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THE EVOLUTION OF PUNISHMENT¹

A. WARREN STEARNS²

It is impossible to trace the origin of punishment. It appears to be a well developed social institution in the most primitive societies and at the dawn of known history. Much speculation has been made as to its origin, but in the main rather narrow definitions have tended to justify special concepts. The following is an example: "Punishment is an evil inflicted upon a wrongdoer, as a wrongdoer, on behalf, and at the discretion of society in its corporate capacity, of which he is a permanent, or temporary, member." This would be a good deal like limiting the concept of sex to its expression in the married state. It would exclude the punishment of captured enemies and animals. The theory that punishment is the outgrowth of private vengeance is supported by overwhelming authority. MacDougal defines it as "the binary compound of anger and positive self feeling."

Let us go to the most simple sources for information. If I step on my dog accidentally, even though he is ordinarily very friendly, he may bite me. This, I take it, is an instinctive act, almost reflex in character. It is certainly a defense mechanism and is, perhaps, akin to punishment. Bees ferociously attack any foreign intruder and even destroy it. This may be akin to punishment; it is certainly social defense. Whether it is retaliation or not is difficult to say. Wherever human beings have charge of animals there is a ruthless insistence upon obedience to a conventional conduct pattern. Any variation from the prescribed conduct is annoying and irritating and results in savage retaliation.

In the government of children, failure to adopt the prescribed mode of conduct annoys and irritates us and often leads to violent attacks for the purpose of inflicting punishment. Here it has been necessary to pass laws and to organize societies to protect children from the brutality of their parents and others in the name of punishment.

So of first importance in the origin of punishment is a reaction of annoyance or irritation expressed toward one who is in some way

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under supervision and control. There are no motivations found in society which are not found in individuals. Because of the contagiousness of emotional expression the feelings of the individual are rapidly transmitted throughout the group; so the control of individuals by society is probably analogous to that exercised by individuals over those under authority, and punishment by society is probably an expression of irritation and annoyance at individuals who do not conform to the conduct pattern prescribed for the group. At this point positive self feeling comes in and, in a subordinate way, fear, cruelty and atonement. All of these go to make up the punishing propensity common to individuals and to societies.

It is customary for human beings to conventionalize and ritualize their necessities. Punishment becomes a social custom and is conventionalized and a ritual is set up for its elaboration. This leads to the formation of a punishing class whose zeal appears to have been a factor in its elaboration. Whatever the biological foundations of a necessity may be, man almost universally assigns some beneficent or altruistic motive to his conduct differing according to cultures and times. Likewise, as in other human propensities, there are superficial and deep purposes. For instance, the biological purpose of taking food is to sustain life, yet the reason for eating is to satisfy appetite. Likewise, the biological purpose of sex is to perpetuate the line, but the immediate response is to satisfy an appetite. So it would appear that punishment, whether by an individual or by a social group, is fundamentally for the purpose of individual or social defense; but the immediate motivation, though less certain, appears to be a reaction to annoyance and irritation.

A study of the customs of primitive persons is enlightening. In a general way it would appear that the life of savages is regulated to a much greater extent by custom than that of civilized man. We perhaps think of savage life as free and unrestrained and yet the more intimately we become acquainted with their social life the more we realize how completely enslaved they are in most matters by custom. Savage society pays little attention to quarrels between individuals. They either fight it out themselves or settle the matter by composition. Quite different is their reaction to violations which supposedly threaten the welfare of the group. The following is a list of crimes among primitive people: (1) treason, (2) witchcraft, (3) sacrilege, (4) incest or other sex offenses, (5) poisoning and like offenses, (6) breaches of the hunting rules. These are punished summarily by extinction or banishment. The savage sees

in the ordinary events of the day the influence of good and bad spirits and attempts to reward the activity of the good and appease that of the bad. All of these early punishments have a certain religious sanction; so the fundamental purpose is biological and has to do with defense, the immediate motivation is irritation or annoyance, and the assigned purpose is beneficent or religious.

Next in order comes a glance at the developments which have taken place at the dawn of history in the so-called archaic civilizations. There is fragmentary data concerning the criminal law of the Egyptians, Babylonians, Hebrews, Mohammedans, Hindus and Chinese. They have a striking similarity. Perhaps the best one to discuss is the Mosaic Law. Here we find an intermingling of the most primitive custom with the beginnings of organized society. Superstition still plays a part, but the religious component has been extended, the element of purification is more apparent, quarrels between individuals are still the affair of individuals, though the duty of expiating the blood feud has become formalized. It is interesting to note that society steps into these quarrels at first, not for the purpose of punishing the individual, but to protect him from excessive or unjust retaliation by the aggrieved. In Deuteronomy, Chapter 19, we find:

"Thou shalt separate three cities for thee in the midst of thy land, which the Lord thy God giveth thee to possess it. Thou shalt prepare thee a way, and divide the coasts of thy land, which the Lord thy God giveth thee to inherit, into three parts, that every slayer may flee thither. And this is the case of the slayer, which shall flee thither, that he may live: Whoso killeth his neighbor ignorantly, whom he hateth not in time past; As when a man goeth into the wood with his neighbor to hew wood, and his hand fetcheth a stroke with the ax to cut down the tree, and the head slippeth from the helve, and lighteth upon his neighbor, that he die; he shall flee unto one of those cities, and live: Lest the avenger of the blood pursue the slayer, while his heart is hot, and overtake him, because the way is long, and slay him; whereas he was not worthy of death, inasmuch as he hated him not in time past. Wherefore I command thee, saying, Thou shalt separate three cities for thee. . . . But if any man hate his neighbor, and lie in wait for him, and rise up against him, and smite him mortally that he die, and fleeth into one of these cities: Then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die. Thine eye shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee."

Here we find also an early attempt to equalize the punishment and the crime and we find: "And thine eye shall not pity, but life

shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.”

An example of the factor of purification is shown in Chapter 21:

“If one be found slain in the land which the Lord thy God giveth thee to possess it, lying in the field, and it be not known who hath slain him: Then thy elders and thy judges shall come forth, and they shall measure unto the cities which are round about him that is slain: And it shall be, that the city which is next unto the slain man, even the elders of that city shall take an heifer, which hath not been wrought with, and which hath not drawn in the yoke; and the elders of that city shall bring down the heifer unto a rough valley, which is neither eared nor sown, and shall strike off the heifers neck there in the valley; and the priests the sons of Levi shall come near; for them the Lord thy God has chosen to minister unto him, and to bless in the name of the Lord; and by their word shall every controversy and every stroke be tried; And all the elders of that city, that are next unto the slain man, shall wash their hands over the heifer that is beheaded in the valley: And they shall answer and say, Our hands have not shed this blood, neither have our eyes seen it: Be merciful, O Lord, unto thy people Israel, whom thou has redeemed, and lay not innocent blood unto thy people of Israel’s charge. And the blood shall be forgiven them. So shalt thou put away the guilt of innocent blood from among you, when thou shalt do that which is right in the sight of the Lord.”

Chapter 22 elaborates the criminal code and provides for its administration. It is interesting to note the forms of punishment: death by hanging, by stoning, and whipping. The number of stripes is fixed in Chapter 25, as follows: “Forty stripes he may give him, and not to exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee.” I am not certain whether “thy brother” refers to the whipper or the one being whipped. Interesting interpretations may be made either way.

An interesting example of primitive superstition showing the probable force of the taboo follows:

“If brethren dwell together and one of them die, and have no child, the wife of the dead shall not marry without unto a stranger: her husband’s brother shall go in unto her and take her to him to wife, and perform the duty of an husband’s brother unto her. And it shall be, that the firstborn which she beareth him shall succeed in the name of the brother which is dead, that his name be not put out of Israel. And if the man like not to take his brother’s wife, then let his brother’s wife go up to the gate unto the elders, and say, My brother’s brother refuseth to raise up unto his brother a name in Israel, he will not perform the duty of my husband’s brother. Then the elders of the city shall call him, and speak unto him: and if he stand to it, and say, I like not to take her;

Then shall his brother's wife come unto him in the presence of the elders, and loose his shoe from off his foot, and spit in his face, and shall answer and say, So shall it be done unto that man that will not build up his brother's house. And his name shall be called in Israel, The house of him that hath his shoe loosed."

The blessing of certain conventions and the cursing of certain other things also illustrates the formalization of the taboo.

We come next to the classical period. It seems rather strange with the enormous elaboration of the civil law in both Greece and Rome that criminal law should have remained so primitive. The Twelve Tables of Rome seem little different from the customs of primitive people. The head of the family has the power of punishing its members as well as the slaves. Torture appears, but can only be inflicted upon slaves. Much of the criminal law still has to do with sacrilege. Death is the usual penalty and may be inflicted by hanging, crucifixion, decapitation, hurling from the Tarpeian Rock, being thrown to wild beasts, or it seems almost any other way the ingenuity of the punisher may devise. Differences between individuals are still largely matters of tort and are settled by composition. Justice appears as an abstract sanction and its administration tends to become the assigned motive for social action.

In 621, B. C., Draco's Codification of Criminal Law removed the power of punishing or acquitting the accused from the hands of near kin to the state. The King was the judge. In 594 B. C., Solon's reforms instituted fines, also debts resulted in the mortgaging of the debtor, i. e., slavery.

The next development, slowly evolved through the dark ages, is seen flourishing under the feudal system. This was to a certain extent an evolutionary process, though in many cases there was a marked regression to earlier reactions. Primitive customs still exist and yet the punishing class was more definitely organized and set apart. Organized religion resumes a dominant place in the regulation of conduct, though for the most part punishment is inflicted by temporal authorities and the deterrent effect of punishment becomes the avowed motive. This is the beginning of social sanitation and the offender is made an example under the theory of the deterrent effect of punishment. It is still a duty to punish the offender, but the assigned motive is prevention. The sinner or offender is punished as an example so that others will not do likewise. Quarrels between individuals may still be settled by actions of tort though organized society takes a fee. Here again it is noteworthy that one

of the principal reasons for interfering with these private quarrels is to protect the accused from excessive retaliation. Obviously, if the purpose of punishment is to overawe the rest of society and thus induce prescribed conduct, the more horrible the punishment the greater its salutary effect. And so human ingenuity was never more exercised than in devising new and unusual modes of hurting the individual. I will omit a recital of the horrors to which this leads. In a general way torture on the continent was not developed specifically for purposes of punishment. Before a man could be executed it was necessary that he confess. A belief was held that if you hurt a man enough he would tell the truth and so individuals were tortured for purposes of gaining a confession. I shall not go into the intricacies of the criminal law or of the administration of justice of this period.

Sometimes in the course of the eighteenth century a ferment began to operate throughout civilized society. Whatever happened there was a tremendous revulsion against the tyranny of rulers and the barbarisms of organized society. This, of course, culminated in the French Revolution. In 1762, Beccaria, an Italian marquis, published his notable book, "Crime and Punishment." For twenty-five years he dared not own its authorship. We may assume one of two hypotheses: either that this book stirred people to action or that Beccaria was merely the spokesman who expressed the ferment of which I have previously spoken. Beccaria specifically cried out against torture and inequality of punishment. Voltaire eagerly seized upon the book, translated it into French with a foreword, and thus marked the beginning of a steady, progressive amelioration in the rigor of punishment and increasing solicitude over the welfare of the individual.

In England, John Howard, having been elected sheriff, visited his jail at Bedford. Here he was shocked by the evils of the fee system and by the unsanitary conditions of prisons. This started him on his career during which he travelled forty thousand miles visiting every major prison of Europe. He published at his own expense two great books which he distributed gratis to his friends. He personally brought about vast legislative enactments tending to improve the conditions of prisons. Furthermore, as an alternative to execution and capital punishment, he suggested the penitentiary house. It was his belief and hope that human hearts could be softened by penitence and prayer and he designed a model penitentiary house to which offenders might be sent and corrected or

improved. He still regarded punishment as necessary and right, but for the first time enunciated the principle of the treatment of offenders, as distinguished from punishment.

At this point we will leave the developments in Europe as it is possible to follow the various steps more intimately in the United States and especially in Massachusetts. It is interesting to note that when the Pilgrims first came to Plymouth in 1620, they brought the laws of Europe with them. In the first publication of the laws and liberties of New England is set forth the punishment of crime. All capital laws were taken directly from the book of Deuteronomy and it is further stated that when there is doubt as to procedure Deuteronomy shall be the guide. Thus in a period of over twenty-five hundred years little progress had been made. We were still expressing our annoyance and irritation at those who did not conform. About the only changes made were religious and legal sanction. To be sure there was a multiplicity of petty punishments for smaller offenses, but serious crimes were still to be punished, according to Massachusetts Law, by death. An ever-widening extension of the benefit of the clergy was proposed, an evidence of the softening influence of civilization. In the beginning the clergy had the right to appeal to the Ecclesiastical Courts. This was gradually extended to all who could read and write. As late as the American Revolution, a man was convicted of killing his wife in Boston; upon pleading the benefit of the clergy he was burned in the hand and released. Most punishments were greatly enlarged and all sorts of authority put stress upon the individual to conform.

In 1655, the enactment against the Quakers showed the fury of the punishing propensity. In 1692 we get another glimpse, during the last prosecution for witchcraft. It is interesting to note that Giles Corey was pressed to death in the streets of Salem for standing mute. In the church records of Billerica we find evidence of the part played by religion in enforcing conformity. Each Sunday morning the members were asked to tarry and complaints were heard as to the conduct of the inhabitants, committees were appointed, and public confession was required.

"July 8, 1771. The church met, being previously notified, to consider the case of R— D— who said that he was falsely charged by M— W— with being the father of her bastard child. He plead innocence before the church; but it appearing that he did not deny that he was guilty, at the time when the young woman was in travail, though he was sent for, and heard her examined, and was charged by her to his face, with being the father of the child, at that critical time; and that though

several discoursed with him, about that time upon the matter, yet he did not plead innocence, as it was thought vastly probable he would, if he had not been conscious of guilt; upon this ground the church passed the following vote, viz:

That notwithstanding what R—— D—— has said in his own vindication, there appear such circumstances against him, that they cannot see the way clear to admit him to church privileges, until they have fuller satisfaction in the matter.

Then the meeting was dissolved."

Also the meetings of the Board of Selectmen showed that this nonjudicial board was engaged in punishing offenders.

"August 27, 1753. At a meeting of the selectmen the selectmen having had J—— K——, Jun'r under examination with respect to his past misconduct Do adjudg the said K—— to be an idle dissolut and vagrant person: The selectmen further Determin to take care of and set to work the said J—— K——: and take care of his family: and Do put him to Ebenezer Beard to be set to work by him: and be employed in his service."

However, the next great change came about at the time of the American Revolution. In 1772, The Society for the Aleviation of the Miseries of Public Prisons was organized in Philadelphia, inspired by the traditional tenderness of the Quakers and perhaps by the writings of John Howard. In 1786 the so-called Sanguinary Laws of Europe were repealed in Massachusetts, capital punishment was limited to one or two offenses, and a beginning was made of a penitentiary house, substituting imprisonment for physical punishment. The old fortress at Castle Island was designated as a state prison and offenders who might otherwise have been executed were sent there. This continued until 1798 when the island was sold to the Federal Government and the prisoners distributed to the various houses of correction which heretofore had been places of confinement while awaiting trial.

John Howard did not succeed in establishing his penitentiary house in England and the first one was built in New York City in 1799. This was followed by the Massachusetts State Prison opened in 1805. Never has more idealism been expressed. Designed by Charles Bulfinch, this institution was in fact a fortress for the punishment, of offenders and early rules state that only the coarsest food should be eaten and the coarsest clothes worn. However, it was hoped that by confinement and solitude and the ministrations of the chaplain the hardest of hearts were to be softened and men made good. Alas, fond hopes were not fulfilled. Those released

were not cured, but confinement in prison had become an established custom and a substitute for corporal punishment.

I shall not have time to enumerate the many evidences of what might be called the rise of humanitarianism at this time except to call attention to the fact that during the next fifty years one after another of institutions were organized for neglected children, sick people paupers, the blind, etc.

We now enter into the period when formal education seemed a cure for all social ills. Josiah Quincy, then Mayor of Boston, in 1821, established a House of Industry and the report of the Commissioners leads one to hope that poverty was to be abolished by educational methods. In 1828 the House of Refuge was opened in Boston, copied from the one established in New York in 1824. Here neglected and delinquent children were to be sent, educated in the three R's and taught a useful trade, and this group of offenders was subjected to an educational treatment entirely new in the annals of civilized society. In 1833 the Worcester Lunatic Asylum was opened, drawing many of its first patients from the prisons of the state, and another special class had been removed from the direct provisions of criminal law. In the fourth Annual Report a number of cases are published which give an insight both as to the previous condition of prisoners and the hopefulness of the new era.

In 1839, Alexander Maconochie, a British Naval Officer, was assigned to the Australian post having in charge the wretched victims of the English system of transportation. From a veritable hell on earth he transformed the colony at Botany Bay to a reasonably stable society. This he did by means of the mark system by which a prisoner was allowed to work out his own salvation. If he behaved himself he accumulated marks with which he could ultimately purchase his freedom. Maconochie was dismissed because of his "abstract ideas," but the plan was seized upon by Sir Walter Crofton who developed the Irish System, thus beginning the era of reformation as a panacea for crime.

Frank B. Sanborn of Massachusetts visited the Dublin Prison and with E. C. Wines returned to America intent upon establishing a reformatory. The result was the Elmira Reformatory, a formalized plan for reforming criminals. This was followed by the Massachusetts Reformatory at Concord in 1884. I shall not go into the detail of this except to say that here was applied the mark system, the indeterminate sentence, the ticket of leave or parole, and the classification of prisoners was begun.

At about this period in Italy, Lombroso, a psychiatrist, began the study of individual criminals. He first asked, what sort of people are these criminals? All are now familiar with the elaborate anthropometric studies of criminals. From this grew the so-called positive school of criminology and the attempted recognition of the born criminal. We are inclined to smile and speak lightly of Lombroso's criminology today, yet it is of tremendous importance because for the first time criminals were studied as individuals.

With the tremendous advances which were made in the study and understanding of mentally diseased persons there came a belief that if criminals could be subjected to a similar study we might find the key to the solution of the problem of crimes and criminals. Psychiatric therapy has proven somewhat disappointing, but it is of importance to note that in the study of criminals it was necessary to take elaborate life histories. Out of this has grown the contemporary case history method of diagnosis and treatment. Scientific methods at last have been extended to this age-old problem. Cautious and conservative students are now working throughout the land, building up a case history system of criminals, different from and yet analogous to the case studies of sick persons so gloriously carried on by the medical profession.

Thus we have seen a gradual evolution from the primitive, superstitious conduct of savages down to the enlightened, rational study and planning of civilized human beings. Throughout the ages the formula has been the same. Fundamentally, the purpose of it all has been social defense, the immediate stimulation annoyance and irritation, the difference has been in the assigned cause of our activity, as follows:

- (1) To propitiate the spirits.
- (2) To purify, cleanse or atone.
- (3) To establish and maintain justice.
- (4) To use the deterrent effect of punishment.
- (5) To soften the hearts of offenders through religion.
- (6) To educate and instruct.
- (7) To reform.
- (8) To study and treat according to our best light.

Just a word as to the future. Although it would be folly to regard criminals as diseased persons, the application of the medical method seems justified. We do not need to consider the element of punishment, as social censure and restraint will always be in themselves unpleasant and so punitive. Just as in medicine in certain

cases, sanitary laws have been devised by which disease has been prevented, so it is to be hoped that laws of social and economic sanitation may be discovered by which crime may be prevented. For instance, by the control of drinking water and food stuffs typhoid fever has been practically eliminated. There has been little advance in the treatment of individual cases of typhoid fever, which has nevertheless been nearly exterminated. Then again, as in the case of diphtheria, specific remedies for specific types of defenders may be developed. Just as the pathological laboratories of a generation ago sent forward information to practicing physicians enabling them to do their work better, so case studies in prisons will ultimately lead to the development of procedures by which courts can improve their work.

But we must remember that punishment is a propensity of mankind carried out through the institutions of society and that any attempt at improvement is in itself an attack upon orthodoxy and so is bound to meet with resistance. Anyone working in this field is continually in conflict with public sentiment, which tends to stand for orthodoxy and looks askance at heterodoxy. And so that class of individuals who in the past have been chosen by society for the purpose of inflicting punishment must be replaced by a class of professional men whose function it will be to formulate laws for the prevention of crime and bring forth methods of treating criminals. Needless to say, for the present our methods are bound to be empirical. Nevertheless, there is no greater challenge to educated men and no greater opportunity for the exercise of ingenuity and scholarship on the part of young men with a pioneer spirit. Already knowledge has outrun public administration and it seems to me our solemn duty is to actively and militantly espouse the cause of those pioneers who are so earnestly advancing the discipline of a new criminology.

SUMMARY

The individual when annoyed by the conduct of others instinctively retaliates; thus he reacts as if there were a punishing propensity. Human beings tend to conventionalize and ritualize their necessities; thus punishment becomes a custom, and institutions are set up for its administration. Man also tends to sanctify those customs arising from individual necessity or social need.

Savages pay little attention to individual quarrels, but punish violations of tribal customs. This is done to propitiate or reward good and bad spirits. In archaic civilizations the same procedure is

carried out, some formalization of individual quarrels is seen and the religious component of group punishment is extended. Government intervenes, at first for the purpose of preventing excessive retaliation. The elements of duty and purification are developed and a punishing class is established whose zeal becomes an added factor.

In the classical civilizations individual quarrels tend to be settled by composition. Punishment by society is further elaborated and formalized, and to religious obligations are added governmental duties.

The punishing class is extended during the feudal times, the divine right of rulers gives society occasion for further control of individual quarrels and more elaborate conventions are set up for their settlement. Religious obligation and social betterment are still important factors, but the theory of the deterrent effect of punishment demonstrates a step toward social sanitation and the individual is punished as an example so that society will be better. This led to an increased severity of punishment and brought the punishing class into greater importance.

During the eighteenth century, as part and parcel of the revolt against the monarchical system, appeared a rapid development of the humanitarian motive and for the first time attempts were made to treat the individual offender. At first this treatment consisted of religious efforts, then formal education was offered as a cure, developing gradually into the modern idea of reformation. This continued the punishing formula for purposes of social sanitation and elaborated the treatment of the individual.

In the latter part of the nineteenth century studies of individual offenders were begun. These studies were at first anthropometric and later became psychiatric. From this has developed the present day case history system as a means of diagnosis and a guide in treatment.

At the present time we still have the punishing propensity of human beings conventionalized and ritualized by organized society, but are engaged in extending the application of scientific methods through case histories and social service techniques. Resistance to this comes because of the dominance of the punishing class. If we are to advance we must condition the punishing propensity of individuals and must substitute for the punishing class a professional group interested in social sanitation and individual treatment.