I would debar him from any other provision or supply; that his subsistence, however coarse or penurious, may be proportioned to his diligence and that he may taste the advantage of industry together with the toil. I would go farther; I would measure the confinement, not by the duration of time, but quantity of work, in order both to excite industry and to render it more voluntary."⁸

According to Mackintosh, Paley "ought to be ranked among the brightest ornaments of the English church in the 18th century."⁹ Whewell tells us that his "Principles" were adopted as a standard book at Cambridge in the disputations upon moral questions and in subsequent examinations for the Bachelor's degree, and he adds that "perhaps few moral and political writers have exercised a greater influence upon their generation than he has done."¹⁰ The "Principles" were issued in numerous English and American editions and were used as a text in many American colleges in the early part of the last century.

How could Whately have been ignorant of this work? That he was interested in Paley is obvious, for in 1859 he issued an annotated edition of that part of the "Principles" which dealt with moral philosophy. His daughter has suggested a pos-

⁸Pp. 292-293 Vol. 2. Tenth Edition, London, 1794. Corrections in this edition involve no changes in this paragraph when compared with the first edition.

⁹P. 180. Mackintosh, Sir James. *A General View of the Progress of Ethical Philosophy*. 304 pp. Philadelphia, 1832.

¹⁰Pp. 165-166 of Whewell, W. *Lectures on the History of Moral Philosophy in England*. xxxiii + 265 pp. Cambridge, 1852.

⁵Compare, for instance, his last work, *The Story of Punishment*. viii + 292 pp. Boston, 1930. p. 209.

⁶P. 330 of *Criminology*. x + 417 pp. New York, 1930.

⁷See biography by Leslie Stephen in *Dictionary of National Biography*. Vol. 43, pp. 101-107, London, 1895.