1901

The evolution of penology

THESIS.

THE EVOLUTION OF PENOLOGY.

BY

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The criminal is as old as human legislation, indeed older, for while he is a creature of law, yet his potential preexistence was the occasion demanding that law. While there may have been a time when men were strangers to legislation, there never was a time when they were not conscious that each one as an individual possessed rights upon which others might not infringe with impunity. Experience would soon teach the individual that his rights were bounded by the like rights of others. To fix the boundaries of these mutual and conflicting domains has been the never ending problem of Ethics. However Ethics has to do more especially with the voluntary adjustment of individuals to each other. But there always exist those eccentric characters who either refuse to recognize these limits, or else they have circumscribed their field of action by lines which greatly overlap the field of others.

So it became necessary for the community to arbitrarily stake off and protect these boundaries. This laid upon Society two burdens, first, to determine these lines of right between man and man, called "laws," and second to properly treat the man who dared to overstep them. It is the purpose of this paper to briefly trace the efforts Society has made to answer this second question, for unto this day the problem of how to treat the criminal remains unsolved.

It is important to note at the outset, the indeterminate nature of crime. Three terms must be carefully distinguished. Vices are wrongs against one's self, sins consist in transgression of God's law, while crimes are a violation of legislation enacted by man. Sins cover the field of absolute wrong, vices are a distinct class of sins, but crimes cannot be so classified, since they cover so much of the domain of sin as men legally prohibit, but leave a large area of real wrong untouched. At the same time crime may overlap the field of right. Since crime is the violation of crystalized public sentiment, which is often in error, it follows that the noblest deeds are in danger of being so

accounted, and so the farseeing, enthusiastic benefactor who breaks away from the common herd in his thought and ministrations to men, is likely to be reckoned a criminal. The history of jurisprudence shows that this has not infrequently been the case. The list of criminals includes some of the purest and most heroic spirits of the world as well as the basest, and all intermediate grades. We can thus see how criminals cannot be regarded as a particular and distinct class. Of all the defective classes they are the most nearly normal, many are perfectly normal. Indeed there is a sense in which all persons are criminals, for in our complex civilization it would be a rare spirit who had not at some time overstepped a legislative enactment. However in this paper it is the criminal who has violated a real law of righteousness who is considered.

Three theories of punishment have been prominent in the history of Penology, and a fourth is now being developed. They have had a sort of chronological order, but to a certain extent have coexisted. They are: 1. Retaliation or retribution, exacting pay for past misdoings. 2. Intimidation

or repression, a guarding of the future. 3. Reformation, and 4. Prevention. While these theories have been largely blended in practice, yet at different periods one or another has held the place of preeminence, and the development of penal methods may be best studied along the line of the growth of these theories.

We return now to those primitive days when Society began to define the rights of men, and protect his interests from the depredations of the criminal. The most natural and simplest solution of the problem of punishment would be to hand the offender over to the one upon whose rights he had infringed, and all the more so since the injured party would be only too willing to undertake the adjustment. This was the method actually followed, and "blood vengeance" became a legal institution. It was not only the privilege but the duty of every man to avenge the blood of his nearest kin. But the abuses and injustice of this practice would soon become apparent. The very readiness of the avenger, together with the blinding and perverting power of passion would render him a most incompetent judge. Efforts to

mitigate the horrors of this system were made. Among the Hebrews "Cities of Refuge" were established whither the accidental murderer might flee, and after an examination by the city officials, and further investigation by officers of his own tribe, he was allowed to live there in safety. This is our first recorded instance of a trial by jury. In other nations the offender was allowed to pay a money equivalent in lieu of punishment. Sanctuaries were also made places of safety from vengeance. In spite of all this the practice of individual revenge grew in disfavor, and so at last it fell upon the community itself which had assumed the function of fixing these legal limits, to adjust their infringement. Nor was the community any more backward than the individual in shouldering this responsibility. Indeed the readiness of Society to deal with the criminal has been exceeded only by its inability and consequent failure.

The State proceeded on the same principle which had underlaid individual revenge, i.e. retaliation or retribution. The criminal had wronged Society, and must pay an equivalent penalty, the punishment must fit the crime, "An eye for an

eye and a tooth for a tooth." The difficulties of this theory were soon apparent. Who can determine the amount of injury done to Society, or fix an equivalent penalty? Who is paid or benefited by the life of the criminal? Again it is not the function of the State to vindicate morality, but to protect Society, hence the theory of retaliation was gradually superceded.

The second theory, that of intimidation or repression seems to be more rational since here the State is pursuing a legitimate end, the protection of Society. It has been an exceedingly popular theory, and no one questions but that severe punishment does exercise a deterrent power. This theory has held sway during the greater part of the historical period of the world's existence.

As a theory it has one very weak point which is this, Has the State any right to make crimes as yet uncommitted, and hence not existing and in no way related to an actual criminal, a basis or even an element in fixing his punishment for an actual crime. To admit this principle would be dangerous and would lead to all manner of excesses and

injustice, and that this has been its result in practice, its history has amply shown. It was this fallacy of acting on probable consequences that underlaid the argument which induced even the sagacious Brutus to join in the murder of Caesar.

The practical results of this theory have been amazing. It has borne fruits of which no one dreamed. Of course it naturally led to the invention of the most horrible and cruel methods of punishment imaginable for the purpose of deterring others. Whatever it may have accomplished along this line it wrought havoc in other ways. The cruelty and bloodshed of penalty seemed to fire all the baser passions in men, and where severest measures were inaugurated crime spread like disease. The hardening and brutalizing effect upon the community was no less marked. When the wretch who had slightly wounded Louis XV, was being quartered by horses pulling him apart, a woman observing the frantic efforts of the animals exclaimed "Oh the poor horses!"

It was during the Middle Ages that severity of penalty reached its acme. Fanaticism in administering punishment

knew no bounds. Dead bodies, animals, and even inanimate objects were subjected to all manner of brutal penalties, and men were burned in effigy. A type of this sort of penal procedure was the Inquisition which during two centuries of its activity put to death 341,021 persons in the most barbarous fashions. In France 100 crimes were punishable by death. One executioner at Nurmberg could boast of 1159 victims. A French judge had burned 800 in sixteen years. In Bordeaux more than 600 sorcerers were burned in a single year, while in England above 70,000 were executed during the reign of Henry VIII. It has been most truly observed that "the inhumanity of penology sometimes exceeds crime itself." Yet crime was not deterred, but was rampant, and we see here a proof of the old adage, "Crime thrives upon severe penalties."

The principle of intimidation has certainly been tried to the full, and any one who hopes for a solution of the criminal problem along this line has never awakened to this fact, and he who supposes penal severity indicates a high moral sentiment is in darkness unto this hour.

While this general attitude toward the criminal prevailed in the later Ancient, Mediæval and the greater part of the Modern World, it was not universal. Here and there voices were raised in protest against the cruel practices, and on behalf of the prisoner. In the darkness there were gleams of light and foretokens of a new day. Various humanitary agencies were evolved which worked to mitigate the severity of existing measures, such as "The Benefit of the Clergy," which was gradually extended to all classes. Indeed we must trace the roots of modern penal institutions far into this gloomy period of the past.

We find evidence of criminal courts even in the ancient Persian and Roman times, although the usual methods of detecting crime were exceedingly superstitious and often fraudulent. Prisons come from an early date, but were not used for penal purposes, but rather as places of detention for criminals awaiting trial or execution. The workhouse which had its rise in the sixteenth century was intended for vagrants rather than criminals but it was a step in the evolution of the penal system.

It was not till the eighteenth century that another theory of punishment began to gain the ascendancy, that of "Reformation." Penal methods were to be adjusted so as to rehabilitate the criminal. With this movement two names are inseparably connected which will ever shine with undimmed glory, John Howard and Cesare Beccaria. Howard was an Englishman whose interest in prisoners was aroused by his own capture at sea and subsequent incarceration. He spent the remainder of his life in studying prisons and prisoners. He developed many needed reforms and laid the basis for others. It was he who advocated the use of the prison as a penal institution, and the introduction of labor. He sealed his devotion to his work by his death, which was caused by prison fever, 1790.

Beccaria was an Italian, born 1735, so ten years younger than his colleague. He was a scholar and a writer and did his service by his pen, and through his writings influenced the more active reformer.

In England the Wesleys and Whitefield protested against the abuses of the prisons of their day, and Oglethorpe

brought the matter before Parliament, but to little avail. Yet the leaven was working, and the dawn of a better day was at hand.

We now note the rise of the modern prison. In 1704 Pope Clement XI established at St. Michael's a hospital or prison for boys, where labor was required and trades taught. But it is Viscount Vilain XIV of Austria who must be called the "Father of modern penitentiary science." Backed by the great-hearted Empress Maria Theresa he planned out and erected the Prison at Ghent, which was completed in 1775, and which has since served the world as a model. He provided for separate confinement by night and labor during the day. He anticipated future reforms which he was unable to carry out. Unfortunately his great work suffered a relapse under the succeeding administration of Joseph II.

When we come to America the Quakers must be credited with being the pioneers in prison reform. In 1776 they formed a "Society for Alleviating the miseries of Public Prisons." This was the parent of all prison reform societies. In 1786 the Legislature of Pennsylvania abolished punishment

by death, mutilation, and the whip, and established a prison wherein each convict was subjected to separate confinement day and night. A grave mistake here was the failure to provide labor. Its distinctive characteristic was its absolutely separate confinement, and this became known as the "Pennsylvania System."

The next step was the founding of the New York States prison at Auburn. Here the prisoners were kept in separate cells during the night, but engaged in common labor during the day under the rule of silence. This became known as the "Auburn System." The heated debate between these two systems has attracted world wide attention. In general the Auburn system has been triumphant, for while the Pennsylvania system has powerful incentives to repentance, its solitude is terribly oppressive and injurious, and has driven many into insanity.

The prison system has encountered many obstacles and suffered many abuses. In England for many years prisons were cursed by private ownership. The renting and operating these institutions proved to be a remunerative commercial enter-

prise, shrewd devices and cruel methods were employed for extorting money from prisoners. The item of prison labor has been another occasion for gross abuses. The desire to make even states prisons pay has thwarted the ends of prison discipline. It has led to the contract labor system the evils of which are well known. Indeed wherever the aim to make the prison pay is paramount, other interests must be sacrificed. An evil of an opposite nature has been a strong sentiment against allowing prison labor to compete with free labor. This position is utterly untenable. Of course it is a mistake to allow convict labor to underbid free labor, but it is right and economical to allow them to compete on an equal footing. It is certainly better for the workingman to meet the self-supporting convict in the open labor market, than to support him from his own scant earnings. Then it is questionable whether the state has the right to deprive a man of the right to earn his own bread, because he has been convicted of a crime.

The relation of prison administration to politics has been a great curse to the cause here in the United States.

In hardly any other position does so much depend upon a man's fitness for his work. But when Wardens, Guards, and Chaplains are appointed as a reward for campaign favors, not only is the element of fitness disregarded, but this method directly tends to select the unfit.

It has long been recognized that our public jails are veritable colleges of crime, where old and experienced criminals act as professors, and newly sentenced youths are the apt and ready pupils. The freedom from other interests, closeness of contact, and bond of sympathy between teachers and taught, make the educational conditions in these schools almost ideal.

Another method of disposing of criminals had its rise in connection with prisoners., this is transportation. The most notable penal colonies have been those of England in Australia and Russia in Siberia. Transportation as a penal measure must be pronounced a failure. The principal difficulty has been the opposition to criminal importation within the colony itself. The Australian settlement is important not because of what it was in itself, but because out of this

largely grew the next step in prison reform.

Norfolk Island was the worst section of this settlement. Its population was 1500 of the most degraded and hardened convicts known. Its terrible condition beggars description. The vilest criminals were glad of any pretext to get away, many preferring death to remaining. In 1840, at his own request Captain Alexander Maconochie was appointed governor. He devised and inaugurated a remarkable system which Penologists have since been endeavoring to develop and perfect. He himself called it the "Social system of prison treatment." His idea was to develop a spirit of cheerfulness and hopefulness, of self-respect, self-reliance and self-control. His system was quite elaborate and only its main points can be noticed. Instead of a time sentence each prisoner was charged with a certain number of marks or in other words, given a "work sentence." His daily labor was paid for in marks according to the amount done, together with his general deportment. These marks had a certain commercial value and could be exchanged for the necessaries of life or applied on his sentence at the prisoner's option.

A part of his wages was to be credited to him, and paid to him on the expiration of his term. The effect of Maconochie's plan was magical. In four years it was a new place. He himself said, "I found Norfolk Island a hell, and left it an orderly and well regulated community." The value of Maconochie's life and work has not yet been fully appreciated.

The next great reformer was Sir Walter Crofton who borrowed the mark system from Maconochie and introduced it into Ireland and England. In one instance he had prisoners graduated through three different prisons, the first at Dublin, the intermediate at Queenstown, and the final one, where restrictions were almost entirely removed was at Lusk. The mark system was adopted by other nations such as Denmark and Hungary.

Two other reformers must be mentioned in this connection who greatly aided in the development of this system. They were Colonel Montesinos, a Spanish prison official whose management of the prison at Valencia was a noted success, and Obermaier, a German prison governor, whose prisoners seldom relapsed into crime.

We now come to the establishment of the Reformatory system in America. The moving spirit in this enterprise was Dr. E. C. Wines, secretary of the New York Prison Association. Associated with him were many kindred souls, notably Mr. Z. R. Brockway, then a prison official in Detroit. The agitation of these men bore fruit. In 1869, the New York Legislature passed an act establishing the state Reformatory at Elmira, of which Mr. Brockway was made Superintendent. The next year 1870, the National Prison Association was formed at Cincinnati. From this the movement has spread and several other states have established Reformatories.

The principles of the Reformatory system were not new. Its founders were greatly influenced by their predecessors who have been mentioned, especially Maconochié whose method was largely followed. Prisoners are divided into three grades through which each must work, each higher grade having less hardships and more privileges than the next lower. Each prisoner is daily credited with a certain number of marks as merited by his manual labor, school work and deportment. These may be such as to subtract marks and the prisoner falls

in his grade. After he has worked his way through these grades, he is released when there can be found a satisfactory guardian under whom he may find suitable employment, and for one year more he is in the custody of the prison to whose authorities he regularly reports.

The excellencies of this system can only be touched upon. In spite of the redemptive principle upon which the prison system is founded,--reformation--public sentiment has never fully reached this standpoint. In the public view the criminal is an enemy who is to be hated and hurt, and his crime is made the standard of public judgment and judicial condemnation. Now it would be difficult to find a criterion which seems so plausible, and yet is so unsafe a guide to the real character of the man as the committed crime upon which he has been convicted. The criminal is just as bad before his deed as after, indeed he is usually more open to reformation after. The free and reckless spirit which was the soul of the crime was doubtless applauded, but the act seemed to close the hearts of men, and call down upon the doer the hatred of his fellows. The poor wretch now feeling that mankind has

turned against him, becomes the settled enemy of Society and a confirmed criminal beyond the reach of reformatory measures. Strange as it may seem petty criminals are as a rule the most hopeless class. A littleness of soul and cowardice prevents them from being great ones. An experienced prison official will look for companionship, efficiency, trustworthiness and such qualities among long sentence men, and it is a truism of penology that murderers are the best class of prisoners while petty thieves are the worst. This all goes to show that it is the man and not the crime that should be treated. This the Reformatory proposes to do. While the prisoner is made to understand that his sentence is a punishment for his crime, this punishment is so adjusted as to benefit him, and train him for his normal life in society.

In this connection we see the philosophy of the "Indeterminate Sentence." Since one crime is no safe standard for character nor punishment, it follows that no court is capable of fixing a proper sentence, since this should depend on the man and his needs. The history of definite sentences has been no less disgusting than their principle. Not only do

we find different courts giving vastly different sentences to the same crimes, but the same court has at times gone to great extremes in capricious treatment of the same offence. In 1832, Archbishop Whately raised his voice against definite sentences and pointed out their manifest injustice. Maconochie was bitter against them, and penologists are becoming more and more opposed to them. In the Reformatory the sentence is indefinite, the prisoner working it out by the mark system, thus to a large extent holding the keys of the prison in his own hands. However the justice of this depends largely upon the good judgment and justice of the prison officials.

The penal element is not lost sight of in this system, the confinement and discipline being severe punishment. The Reformatory agencies are along three lines: Labor, Education, and Religion, thus corresponding to man's threefold nature and needs, the physical, intellectual and spiritual.

Another beneficent point in this system is the parole law, which places each man for one year after the close of his imprisonment under a competent guardian with steady employment.

This gives him an opportunity to find his place in society and prove his worthiness to fill it. The benefit of this plan can hardly be overestimated. There are two critical periods in the life of a criminal when he is most in need of outside help. One is when he comes to a consciousness of his guilt, the other is when the prison doors close behind him and he faces a cold and unsympathetic world. The avenues to an honorable life are much more forbidding than is the thoroughfare back to crime. How many would be the failures among the graduates of Harvard and Boston University were they not backed by the aid and sympathy of friends during the first two years after graduation!

Of course this system is not perfection in itself. By itself it is merely a tool, and its efficiency depends almost entirely upon the personality of those who have it in charge. Colonel Macquarie's success in the Australian Colony was followed by failure. Maconochie could devise a system and reform Norfolk Island, but his successors could not even wield the system. Many other examples such as Captain Lynds at Auburn show the importance of personality. After all a strong, warm, manly heart has more of redemptive and

reformatory power than all devices and methods. Of course there is a sentimentalism that must be ruled out. A warm heart that cannot recognize villainy and be firm in discipline has no business in a place of authority inside prison walls.

The practical results of the system have been good. Some relapse into crime, and those who are unaffected by this training and do relapse, are of course among the worst class, so that penitentiary officials may well say that their worst convicts are reformatory graduates.

The world has now tried the three theories of punishment: retribution, intimidation, and reformation, and the problem is as yet unsolved. Penologists are coming to see that there is an element of truth in each. Crime must meet its penalty, Society must be protected, and the criminal must be reformed. The ultimate solution of the problem will be in unifying the truth in this trinity of theories. It is possible to befriend the criminal and yet conserve the interest of Justice if we but have the wisdom. This is seen in the Divine dealing with men, concerning which Dr. Sheldon well remarks, "The punishment which justice calls for defeats no true end of benevolence,

and the grace which love bestows is not against but for the promotion of righteousness. Justice in its perfection cannot be indifferent toward any capacity for good, and love in its perfection can have no complacency with aught that makes for moral evil and consequent injury."

No one realizes so keenly as the penologist himself how far we are as yet from realizing a system which will meet this ideal threefold requirement of justice, protection and redemption, but the battle is being pressed along these lines, and the search for light is intensely sincere. The problem will never be solved by any mere rules nor any mechanical system. Heart is required as well as head, and efficient service will require immense self-sacrifice.

The fourth theory of penology, the prevention of crime, is as yet in its infancy as a theory. Extensive investigations are being carried on along the lines of finding out the peculiarities, habits, antecedents and environment of criminals and the causes and conditions of crime. So far all this study is such an admixture of the vastly important and the absolutely worthless that it lies beyond the proper range of this paper. This

theory is also made to include all educational, religious and social reform work, and in fact whatever tends to develop and elevate the moral tone of the community, but this certainly exceeds the boundaries of penology proper.

The progress of genuine penology is retarded on the one hand by a spirit of vindictiveness toward the criminal on the part of the public generally, and on the other by a sickly sentimentalism which takes no account of the criminal's real character and deepest needs. Yet the outlook is hopeful and the spirit of criminal treatment is coming nearer and nearer the standpoint of Him who came into this world of evil to solve the problem of justice and mercy, who knew the human heart and all its capacity for wickedness, and yet pronounced his blessing upon certain ones because "I was in prison and ye came unto me."