

THE RATIONALE OF PUNISHMENT

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PROF. L. T. HOBHOUSE

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PROF. E. A. WESTERMARCK

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THE RATIONALE OF PUNISHMENT

BY

HEINRICH OPPENHEIMER

D.LIT., LL.D., M.D.

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PREFACE

AT the present time, when the State punishment of crime is constantly cited before the tribunal of science in order to show cause why it should not be eliminated, like other relics of barbarism, from the arsenal of modern civilization, in which there is no room for mere superstitions of the past, a critical investigation of the problem of punishment cannot be out of place. The new doctrine has already succeeded in insinuating some of its minor canons into more than one legislative system, and whilst it must be conceded that the measures hitherto adopted under its influence, such as the probation of first offenders, conditional sentences, and conditional liberation of prisoners, have all proved highly beneficial, the more extravagant claims of the criminological school threaten to subvert the very foundations of the rampart which society has laboriously erected against the onslaughts of crime. Indeed, one shudders at the mere thought that the accumulated wisdom of thousands of years may be sacrificed, in a few years of revolutionary experiments, on the altar of a fashionable and self-complacent, withal utterly unverified, hypothesis. If we remember that the institution of punishment has had its beginnings in the infancy of the human race, and that it has accompanied mankind all along the course of its progress from savagery to barbarism, from barbarism to civilization, if we realize how deeply rooted it is even in the consciousness of modern society, we cannot accept

the thesis that the elaborate machinery which it has evolved serves no useful purpose whatever—without, at any rate, attempting to ascertain its deeper meaning in the past and in the present. I am not acquainted with any monograph in which both these aspects of the problem have been submitted to a critical examination. If a further apology were required for the appearance of this book, the extreme meagreness of the English literature on the subject would appear to supply a sufficient justification.

In conclusion, I cannot allow this volume to go forth without acknowledging the debt of gratitude which I owe to Prof. L. T. Hobhouse for many valuable suggestions and criticisms generously offered.

*5 Essex Court, Temple,
December 1912.*

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INTRODUCTION

“ POSITIVE LAW, as an empirical fact, is subject to the eternal law of causation ; as a product of historical development it is the necessary outcome of antecedent facts, linked to a long chain of causes and effects. The law which we now obey derives its origin from that which once was law ; it is *what* it is and *as* it is, because the old, in growing old, begot the new. In the dim distant past lies the seed of modern legislation. The seed had to decay if it was to bear fruit. But how can we comprehend the fruit without watching its growth, without tracing it back to the ultimate cause of its existence ? The common herd stands gaping at that which is, and sees nothing, and wishes to see nothing, but *that* it is. The *How ?* and the *Why ?* are questions which every superior mind claims as its privilege.” In this passage Feuerbach prescribes the route which our investigation is bound to follow if we wish to discover the rationale of punishment, the true reason for state punishment of crime as an institution of positive law, as a sociological phenomenon. Speculation, unchecked by constant reference to historical facts, has always resulted in theories of an imaginary punishment which has no counterpart in political reality. Our object is to discover what function punishment does discharge in the modern state, not what function it might, or ought to, discharge in an ideal commonwealth. It is obvious then that no doctrine can appear acceptable which is not built upon the bed-rock of solid fact. Now punishment, as we know it, is the outcome of a long evolution, and its origin and the course of its organic

development cannot, therefore, fail to supply the most reliable index to its real meaning. Hence a study of the theories of modern punishment must be preceded by an inquiry into the genesis of punishment. But if history is to be the guide of our researches and the test of their results, history must not itself be made the playground of speculation, and we must rest content to stop at that point of the historical horizon where distant phantoms, but faintly perceptible in outline, pass into palpable realities. Such statements, for instance, as von Liszt's assertion (*Lehrbuch*, par. 2) that the origin of punishment coincides with the origin of the social life of man, are quite incapable of historical verification; for an endless void is reached in our knowledge of the past at a stage certainly posterior to the first beginnings of the socialization of man.

Before we embark upon our historical inquiry, it will be necessary to ascertain the precise meaning of punishment. Most definitions of the term met with in the literature of the subject contain as an essential ingredient a reference to the supposed end of punishment, and are, therefore, quite useless for our purpose; we cannot, without begging the question, adopt any of them. Again, we have to reject all definitions based on the notion of crime or offence. There are no acts intrinsically criminal, no deeds that constitute offences at all times and in all places. Indeed, the sole generic character of crime is that it is visited with punishment, and, by being made punishable, any course of conduct is converted into a crime. Since, then, the definition of crime implies a definition of punishment, the assertion that "punishment is the social reaction against crime," and similar statements, though true as far as they go, and valuable because they draw attention to the important fact that crime and punishment connote each other, are circumlocutions rather than definitions. We must also exclude

definitions which take into account the facts of mature jurisprudence alone and are couched in terms that become meaningless when applied to early communities. Of the few remaining definitions we accept that of Prof. Westmarck, subject however to such modifications and explanations as appear necessary in order to elucidate fully the nature of punishment. "By punishment," writes this author (*Moral Ideas*, i. 169), "I do not understand here every suffering inflicted upon an offender in consequence of his offence, but only such suffering as is inflicted upon him in a definite way by, or in the name of, the society of which he is a permanent or temporary member." For "upon an offender in consequence of his offence" we substitute "upon a wrongdoer as a wrongdoer." By doing so, we eliminate the words "offender" and "offence," to which we have taken exception, and at the same time avoid a form of expression which might be thought to imply assent to that theory according to which punishment is the necessary consequence of crime. The words "by, or in the name of, society" are to distinguish punishment from civil redress, the alternatives being inserted because punishment may be awarded and executed either by society as a whole or by an agent to whom it delegates its powers. The terms chosen fail, however, to express the real difference between the two classes of sanctions. For society, in imposing an evil upon a wrongdoer, may act at the sole instance, and in the exclusive interest, of one of its members, and in this case the sanction is private, not public. What really matters is that in punishment the sanction is inflicted on behalf and, to use Austinian phraseology, at the discretion of society itself. In the next place, the suffering must be inflicted upon the wrongdoer "in a definite way," or it is not punishment proper. The definiteness of the sanction marks off the field of criminal law from the sphere of positive morality.

But to be definite the evil must proceed from a determinate body of persons; society must be organized or act through an ascertained organ. In other words, society must inflict the suffering *in its corporate capacity*. And, finally, the person upon whom the suffering is inflicted must be "a permanent or temporary member" of the society which inflicts it; harm done to an utter stranger is an act of hostility, and not punishment. Our definition, then, runs as follows :

Punishment is an evil inflicted upon a wrongdoer, as a wrongdoer, on behalf and at the discretion of the society, in its corporate capacity, of which he is a permanent or temporary member.

The next few chapters, which are devoted to a critical study of current views on the genesis of punishment, will afford us ample opportunity for applying this definition.

BOOK I

THE ORIGIN OF PUNISHMENT

PART I

CURRENT VIEWS ON THE ORIGIN OF PUNISHMENT

CHAPTER I

PRIVATE VENGEANCE THE SOURCE OF PUNISHMENT

THE first theory which we have to examine, teaches that private vengeance is the seed out of which criminal justice has grown. This theory is supported by an overwhelming weight of authority; for, however much they may differ in detail, and especially in the description of the historical stages by which primitive revenge was gradually transformed into state punishment, the vast majority of writers upon the subject have accepted as an almost axiomatic truth the proposition that private vengeance has been the first phase in the evolution of the idea of punishment.

It will not be necessary for us to enter into a psychological analysis of the impulse of revenge or to discuss the relation which it bears to anger or irascible emotion; it is immaterial for our immediate purpose whether it has its root in the intoxicating joy of cruelty, in the wild satisfaction to be derived from the infliction of suffering upon others, in the desire for self-expansion after the self has been humiliated by the infliction of an injury (Steinmetz), whether it is "a binary compound of anger and positive self-feeling" (McDougall), or whether it is a deliberate form of non-moral resentment, in which the hostile reaction against a cause of pain is more or less

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restrained by reason and calculation (Westermarck). Utilitarians look upon revenge as a necessary means of self-defence against external attacks. Physiologists claim that it has its foundation in the reflex movements with which all living matter responds to such stimuli as disturb its conditions of existence; in revenge those defensive reflex movements are merely postponed and controlled by reason and reflection. Evolutionists insist upon the advantages which strong vengeful emotions confer in the struggle for existence; those slow to forget a hurt received and always prepared, even after a long period of time has elapsed, to get even with an aggressor, were most likely to be immune from attack and had the best chances of raising a large progeny. Again, we need not take sides in the controversy whether man alone is capable of a desire for vengeance or whether this desire is founded upon an instinct shared by man with some of the lower animals: the answer to this question must depend largely upon the definition which we accept of the term. And, finally, we may renounce the attempt, which, in the absence of historical evidence, would be purely a matter of speculation, of tracing the steps by which individual revenge gave way to group vengeance, and of determining the respective shares which feelings of sympathy and more tangible self-interest had in bringing about this change.

We take up the thread at that stage when the clan organization is at its height, when there is complete solidarity between the members of each of these small ethnical groups and the desire for vengeance has become collective. It is the phase in human history known as the era of the blood feud. It is at this epoch that vengeance, "at first neither a right nor a duty, but simply a fact" (De la Grasserie), having become a constant habit, at last acquires the force of custom and is thus converted both into a right and into an obligation. It is at this

epoch, too, that vengeance, at first boundless, has its wings clipped and is reduced to the proportions prescribed by the ubiquitous *lex talionis*. Furthermore, custom now more or less vaguely defines the occasions on which, and the circumstances in which, to retaliate. And soon, as property becomes more valuable and grows in public estimation, avarice enters in competition with the more primitive passion and drives it more and more into the background, with the result that over wider and wider areas the system of revenge is displaced by a system of compositions.

Gradually and slowly the organizations based upon the principle of blood-relationship begin to decay, and as this process goes on, the blood feud is carried on between smaller and ever smaller groups till, at last, there remains but a single avenger to wreak vengeance upon the actual malefactor alone (Post). Revenge has once more become individual. But simultaneously with these retrogressive changes in the clan and tribal organizations, the germ of state organization develops, and the kinsman, transformed into the citizen, either voluntarily delegates, or is forced to transfer, the exercise of his right of revenge to the political power, which henceforward acts in his stead. "We cannot doubt that the state acquires its punitive power by redemption of the right of the individual to demand satisfaction for the injury inflicted upon him" (Wundt). Nor is this connection between punishment and vengeance simply a matter of history. Modern punishment of crime by the state has been defined as "a substitute for private vengeance" which the state has to supply, since nowadays it forbids the individual to avenge himself (Lammasch, Lilienthal). According to Bruckner and Schulze the right to punish flows from the necessity to appease the desire for vengeance excited in the victim of the crime. Again, criminal justice has been described as the official regulation of private vengeance,

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with a later infusion of theological notions relating to sin and guilt. In a similar strain writes Letourneau : " The very imperfect sense of justice which to-day exists in the brain of the majority of men with any pretence at civilization, is but the product of the life of the ancestors, a slow and painful acquisition, the psychic transformation, the idealization of the desire for vengeance." Other authorities, without going quite so far, yet assert that one at least of the functions of punishment is to afford what Bentham calls a " vindictive satisfaction " to the injured party. However, by no means all writers who subscribe to the doctrine that the state first acquired its punitive powers as the mandatary of the individual wronged, uphold the view that it still exercises the same, wholly or in part, in the interests of its quondam principal; many of them maintain that by passing into the hands of the state the reaction against the wrongdoer acquired an entirely new meaning, that it was gradually divested of the last vestige of vindictive feeling and pressed into the service of the objects of the state, whatever these may be.

The process just outlined, by which the state comes into the heritage of vengeance, explains the origin of capital punishment. But there is another way, it is claimed, in which the foundations of a true criminal jurisprudence have been laid. We have seen that at a certain phase in the early history of mankind it became customary to commute private vengeance for a money payment. When once this practice had firmly struck root, disputes as to the amount of compensation would, as a matter of course, be referred for settlement to the tribal assembly, which was held periodically among most primitive peoples. Soon the nascent state would take altogether into its own hands the regulation of such compositions and retain for itself a share thereof whenever its intervention had been invoked by the parties. From its very

infancy the state displayed an insatiable appetite, and the part which found its way into its coffers, small at first, would gradually become larger and larger. Before long, the state retained the lion's share and in the end, as the *tertius gaudens*, the whole amount paid by the offender. In this manner what had been compensation to the subject wronged became converted into punishment by fine. But the malefactor may have taken to his heels and fail to appear when summoned before the tribal assembly by his adversary; or he may refuse to satisfy the judgment when it has gone against him. In either case, sentence of outlawry would be passed upon him. "The prototype of a modern criminal trial appears in the solemn proclamation, at the tribe meeting, after full inquiry, of the sentence of outlawry" (Cherry). Capital punishment, fine and outlawry, the three primitive forms of state punishment, are thus accounted for. And as the list of punishments, so the catalogue of crimes is explained by the source out of which criminal jurisprudence has issued. "Different acts became crimes under different systems, but the general principle which underlay all was the principle of revenge. Those acts have everywhere come to be regarded as crimes which in early times tended to provoke vengeance or retaliation" (Cherry).

The theory of which we have just given a rough sketch, is based upon the history of those wrongs which are described in modern codes as offences against individuals, more especially upon the history of the reaction against that wrong to the person which in civilized countries is looked upon as the crime *par excellence*, viz. homicide. That individual or group vengeance was the normal mode of repelling attacks long before the state yet existed even *in embryo*; that self-redress, in the form of revenge, was sought only in the case of injuries received by the group, or by a member thereof, from without, whilst wrongs committed in the bosom of the family, clan, or tribe, as a

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rule, failed to excite any reaction whatsoever; that at a later stage the practice of retaliation gave way to a system of compositions; and that finally the state took over the regulation of the one and other; all these are facts supported by unassailable testimony. The point, however, which requires a good deal of elucidation is the alleged transformation of revenge or compensation into true punishment. It must, therefore, be our task to examine in greater detail the mode or modes in which the state came to deal with what hitherto had avowedly been matters concerning individuals and families alone.

There are several ways in which the public authority may be brought into contact with these personal quarrels or family feuds. Even under tribal organization we find that the injured person or family, if too weak to take revenge, would invoke the assistance of the chief. Thus among the tribes of Eastern Africa, the injured party, at his own choice, either personally avenges the injury received, or he places the exercise of his vengeance into the hands of the chief (Burton, *Lake Regions of Central Africa*, p. 662. 1860). Similar customs prevail in the Sandwich Islands and elsewhere (see the instances quoted by Westermarck, i. 180). Before lending his help, the chief would naturally inquire into the merits of the case, and in this inquiry, quite informal at first, but in the conduct of which he would soon associate with himself some of the most prominent members of the tribe, we have one of the germs of public jurisdiction. Before the chieftain's court, thus constituted, the injured family would, in the Togo colony, summon its adversary if unsuccessful in its attempts to obtain self-redress (Henrici, *Epheneger*, p. 147). Moreover, from an early date, the ruler tended to become the champion of all those who, through age, infirmity, or want of a natural protector, were unable to retaliate upon an aggressor. Where the tribal constitution was of a democratic

character, the victim of oppression would complain to the popular assembly, which would investigate his grievance and help him to obtain satisfaction. In all these cases the intervention of public authority is merely in aid of private vengeance and an alternative to its exercise by the injured party himself. Indeed, we find these alternative methods of seeking redress, at the option of the aggrieved party, even after the courts are in full working order and when an award in damages has become the only form of reparation obtainable through an action at law. According to the law of the Salic Franks, for instance, the aggrieved party could choose between the exercise of personal vengeance, after giving due notice to the magistrate, and instituting legal proceedings with a view to pecuniary compensation. The origin of jurisdiction in arbitration, mainly in connection with the assessment of compositions, has already been touched upon. But there remains one method more in which the state came to evince a practical interest in private vengeance and family feuds. The organs of society intervened *proprio motu* in order to regulate and restrict that internecine warfare which could not fail to sap the strength of the young commonwealth. Such interference was probably at first of the most rudimentary kind. Nothing more might be required, in order to render revenge legitimate, than notice to the magistrate of the intention to take it. We have seen that such notice was exacted by Salic law; it was only after giving such notice that, in Johore, the avenger of blood was entitled to hire assassins (Waitz, v. 154); according to ancient Chinese law nobody could be made responsible for slaying an enemy out of revenge provided that he had given formal notice to the judge (Plath, *Gesetz und Recht im alten China*, p. 84); but the best-known instance is the *kataki uti*—i. e. lawful vengeance—of Japan, practised as late as the nineteenth century, according to the provisions of the code of Jyeya :

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here the notice had to specify the exact number of days or months which the avenger of blood required for the execution of his design, and a document to that effect was drawn up by the magistrate in solemn form (L. Metchnikoff, *L'empire japonais*, p. 613). But the public functionary, from being a merely passive recipient of such notice, would easily be converted into an examining magistrate: being informed of the avenger's intention, he would naturally be prompted to inquire whether, in the actual circumstances of the case, the applicant was justified by custom in taking revenge. At any rate, the active interference of society does not, originally, go beyond insistence upon the observance of the customary rules governing vengeance. In the next stage the state takes the bolder step of imposing, in the interest of public order, further checks of its own devising upon the practice of revenge. And, finally, it makes the exercise thereof dependent upon the consent of the public authority, such consent being given only after inquiry duly held. It is important to remark that the measures taken by society of its own initiative are all directed towards a limitation of the right of revenge and never operate in furtherance thereof. Indeed, in order to accomplish its object, the preservation of the public peace, the intervention of public authority was bound to assume the form of protection extended to the malefactor against excess and abuse of vengeance rather than that of support given to the injured party in the assertion of his claim. We shall have to revert to this point in a later chapter; but it is necessary to point out already here that though the spontaneous interposition of the state founds jurisdiction, the theory according to which punishment is but a metamorphosis of revenge, derives no support from this source.

In whatever manner and from whatever cause the public authority acquires jurisdiction, the only question which the primitive tribunal is called upon to decide, is the

existence or non-existence of the right of revenge or of a claim to compensation. Even in peoples that have attained a comparatively high degree of civilization, this is the only issue before the court in trials for wrongs inflicted upon individuals.

Among some of the native tribes of North America, the Ojibways (Jones, *History of the Ojibway Indians*, pp. 109 *seq.* London, 1861) and the Wyandots, the avenger of blood prosecutes the slayer before the tribal council. If judgment is pronounced in his favour, the parties negotiate with a view to compensation; if they do not come to terms, the plaintiff proceeds to take revenge (Kohler, *Nordamerika*, p. 407). In the Malay Peninsula, the case is tried by the chief of the *suku* or, if of sufficient importance, by a council of chiefs; but it is for the sister's son of the slain man to execute the murderer (Waitz, i. 143). Steinmetz (*Rechtsverhältnisse*, p. 48) informs us that a similar practice prevails among the Banaks and Bapukus of the Cameroons. We owe to the same authority the following particulars as to other African tribes. In the Sansanding territories, on the Senegal river, nobody may lay hands upon the murderer except the avenger of blood, here the nearest agnate; but even he is liable to punishment if he takes the law into his own hand. After judgment obtained, he takes revenge; but it rests with him to pardon the murderer, and so may the widow of the slain man who is reckoned among the agnates (pp. 88, 89). Among the Waganda of Uganda, no malefactor is ever brought to trial unless the aggrieved party institutes proceedings (p. 199). Again, among the Diakite-Sarrakolese (French Sudan), the *cadi* takes cognizance of causes only on the complaint of an interested person. Even in case of murder the criminal cannot be brought to trial unless the relatives of the murdered man prosecute. The chief provides for the execution of offenders, but the family of the victim witnesses it.

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Capital punishment can, however, be redeemed by a money payment; and it rests entirely with the clan of the victim to accept or to refuse such composition (p. 130). Among the Basutos, the administration of justice is committed to the chiefs; but, says Casalis (*Basutos*, p. 237), the idea of wrong to the individual is that which governs their action in relation to crime, the punishment for which depends on the social position of the offender and on the kind of satisfaction which the aggrieved party desires. In Shoa (Abyssinia), cases of homicide must first be submitted to the judgment of the prince or governor. If condemned, the slayer is delivered up to the family of the victim. The relatives themselves are the executioners, for which purpose six of them generally combine. But if the family cannot supply the full contingent, the king, *virtute officii*, commissions some of his own men to co-operate with them in the application of the *lex talionis*, viz. a life for a life (Combes et Tamisier, *Voyage en Abyssinie*, iii. 7). Among the Aztecs, writes Kohler, self-redress was in no circumstances allowed. The punishment for murder was death; but if the family of the murdered man forgave the murderer, slavery was substituted for capital punishment, and the culprit had to work in order to provide the necessaries of life for the family of the victim. In other offences too, e.g. in adultery, the pardon of the injured party operated in mitigation of punishment. In some of the states the execution of the sentence was left to the victim or his friends, who could deal with the offender as they pleased. In Japan, crimes other than homicide were regarded as simple torts. Thus in case of adultery, the husband might with impunity kill both guilty parties. If he did not do so, the judge had to punish the culprits; but even then the husband had the right to pardon, and the judge was bound to postpone the execution of the sentence in order to give the husband time to exercise his privilege

(Metchnikoff, *op. cit.*, p. 612). Among the Hebrews, the practice of blood-revenge did not fall into desuetude till after their return from the Babylonian Captivity. "The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him" (Numb. xxxv. 19). It was only if the homicide had succeeded in reaching one of the cities of refuge that a trial was held, in order to decide whether the killing had been "at unawares" or of malice aforethought. And the text clearly defines the meaning of these proceedings where it is said that "the congregation shall judge between the slayer and the revenger of blood" (Numb. xxxv. 24). The Korân, whilst forbidding murder under the severest penalties to be inflicted in the next life (Sûra iv.), prescribes no temporal punishment, but is content to sanction the practice of retaliation, though recommending the heir, as a work of charity, to accept a composition in camels instead (Sûras iv., xvii.). In Mahometan law, however, blood-revenge is placed under the control of the state. The person or persons entitled to exercise that right, here the heir or heirs, must apply to the *cadi* for permission, and this is only granted after a judicial inquiry. If the latter ends in a capital sentence, it is for the avenger of blood to execute the same. Execution by the relatives of the slain man is "the universal practice among the Moslems from the West Coast of Africa to the extreme borders of Persia" (Du Boys, *Peuples modernes*, iii. 33). For this purpose the *cadi* hands over the murderer to the heir, but not without reminding him of the precepts of the Korân: "I deliver the murderer into your hands. Make yourself paid on account of the blood shed, but know that God is indulgent and merciful." This is the formula in use among the Mahometans in Persia (Chardin, *Voyage en Perse*, vi. 294; Kohler, *Blutrache*, p. 18). The heir is at liberty to follow or to disregard this recommendation, which is supported by the entreaties

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of the murderer's friends and relations; but if there are several co-heirs, any one of them can compel the others to accept the composition. Such commutation of the sentence does not, however, exempt the offender from all further liability. For if he obtains a private pardon, he receives at the instance of the public authority a hundred lashes and a year's imprisonment (Kohler, *op. cit.*, 19; Du Boys, *op. cit.*, i. 271). The rule of retaliation applies also to bodily injuries; unlike blood-revenge for murder, it is not practised by the injured party himself, but always by a public executioner, who by reason of his greater experience is credited with superior skill. The Persian chronicle of Tabari (ed. Zotenberg, i. 283) records the following saying of King Parwitz, one of the last Sasanids: "If a man kills another unjustly, the king may not pardon him. On the contrary, he must administer the law of retaliation, unless the relatives who have the right to avenge the blood, choose to pardon the murderer." In Athens, up to the time of the Solonic legislation (Plutarch, *Solon*, 18), none but the blood-relations of the victim within the fourth degree, *i. e.* those originally entitled to take blood-revenge, could prosecute for murder; and this monopoly of the kinsmen is all the more significant as, in offences of a public character, it was open to every citizen who enjoyed full political rights, to institute criminal proceedings (v. Meier-Schömann-Lipsius, *Der attische Prozess*, pp. 199, 202. 1883. Freudenthal in Mommsen's *Kulturvölker*). The prosecution of the murderer was altogether forbidden if the victim, before expiring, had forgiven him (Demosthenes in *Pantaenetum*). Up to the time of judgment, the accused could avoid condemnation, either by voluntary exile or by inducing the family of the victim to abandon the action and to grant him a pardon in consideration of a pecuniary compensation. Such a bargain was quite lawful (Demosth. in *Macartatum*; idem, in *Theocrinem*, 28, 29; Plato,

Leges, ch. ix.); but in order to be effective, this pardon, at any rate under the Solonic system, required the unanimous consent of the kinsmen who, in the more ancient law, had been privileged to prosecute. Originally it was for the prosecutor to carry out the sentence; but later on this right dwindled down to the privilege of the nearest relative to be present at the execution. In cases of involuntary homicide, pursued at first before the Ephetes and later before the tribunal of the Palladion, the slayer had the legal right to redeem himself from exile by means of a penalty, the amount of which was settled by the court, paid to the family of the victim. We have it on the authority of Pliny that in Rome the punishment for homicide was, from the first, death. But "the probability is that the infliction of death was here, as elsewhere, merely sanctioned by the law, if inflicted, in retaliation, by the relatives of the murdered man" (Cherry). However that may be, the ancient law governing personal injuries has come down to us in the well-known provision of the Statute of the Twelve Tables: "Si membrum rupit, ni cum eo pacit, talio esto" (Festus). The penalty, in default of compensation, was retaliation exacted by the nearest relative of the injured person ("talione proximus cognatus ulciscitur," Cato in *Priscian*, 6, 710) in execution of a judicial sentence: "si reus, qui depacisci noluerat, iudici talionem imperanti non parebat, æstimata lite iudex hominem pecunia damnabat" (Gell., 20. 1). It would seem from the latter passage that the delinquent could resist talio if he pleased, in spite of the judgment, and insist on a judicial fine. "The procedure in offences against individuals is, in principle, purely civil procedure (*actio*) and hardly differs from civil procedure in non-delictual causes. The court never moves in these matters unless the injured party takes the initiative." (Hitzig in Mommsen, *Kulturvölker*.) Passing on to the Germanic peoples, we can trace the transition from self-redress to

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state jurisdiction in the ancient Icelandic code. The *Grágás* permits private vengeance up to the next *all-thing*. Thereafter, the injured party was no longer allowed to take the law into his own hand, but had to bring suit before that assembly. The nearest heir alone could prosecute for murder; if there were several heirs of the same degree, they exercised that right collectively and could not accept composition unless they were unanimously agreed. In Scandinavia, it depended at first upon the victim or his relations alone whether the offender, after proclamation of outlawry, could recover his peace (Du Boys, *Peuples modernes*, i. 120). And even after an exercise of the royal prerogative had become necessary for that purpose, the Norwegian sources make it abundantly clear that the king's pardon does not protect a murderer from the vengeance of the friends of the victim unless and until he has succeeded in regaining their friendship. Mr. Lee describes it as a general characteristic of the barbarian codes that "the act which is to-day described as a crime was then looked upon as a private wrong. The wronged party, not the state or that which stood for the state, brought suit" (*Historical Jurisprudence*, p. 375). It was, accordingly, at first a universal rule that if the injured person or his family failed to take action, the offender could not be called to account, and there was nothing to prevent the victim from remaining silent or from privately coming to terms with his adversary. Thus the Zealand code of King Eric expressly provides that nobody shall be compelled to prosecute the offender; and this rule was recognized, at a much later date, by the Saxon common law (L. I. art. 62): "Nobody is bound to prosecute unless he has started proceedings. Every man is at liberty, as long as he likes, to suffer in silence any wrong inflicted upon him." Indeed, as Wilda remarks, the law at first defines who is entitled, not who is bound, to institute proceedings.

And the person so privileged in cases of murder was invariably the person singled out by ancient custom to avenge the blood shed, viz. the nearest male relative. The intimate relationship existing between the right to take blood-revenge and the right to institute proceedings for homicide is indicated, in the language of medieval German law, by the use of the term *rächen*—*i. e.* to avenge—in the sense of “prosecuting for murder.” In many cases it was for the plaintiff to carry out the sentence pronounced by the court (P. Frauenstädt, *Die Totschlagssühne des deutschen Mittelalters*. 1886). Nor was it only in cases of homicide that the execution was left to the complainant. This was the practice of the Eastern Goths, Burgundians, Bavarians and Anglo-Saxons (Hobhouse, i. p. 100, note 2); and the law of the Visigoths is specially rich in passages which provide that capital sentences are to be carried out by the accuser, or that the evildoer is to be handed over to the plaintiff to receive at his hands such treatment as the latter chooses to mete out to him; *e.g.* “ut in potestate eius vindicta consistat” (L. Wisigoth, iii. t. 4, c. 1, 3, 9); “quod de eis facere voluerint habeant potestatem” (vi. 5, 12). He might keep the condemned man as his slave, sell him into slavery, chastise, or mutilate him (iii. 4, 13), and satisfy his thirst for vengeance by the infliction of all tortures imaginable (Wilda). The Frisian common law, which was in force up to the time of the *Carolina* (sixteenth century), provides: “When the thief is caught, he is to be taken before the magistrate. If he is condemned to death, it is not for the magistrate to provide for his execution. The court beadle must bind him and lead him to the gallows. There the man whose property he has purloined may either himself hang the thief or hire another to do it for him.” And a similar practice is met in Flemish law, the “Keure of Arkes” (anni 1231, art. 28) providing: “De homicidio voluntario convictus parentibus

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vel cognatis occisi tradetur occidendus" (Warnkönig, *Flandrische Rechtsgeschichte*, iii. 1. p. 182). It is clearly a survival of this ancient function discharged by the prosecutor in carrying out the sentence that according to some later law-books, e.g. that of the city of Augsburg (*Stadtbuch*, 27), the plaintiff had to pay the executioner. The "Civil Law and Customs of the Eight Free Cities of Hungary" lay down the principle that punishment cannot be awarded unless the injured party prosecutes. Not only may the victim accept a composition in lieu of the execution of punishment, but often the judge himself recommends such a bargain. Indeed, in cases of murder, the judge is directed to appeal three times in succession to the prosecutor to agree to pecuniary compensation: "Mitibus sermonibus obviari actori ne festinet in mortem ipsius homicidae. . . . Judex actorem debet inquirere utrum sua iura contra homicidam petit effectui mancipari, qui si responderit quod vult, iudex tamquam misericordia motus compatiendo debebit dicere: Bone vir, aut Bona mulier, quid tibi auxiliabitur de morte huius viri? Num quid resurget ipso facto vir tuus vel frater?" (lib. iii. c. 61, "De homicidis"). Not a few instances occur in Slav law of the practice of giving up the criminal to the injured party to receive punishment at the latter's hand and at the latter's discretion, subject, however, to this limitation—that the punishment should correspond to the amount of injury suffered (Macieiowski, *Slavische Rechtsgeschichte*, ii. 127). The statute of King Otho of Bohemia (anni 1229) enacts in art. 17 that the murderer must leave the country till he has compounded with the family of the victim.

The survey which we have just taken teaches us that, from the very dawn of jurisprudence up to comparatively high stages of civilization, the procedure in trials for what we now call offences against individuals exhibits everywhere one or all of the following features—

1. Nobody is bound to prosecute. Such persons alone as are directly affected by a wrong, may institute legal proceedings; and even for them to do so is a right, not a duty. In cases of homicide, this privilege is, as it were, but a continuance of the ancient customary right to take blood-revenge and is generally enjoyed, like the latter, by the nearest heir or heirs.

2. The plaintiff himself carries out the sentence of the court. In the early stages of legal development this practice appears to have prevailed everywhere, and the instances given could be supplemented by a further list drawn from the four quarters of the globe (see, for instance, the examples given by Post, *Bausteine*, i. 156, 157, and by Westermarck, i. 184). Occasionally, as in Frisia, the complainant was allowed to act by deputy; and the right of the family of the victim to witness the execution, which we have met with both among the Diakite-Sarra-kolese and under the later Athenian law, probably developed out of the practice of an earlier period when the aggrieved parties were present at the execution in order to convince themselves that their agent did carry out the job for which he had been hired by them. Indeed, it seems that the habitual employment of paid deputies has given rise to a class of men who made a speciality of that work, in other words, to the professional hangman. The public executioner himself, at first paid by the plaintiff in the suit, as in Augsburg, appears to have been in origin but a statutory agent whom, on account of his superior skill in the work, the complainants were bound to employ.

3. In discharging the function of the executioner, the injured party is in no sense an instrument of public justice; he is merely exercising that which the court has pronounced to be his right. He is under no legal obligation whatsoever to execute the judgment, and if he does not do so, nobody else will. In some instances, as in Mahometan and in Hungarian law, the weight of public

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authority is thrown into the scale in favour of the offender, the plaintiff being urged by the judge not to exact his pound of flesh. But the final decision of the fate of the malefactor lies always entirely with the victim. He may let him go scot-free, or he may pardon him for a consideration and, unless there is a customary or statutory tariff or a rule requiring the amount of the compensation to be fixed by the court, he may, in imposing terms, indulge in every known art of extortion. In many cases his right goes even further than that, the offender being delivered into his hands to be dealt with at his unfettered discretion, and he may then, whilst sparing his life, inflict upon him every form of suffering and oppression.

4. Whilst the aggrieved person has the right to pardon the offender, no such power is possessed by the public authority.

So far, then, as we have traced legal development, in wrongs to individuals the sanction is invariably enforced or remitted at the discretion of the injured party; and this, according to Austin, is the true distinguishing characteristic of civil from criminal procedure. The conclusion is, in fact, forced upon us that society did not feel itself attacked in the attack upon one of its members. It did not assert any claim of its own as against the aggressor; but whilst ready and prepared to adjudicate impartially between the contending parties, it was satisfied the moment those directly affected declared themselves satisfied.

It now remains to inquire how, if at all, the civil is converted into a criminal trial. Indications of a nascent penal procedure were, indeed, not wanting in our short historical sketch of early jurisdiction. We have seen how in Mahometan law the public authority punishes the murderer if the family of the victim fails to call him to account. Here we are brought face to face with a genuine criminal sanction, but it is of a subsidiary nature and

entirely subordinate to the private right to redress vested in the heirs. Again, on several occasions outlawry has been mentioned, undoubtedly one of the most ancient forms of public punishment. But lest we jump to false conclusions, we must remember that outlawry is known to ancient law under two different aspects. On the one hand, it was a recognized form of punishment for crime, on the other a mere procedural measure. As Sir Henry Maine has pointed out, one of the greatest difficulties with which the law in its infancy had to deal, was how to get the defendant into court, and proclamation of outlawry in default of appearance must have been a very effective means of inducing the offender to submit to its jurisdiction. Besides, in medieval law outlawry was regularly employed against the recalcitrant judgment debtor. The fact that outlawry, as a matter of procedure, was not by any means limited to criminal trials, but was freely resorted to in civil causes, is quite familiar to English lawyers, since in this country its application in civil suits was abolished by a statute of quite recent date, viz. by 42 & 43 Vict. c. 59, sec. 3. It is undoubtedly to its use as a form of procedure in civil actions that the early codes must be understood to refer where they mention outlawry in connection with wrongs to the person, since in such cases it depended at first upon the plaintiff alone whether the outlaw should, or should not, be inlawed. Even when the consent of the king, as well as the consent of the party prejudiced by the wrongful act, was required, it does not necessarily follow that outlawry in such cases has acquired an altered meaning; for matters of procedure, in civil no less than in criminal trials, are *publici juris*, and inasmuch as the proclamation of outlawry had been made by the public authority, whether in the popular assembly or in the king's court, it is but natural that the sanction of the representative of public authority should be necessary if it is to be revoked and its effects cancelled. Moreover,

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even when wrongs to individuals come to be regarded as attacks upon society, *i. e.* as true crimes, the rights of the injured party are not all at once extinguished, but are recognized no less than the claims of the state, if the former are not actually given priority. "The pardon of homicides in Brabant does not take legal effect until the slayer has come to terms with the family of the victim" (Depape, *Traité de la joyeuse entrée*). Thus runs art. 20 of the Book of Liberties of Brabant, which was in force down to the time of the French Revolution. In Antwerp, as late as the seventeenth century, it availed a murderer but little to have received his sovereign's pardon unless and until he had succeeded in reconciling the relations of the murdered man; and in order to obtain their forgiveness he had to sue for it in solemn form, and had, moreover, to comply with such conditions as they thought fit to impose. In Spain, up to quite modern times, the exercise of the royal prerogative of pardon was dependent upon the consent of the friends of the victim. The co-existence of civil and criminal liability is well illustrated by the *Lithuanian Code* of 1529 which in Book VII ("Of Acts of Violence and Homicides") provides capital punishment for murder, but at the same time expressly directs that, as heretofore, *golovt-china*, *i. e.* the composition, shall be paid to the family of the victim and the fine to the state. But no better instance can be found of civil and criminal procedure continuing side by side than the reduplication of legal remedies available, in theory at least, till modern times in English law. At any rate, throughout the Middle Ages, and even long after the close of that period, cases of murder and manslaughter were tried either at the suit of the sovereign or at the suit of the kinsmen of the victim, the latter form of procedure being the more usual one to the end of the fifteenth century. Proceedings at the suit of the king bore all the characteristic features of a criminal prosecution and did not differ in principle from

a modern trial upon presentment by a grand jury. It is the proceedings instituted by the relatives, technically called an appeal, that interest us here and repay a more detailed study. An appeal is defined by Blackstone (*Commentaries*, iv. 312) as "an accusation of a private subject by another for some heinous crime, demanding punishment on account of the particular injury suffered, rather than for the offence against the public." An appeal when for homicide—and appeals for other "heinous crimes" fell into desuetude at an early date—could be brought only by those who were of the blood of the deceased, or by his widow. Not until he had appealed against the slayer could the heir, in feudal times, be admitted to the fief. Originally, the right of the subject to an appeal had priority to the sovereign's right of proceeding by indictment. By the Statute of Gloucester (6 Edw. I, c. 9), the appellor was restricted to a year and a day within which to bring his appeal; but to save the suit of the party, the homicide was never arraigned at the suit of the crown till the year and the day had expired. This practice found statutory recognition in 22 Edw. IV. It proved, however, so mischievous that, before many years had passed, the policy of this act was reversed by a clause in the Star Chamber Act (3 Hen. VII, c. i) which allowed indictments to be tried at once, but safeguarded the rights of the relatives by a proviso that an acquittal on an indictment was to be no bar to an appeal. Proceedings on appeal were on the civil side of the court. The appellee could claim trial by battle, and if he were worsted in the combat, he suffered the same judgment as if convicted on an indictment. In olden times the execution of the sentence was left to the relatives of the murdered man; and later, down to the reign of Henry IV, they had to drag him to the place of execution where they delivered him up to the hangman. The appellee could, however, always compound with his accusers by a money

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payment. Indeed, as Blackstone (*loc. cit.*) remarks, "the chief object of an appeal at all times was to compel the defendant to make a pecuniary compensation. For where the verdict in an appeal was given in favour of the appellant, he might insist upon what terms he pleased as his ransom of the defendant's life, or a commutation of the sentence." The right of pardoning the convicted appellee always rested with the appellor, whilst the crown had no power to pardon him. The underlying idea was that as the king was not a party to the suit, he had no claim to interfere with the result; as regards the sovereign an appeal was *res inter alios acta*. This is the reason given by Hallam (*View of the Middle Ages*, after Littleton, par. 189, 190). Appeals, then, whilst unmistakably betraying their origin in the primitive modes of redress by vengeance and pecuniary satisfaction, were, as Sir James Stephen (*History*, i. 496) observes, "in nearly every respect in the nature of civil actions, and were conducted like other private litigations," thus affording striking evidence in favour of the proposition for which we contend, viz. that revenge was the source, not of punishments, but of rights to redress for wrong enforced by civil actions, in other words, of liability in damages.

The view here advanced, then, amounts to this: that in the infancy of the courts their jurisdiction in wrongs to individuals was limited to an adjudication upon the claims of the offended party to take revenge or to exact composition, both of which kinds of claims were subsequently transformed into a claim to damages. The transition from compositions to damages does not seem to amount to much more than a change in terminology. But the modern mind finds it somewhat difficult to grasp that the claim of one man to slay another should ever have been recognized as a right, in the nature of an indemnity to the aggrieved party, enforceable by an action at law. According to Post and other writers, the *rationale* of this

right and of its legal recognition must be sought in the fact that the act of revenge tends to restore the social equilibrium temporarily disturbed by the act of aggression. By killing a member of group A, group B has obtained an undue advantage, both military and economic, which it ought not to be allowed to retain; therefore group B must, in its turn, lose a man in order that the balance of power between the two groups may be re-established in the only way in which it is possible to restore it. This explanation is not acceptable; for it presupposes a capacity for evolving far-seeing schemes of statesmanship for which we are not entitled to give credit to the primitive public authorities of peoples as yet hardly emerged from the stage of barbarism. The problem admits of a much simpler solution. The right sued for was the right to the enjoyment of such satisfaction as can be derived from the gratification of the desire for revenge. We wish it to be clearly understood that we pronounce no opinion about the origin of the impulse of revenge. But whatever its source and its primary significance, there can be no doubt that revenge is sweet even to modern man. The pleasure of vengeance, writes Bentham, "calls to my mind Samson's riddle—it is the sweet coming out of the terrible, it is the honey dropping from the lion's mouth." Being a source of pleasure, the right to take revenge is a valuable right, and since the economic theory of primitive races is not advanced enough to enable them to distinguish value in use from value in exchange, it was regarded as a proprietary right. Numerous facts can be adduced in evidence of its quasi-proprietary character. Thus the right of avenging bloodshed, or the equivalent right of instituting proceedings for homicide, is intimately connected, and generally co-extensive, with the right of succession to the property of the slain man. Mahometan law, for instance, according to the teaching of both Shâfeites and Azemites,

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concedes this privilege to each of the heirs, and to none but the heirs, of the victim (von Tornaauw, *Moslemisches Recht*, p. 230); and this principle appears to have been recognized by the Arabs in pre-Islamitic times. The same relationship between the two rights is discovered in the Germanic law-books. The *Lex Angliorum et Wrinorum* enacts in chap. 31: "Ad quemcunque hereditas terræ pervenerit, ad illum vestis bellica, id est lorica, et ultio proximi et solutio leudis debet pertinere." Similar provisions are to be found in Lango-bardian and Scandinavian law and occur with special frequency in the Anglo-Saxon sources (L. Ines, c. 74; L. Edmund, II. 1 and 7; L. Knut, II. 56; L. Henrici, I. i. 70, sec. 5). Indeed, the right of revenge seems to have come to the heir by way of inheritance as part of the ancestor's estate. For that right belonged in principle to the injured party himself, in cases of homicide to the victim; but since he could not exercise it himself, it descended to the person or persons who stepped into his shoes and continued his legal personality. Again, it is only by regarding the right of revenge as closely akin to a right of property that we shall cease to be amazed at the facility with which it is known to have given way, on five continents, to claims for compensation. Nor did the one merely succeed to the other; our sketch of early legal development has shown how promptly, if compositions are refused, the more ancient right revives. It is not likely that revenge and compositions should have continued over such long periods of time to exist side by side as alternative remedies if they had not been felt to be *eiusdem generis*. Far more incomprehensible even, without some such assumption, is the practice of allowing the one remedy to supplement the other in cases where full satisfaction cannot conveniently be obtained by the ordinary form of redress alone. The most striking instance in point is the Mahometan law of bodily

injuries. The general method of redress is here a strict application of the *lex talionis*. But an exception is made in case of internal lesions and, generally, whenever the injury inflicted is of such a nature that retaliation would endanger the wrongdoer's life. In such cases an injury not dangerous to life is inflicted, and the resulting inequality is compensated for by a money payment. Again, if the limb of the wrongdoer is so much smaller than that of the injured party as to render the infliction of an injury of equal extent a matter of physical impossibility, the deficiency is made up in money. Not only pecuniary compensation, but other proprietary and quasi-proprietary forms of satisfaction frequently take the place of revenge. Thus among the Wapokomo of Tanaland blood-vengeance is the rule if a man is slain; but if the victim is a woman, the avenger of blood claims another woman in her stead (Steinmetz, *Rechtsverhältnisse*, p. 292). "Among the Jbâla of Northern Morocco, a homicide sometimes induced the avenger to abstain from his persecutions by giving him his sister or daughter in marriage; and a similar custom has been noticed among the Beni Amer and Bogos" (Westermarck, i. 484). "Sometimes," again, "the manslayer, instead of being killed, is adopted as a member of the family of his victim" (ibid. For instances see also Steinmetz, *Studien*, i. 410 *seq.* & 439 *seq.*). In connection with these practices it is enough to remind the reader of the well-known fact, symbolized in the meaning of the Latin word *familia*, that in primitive peoples domestic subjection bore a proprietary character. We have seen how the homicide, instead of being made to serve the short-lived pleasure of vengeance by being done to death, may be put to more lasting uses by being reduced to slavery "in order to provide the necessaries of life for the family of the victim"; how he was liable to be sold into slavery or to be surrendered at discretion by the judicial authorities, to

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become a mere chattel in the hands of the successful plaintiff. But the strongest proof of the proprietary character of the right of revenge is afforded by the provision found in several Germanic, particularly Alemannic, sources, according to which the body of a fugitive homicide, if he had died an outlaw, was to be delivered up to the relatives of the victim, whose claim to the corpse is expressly recognized in art. 26 of the Penal Code of Zug of the year 1432, and, as late as 1675, in art. 22 of the code of the county of Kyburg (Osenbrüggen). The conception of the right of killing, enslaving, or mutilating a convicted tortfeasor as originally partaking of the nature of a proprietary right will, probably, strike the reader as not quite so strained and unnatural as it might at first sight appear, if he will remember that these forms of redress were by no means limited to those actionable wrongs which are nowadays crimes, but were the regular methods of execution, in practically all primitive systems of law, for breach of contract. To mention but one example, the old Roman "Statute-Process" by *manus iniectio* enabled any creditor whose claim was liquidated, after complying with the prescribed formalities, to put the defaulting debtor to death or to sell him into foreign slavery. And if there were several creditors, they were allowed to cut their portions of his body. Nor could a Portia have delivered an old-Roman Antonio from the clutches of Shylock; for the Twelve Tables expressly provide that "no creditor who cuts too little or too much shall be therefor called to account."

Rights of retaliation, then, are damages in kind. We now proceed to examine the primitive measure of such damages, the *lex talionis*. According to modern notions, damages, if properly assessed, leave the plaintiff neither better nor worse off than he would have been if he had never suffered the wrong. Expressed, not in terms of the money standard to which we are accustomed, but in

units of revenge, the rule of damages ought to read : The plaintiff is to be allowed to inflict upon his opponent an evil of such gravity as to render the gratification which he derives therefrom equal, or—since pleasure and pain are incommensurable magnitudes—equivalent, to the pain which the wrong has caused him. And a modern judge, in his charge to the jury, would probably lay down that that amount of satisfaction was to be considered equivalent which would induce the plaintiff voluntarily to submit to the injury which he has suffered. Of course it would be quite impossible even for one of our special juries ever to apply this rule in practice. Primitive man, however, is no psychologist. To him the external act is the measure of all things. He could not grasp, if it were explained to him, the ideal and subjective compensation of pain and pleasure. But what offers no difficulty whatever to his mind is the elementary and transparent principle “Equality is equity,” as long as the equality here spoken of refers to the number of lives, limbs, eyes, teeth, or heads of cattle, or to the length and depth of wounds, and he is quite willing to submit to a restraining rule founded upon the principle of objective equalization, whether imposed by public opinion or public authority. Instead of repaying an injury with hundredfold interest, he will be content with such satisfaction as he can obtain by rendering like for like. As Alfred Fouillée rightly remarks (p. 290), only an optical illusion can cause a man to believe that by knocking out the eye of his enemy he recovers his own lost eye—an illusion, however, vivid enough with some primitive peoples among whom “the blood of the slain homicide is supposed to restore, as it were, to the family of his victim the loss of life which he has caused them” (Westermarck, i. 483). In truth, the principle upon which the *lex talionis* directs damages to be assessed, is not that of reparation at all, but the principle of fairness

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in exchange. Once again we are confronted with the quasi-proprietary character of the right of revenge. For "the foundation of talio is an idea commercial rather than legal; the mental register of wrongs and acts of revenge corresponds but to the debit and credit sides of a ledger" (Letourneau, p. 489).

"In the infancy of jurisprudence the citizen depends for protection against violence or fraud not on the Law of Crime, but on the Law of Tort" (Maine, *Ancient Law*, p. 371). The remedial rights to which wrongful attacks upon the individual, whether directed against his person or against his property, give rise, are the right of revenge and the right of compensation, damages in kind and damages in money, and both these rights are enforced, at the sole discretion of the injured party, by a suit which bears all the characteristic features of a civil action. The state intervenes, first as arbitrator, later as judge, but never as party, and provides, when once its jurisdiction is firmly established, in the institution of outlawry, an effective method of procedure in order to compel the defendant to appear and to satisfy the judgment of the court. And where pecuniary compensation is awarded to the plaintiff, it claims a share therein as a fair price for its time and trouble. This, at any rate, is the meaning assigned by the best authorities, such as Kemble, Maine and others, to the participation of the state in the composition. The share which found its way into the public treasury has, therefore, to be regarded as the source, not of punishment by fine, but of modern court-fees. We have seen how at a higher level of civilization, when the state itself begins to call to account those guilty of serious infringements of the elementary rights of its subjects, in other words, when wrongs to individuals enter into the domain of criminal law, civil and criminal proceedings run in parallel, but independent, channels. But however far down the

current of time we follow legal development, no scintilla of evidence is forthcoming of the alleged transformation of civil into criminal sanctions. Never do we find the individual, either expressly or impliedly, deputing society to exercise his rights or his remedies on his behalf. History fails to supply the missing link in the chain of that theory according to which the state punishment of crime originates in, and has to be regarded as the continuation of, private vengeance.

Criminal law has a different origin. With the rise of the power of the state it gains in strength and expands and begins to claim joint-ownership in large tracts hitherto held by the civil law alone. As the weapons of which it disposes are so much more powerful, the individual is content to rely on them more and more for the protection of his vital rights. Where an effective criminal sanction co-exists with the civil sanction, the latter loses more and more in relative importance, with the result that, in the end, one of two things must happen. Either the civil remedy falls into complete desuetude in all the more heinous offences; to borrow the language of English law, the trespass is merged in the felony; and only in respect of minor offences do the two classes of remedies continue to exist side by side, as in our own law in cases of assault and libel. Or the criminal and the civil proceedings coalesce, the plaintiff being allowed, as in France, to join, in the subordinate character of *partie civile*, in the criminal proceedings instituted by the state. But here, too, is the tendency noticeable for the private remedy to become obsolete in the most serious classes of crimes. It is many a long day since a *partie civile* was joined in a trial for murder.

CHAPTER II

SOCIAL VENGEANCE THE SOURCE OF PUNISHMENT

If there is truth in Bacon's remark that revenge is a wild kind of justice, we have learnt in the preceding chapter that it is civil, not criminal, justice of which private vengeance may be regarded as the primitive equivalent, the savage prototype. But how about public vengeance? Is not collective wrath the source, as well as the soul, of punishment? Is it not a fact that punishment is, and always has been, an expression of public indignation, the passionate reaction of a community against an act that stirs its corporate conscience? Philosophers, lawyers and sociologists of the greatest eminence do not hesitate to answer these questions in the affirmative. "The sentiment of justice," writes John Stuart Mill, "in that one of its elements which consists of the desire to punish, is, I conceive, the natural feeling of retaliation or vengeance, rendered by intellect and sympathy applicable to those injuries, that is, to those hurts, which wound us through, or in common with, society at large." Sidgwick concurs in this view "provided that it is taken as an account of the antecedents rather than the elements of the sentiment in question." The same attitude is taken by Bain, who teaches that "a main prompting to justice, in the first instance, is sympathetic resentment," that "in the sentiment of justice, when analysed, there may still be traced an element of resentful passion," but that "the idea of justice, when

matured, guides and limits revenge," so that the gratification of the sympathetic resentment of the community is merely an incidental effect of modern punishment, the principal end of which is the prevention of injury. Whilst the utilitarians look upon public resentment as the mainspring in the evolution of criminal justice, but assign to it a subordinate place in its administration in civilized countries, there are jurists who regard the gratification of those feelings as the chief object, or one of the chief objects, with which punishment is awarded in modern tribunals. Especially emphatic in expressing this view is Sir James Stephen, who insists that one of the purposes of punishment is to serve as an outlet, a kind of safety-valve for the indignation of the community. "The benefits which criminal law produces are twofold: In the first place, it prevents crime by terror; in the second place, it regulates, sanctions and provides a legitimate satisfaction for the passion of revenge. The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite" (*General View of the Criminal Law*, ch. iv. p. 98). And again: "In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence. . . . The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it. . . . I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it" (*History*, vol. ii. pp. 81, 82). Prof. Westermarck, according to whom "punishment is, in the main, an expression of public indignation," has taken

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great pains to prove that "even among savages public indignation frequently assumes that definite shape which constitutes the difference between punishment and mere condemnation." Nay, more than that: even individual and family revenge become an expression of public feelings, of moral indignation, as soon as a custom of revenge is established and blood-revenge is regarded, not only as a right, but as a duty incumbent upon the relatives of the slain person. "Thus public indignation displays itself not only in punishment, but, to a certain extent, in the custom of revenge." But "strictly speaking, the relationship between the custom of revenge and punishment is not, as has been often supposed, that between parent and child. It is a collateral relationship. They have a common ancestor, the feeling of public resentment." Makarewicz goes a step farther. He describes "public, social and instinctive vengeance" as one of the forms which the social reaction against crime takes, as one of the three roots out of which punishment has developed. "The instinctive reaction of society against one of its members who has in any manner infringed its laws or attacked its interests, has for its basis the desire for revenge. As Loeffler remarks, speaking of the ancient Germans, in many respects public punishment has been but an act of vengeance accomplished by the state. There are, indeed, facts which show that a crowd may be regarded as a collective individual, and which entitle us to say that from the psychological point of view there is no difference between such collective individual and a natural person." Moreover, from the moment when society begins to display an interest in acts prejudicial to individuals and to control the exercise of private vengeance, private revenge "may be regarded as an equivalent of punishment, or of social reaction, may be looked upon as punishment the execution of which is left to the injured party." According to Garofalo, the final

end of punishment is the elimination of the offender, its primary and proximate object to wreak vengeance upon him. It is of the essence of crime, he writes, to wound one of those feelings which are most deeply rooted in the human soul, one of those sentiments which collectively form the moral sense of a community. Every race possesses a store of innate moral instincts, and, without indulging in undue generalizations, it may be asserted that over a vast area of the inhabited globe the more important of these instincts are identical; they are none other than the fundamental altruistic sentiments, viz. benevolence and honesty. Crime, then, may be defined as an act which shocks the public conscience by wounding the fundamental and essential altruistic sentiments of the community. The insult thus offered to the collective feelings evokes a reaction on the part of society the apparent aim of which is revenge. For "vengeful passion is not purely individual, though it is in a minor degree only that others feel, through sympathy, the indignation and the pain caused by the delict. Now it is necessary, in order to allay the one and the other, to inflict an evil upon the malefactor. The hatred towards the criminal always brings with it a desire that he should suffer."

A similar train of thoughts underlies the teaching of Emile Durkheim, in whom the theory of social vengeance has found its most thorough exponent. In order to constitute a crime, an act must wound feelings which in a given social type—

- (1) are shared by all normal members of society;
- (2) attain a certain average intensity;
- (3) are definite and precise.

Universality, strength and precision are the only distinguishing features of those sentiments. It is quite impossible to specify their intrinsic nature or to define them with reference to their particular objects. Nowa-

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days the altruistic sentiments undoubtedly exhibit those characteristics in the most marked degree. But there was a time, not so long past, when religious, family, and a thousand other traditional sentiments had exactly the same effects. One cannot, therefore, compile a list of sentiments the violation of which constitutes crime. But the mere fact that a sentiment, whatever its origin and whatever its content, is shared by all members of a society with a certain degree of strength and definiteness, makes an act that wounds such sentiment, a crime. It is incorrect, then, to say that an act gives a shock to the feelings of the public because it is criminal; it is criminal because it shocks those feelings. Now the ensemble of beliefs and sentiments common to the average members of a society forms a definite system which may be called the collective or public conscience. It has a life of its own, independent of the individuals of which the society is composed. The latter pass away, while it remains. It does not change with every generation, but, on the contrary, forms a connecting link between successive generations. It is the psychic type of the society. We may then say that an act is criminal if it offends strong and well-defined states of the public conscience.

What characterizes crime is that it determines punishment. If, therefore, our definition of crime is correct, it must account for all the characteristics of punishment. What are these ?

1. Punishment consists in a passionate reaction. At the lower levels of civilization this is an unmistakable feature of punishment. Primitive peoples, indeed, punish in order to punish, strike in order to strike, strike blindly, indiscriminately, inanimate beings, animals, and with the offender innocent members of his family. For passion which is the soul of punishment does not stop till it is completely exhausted. But nowadays, it is claimed, punishment has changed its nature; it is no longer to

avenge itself, but to defend itself, that society punishes; the pain which it inflicts is in its hands but a systematic instrument of self-protection. One is not, however, entitled to draw so radical a distinction between these two kinds of punishment, merely because it can be proved that they are employed with different ends in view. The essential nature of a practice does not necessarily change because the conscious aims of those that resort to it undergo a modification. It might, as a matter of fact, have served the very same object from the very beginning, the true part which it was playing all along remaining unnoticed. And, indeed, it is an error to believe that vengeance is but useless cruelty. In itself but a mechanical, aimless reaction, a passionate, irrational desire to destroy, it yet in reality constitutes a genuine act of defence, however instinctive and indeliberate. The instinct of vengeance is, after all, but the instinct of self-preservation stimulated into activity by peril. Vengeance is a weapon of defence which has its value; only it is a coarse weapon. Unconscious of the services which it renders automatically, it is unregulated in its action and strikes haphazard in response to blind impulses, with nothing to moderate its impetus. Nowadays we are better aware of the end to be attained and, consequently, we know better how to utilize the means at our disposal; we protect ourselves with more method and, therefore, more effectively. But the same result was attained, though in a less perfect manner, from the very beginning. Between modern and primitive punishment there lies no impassable gulf. In fact, punishment has remained, partly at least, an act of vengeance. It is claimed that we do not make the guilty suffer in order that they may suffer. It is, nevertheless, true that we find it just that they should suffer. The trouble which we take to adjust the suffering to the guilt would be quite unintelligible if punishment were but a measure of defence. For against

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an enemy one cannot take too stringent precautions. The nature of punishment has never changed. All one can say is that the desire for vengeance is now better directed than formerly. The modern spirit of foresight no longer leaves the field to the blind operation of passion, but assigns it certain limits and prevents absurd outbursts of violence. More enlightened, it does not discharge itself in the same haphazard fashion as in primitive society. In short, we may say that punishment nowadays consists in a passionate reaction of graduated intensity.

2. The reaction emanates, not from the individual, but from society. If society alone disposes of the means of repression, the reason is that it is attacked, and is attacked even in those cases in which individuals are attacked too; it is the attack upon society which is repressed by punishment. The social character of the sentiments wounded by crime and of the punitive reaction is illustrated by an experience drawn from our inner life. When we demand the punishment of crime, it is not ourselves we wish to avenge, but something sacred which we feel, more or less confusedly, outside and above ourselves. This something is conceived differently, according to time and environment. Sometimes it is merely an idea, such as morality, duty. More often it represents itself in the shape of one or more concrete beings, like ancestors, a deity. This representation is obviously illusory; for it is in a sense ourselves we wish to avenge, ourselves we seek to satisfy, since in us, and in us alone, do the wounded feelings reside. But the illusion is necessary. As by reason of their collective origin, their universality, their permanence, their intrinsic intensity, these sentiments have an exceptional force, they separate themselves radically from the rest of our consciousness, the states of which are much weaker. They dominate us, they have, as it were, something superhuman and, at the same time, they attach us

to objects which lie outside our temporal life. They, therefore, appear to us like an echo within us of a force foreign and, moreover, superior to us. Yet this error is but partial. Since the sentiments in question are collective, it is not ourselves, but society, which they represent to us. Hence, in avenging them, it is society, and not ourselves, we avenge, and society is surely something superior to the individual.

3. Penal repression is organized. This feature distinguishes punishment from those diffuse kinds of reaction which follow acts merely immoral. The organization met with wherever there is punishment properly so-called, consists in the establishment of a tribunal. It matters not how the tribunal is composed, whether it comprises the whole people or only a chosen few, whether or not it follows a regular procedure in the investigation of the cause and in the application of punishment; by this alone that the infraction, instead of being judged of by each person individually, is submitted to the appreciation of an organized body, that the collective reaction has for its instrument a definite organ, does it cease to be diffuse and becomes organized.

Punishment, then, consists essentially in a passionate reaction of graduated intensity, which society applies, through the instrumentality of an organized body, against those who have violated certain rules of conduct.

Among the supporters of the doctrine according to which punishment is both in origin and in substance the passionate reaction of the community against an act which excites its wrath, it is a matter of controversy whether or not the feelings to which society gives vent in punishing criminals are identical with, or at any rate closely akin to, revengefulness. And this difference of opinion has to be taken serious notice of, as it is intimately connected with, and indicative of, a profound divergence of views relating to the source and character of the

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sentiments supposed to be offended by the criminal act.

First of all, however, we have to make up our minds as to the nature of the social group whose ebullition of feeling is to be regarded as the fountain of punishment. Within the smallest social units, the family, the clan, and even the smallest tribes, solidarity of feeling and of interest is so complete that the whole group feels, with undiminished force, the shock received by any one of its members and responds thereto, as it were, with one soul and with one body. The same wave of true vengeful passion surges in the breast of each member; and each member, in avenging his fellow, really avenges himself. Group vengeance of this type could not by any stretch of imagination be called public vengeance; it is private revenge pure and simple.

Passing on to the larger social aggregates, in which collective sentiment may with strict propriety be described as public in character, we find that the advocates of the theory under consideration, whilst agreeing that punishment is an expression of popular indignation, are at variance in assigning the cause of such indignation. According to some, the root-feeling is common compassion for the immediate sufferer, whilst others claim that crime causes the passions of the public to explode because a blow inflicted upon the community is felt as a blow inflicted upon himself by every member thereof.

When used by those authorities who maintain that sympathy with the victim is the key-note to the wrath of society, the term "public vengeance" is undoubtedly a misnomer. As Green well expresses it, "indignation against wrong done to another has nothing in common with a desire to revenge a wrong done to oneself. It borrows the language of private revenge, just as the love of God borrows the language of sensuous affection." Such indignation differs from revengefulness in two

essential particulars. First, unlike the latter, it is altruistic, not egoistic, in character. And secondly, the feeling primarily excited by the wrongful attack in the disinterested spectator is not one of hostility to its author, but one of pity for the sufferer; and only in this somewhat circuitous manner do his feelings turn against the aggressor. But we need not pursue any further this purely academic aspect of the question. What really concerns us here is that those writers who regard punishment as the outcome of sympathetic resentment, impliedly assert that criminal law starts with wrongs to individuals, whereas we have seen in the preceding chapter how not only primitive communities, but societies that have made fair progress on the path of civilization are content to leave such wrongs to be dealt with by the injured party, and how, later on, self-redress for these wrongs is replaced by civil, not by criminal, proceedings. We do not deny for one moment that individual suffering sets vibrating a responsive chord in the soul of society; what we contend for is that public indignation aroused by sympathy remains purely moral, *i. e.* fails, even in highly organized communities, to be translated into punishment proper.

The same argument is fatal to the view that private or family revenge, when it has acquired the obligatory force of custom, "may be regarded as punishment the execution of which is left to the injured party" (Makarewicz), or, as Wundt expresses the same idea, that the state, at a certain stage of its evolution, "*entrusted* its vengeance to the injured man or his kindred." The true attitude of early society towards the feuds between its members is well illustrated by an old proverb of the Ossetes: "Aggressor and avenger meet on an equal footing"; that is to say, they are equally entitled to claim the rights of belligerents, and it is the duty of those not directly involved in the quarrel to observe a strict neutrality. The community is in truth but an impartial

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looker-on, a part it could hardly be content to play if the avenger were its accredited organ. And when in the long run the state came to interfere, it did not do so in order to lend its aid to the offended party, as we should expect if the latter's were the arm entrusted with the sword of punitive justice: on the contrary, it imposed restrictions upon his right of vengeance and prescribed conditions with which he had to comply before he was allowed to enforce his claim. At a certain level of social development blood-revenge was certainly both a custom and a duty. But we have seen that it was a right before it became a duty, a right highly prized by primitive man in whom the combative spirit was more strongly developed than it is in us moderns, a right exercised as a matter of course by the party entitled and the enjoyment of which no one would think of foregoing—unless, indeed, fear of a powerful adversary counselled prudence. If what everybody does becomes of itself binding upon all, the duty of taking vengeance was all the more readily enjoined because failure to conform to the ordinary practice betrayed cowardice, the one unpardonable sin in the code of primitive man. But how was this obligation enforced? The man, we read, who is weak enough to submit to insult and injury, is taunted by the old women, shunned by the maidens, despised by his companions, treated with contempt even by those nearest and dearest to him, and constantly upbraided with pusillanimity. In short, the evils to which he exposes himself, are ridicule and contempt, and though social ostracism may become so intolerable as to drive him into voluntary exile, it is, nevertheless, true that all the sanctions which he incurs are purely moral, and not legal. It may be contended that it is not permissible to draw so sharp a line of demarcation between early law and early morality. Whilst we recognize the force of this objection, the fact remains that the man who omits to avenge a wrong incurs the

displeasure of society, not because he fails in the supposititious duty to vent the anger of the community upon the wrongdoer, but because he violates that fundamental commandment of primitive man's decalogue: "Be strong." Nor does it make any difference that the obligation is often conceived as a duty to the slain man, or as a duty which the avenger owes to his own kinsmen who would share his disgrace if he were remiss in the fulfilment of the obligation; for in early society the family honour, like the family property, is undivided. Besides, even in higher stages of legal development, when the practice of revenge is controlled by the state, we do not find that the public authority enforces any such obligation. Only one system of laws is known in which blood-revenge may be said to have been recognized as a duty of which the courts took cognizance, and this solitary instance, instead of supporting, weakens the doctrine with which we are dealing. In Athens, during the classical period, the heir who neglected to prosecute the murderer of his ancestor was liable to proceedings for *ἀσέβεια*, and since the duty to prosecute the murderer has undoubtedly succeeded the earlier duty to avenge the murder, it may fairly be maintained that at an earlier stage the latter obligation was enforced by a similar remedy. Now, a suit for *ἀσέβεια* lay for breaches of religious duties alone and was available against him who, by his impious conduct, had excited the anger of a god. And though the wrath of the deity was clearly but the reflection of the wrath of society and was believed to be kindled by those very acts and omissions which were held in abhorrence by the community, the fact that public indignation had to be refined in the crucible of religion before it could find expression in punishment, proves that it is not of itself sufficient to generate a criminal code.

There is, however, as we have seen, another version

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of the theory of public vengeance, according to which public indignation, which is said to find expression in punishment, is aroused, not mediately, through sympathy, by an attack upon an individual, but directly, by a blow inflicted upon the community. Here again we have to be on our guard against an ambiguity. The deed may wound the susceptibilities of every member of society and provoke in each one of them a passionate reaction which differs in nothing from genuine revenge. As their pulses beat with the same emotion and their hearts burn with the same desire, they will combine their forces the more effectively to strike the common object of their hatred. Mental contagion adds further fuel to the flame, and the fury of the populace no longer knows any psychological bounds. Nothing less than the destruction of the obnoxious individual will satisfy it, and the choice of means becomes a matter of absolute indifference. Such is the genesis of mob-law which, undoubtedly, has its source in public ire. But is this punishment? So much is it wanting in all the attributes of what we call justice, so clearly does it appear to be the very antithesis of law that, in the absence of cogent proof, it cannot be conceded that it is the primordial form in which the nascent idea of justice first clothed itself, or that it has anything in common with punishment properly so called. And no evidence whatever is forthcoming that the latter has developed out of, and has superseded, lynch-law. Nor must it be forgotten that the reaction of a crowd is but the reaction of the individuals composing it; whilst acting together, they yet act *ut singuli*. Penal repression, on the other hand, is, as Durkheim remarks, organized. It is the organic reaction of the community against an attack upon the commonwealth in its corporate capacity. For "crime is an outrage, not on *the one*, or *the many*, but on *the whole*" (Watt). Now a corporation has proverbially no soul, and the commonwealth, as a cor-

porate whole, is in itself immune from vengeful emotion and other passions which postulate an animal body as their material substrate. If it is claimed that the attack upon the organic whole excites a passionate reaction in all of its members, it may be granted that in a few instances, of which treason by adhering to an enemy at war with one's country suggests itself as the most obvious one, the shock received by the community is at once felt by every citizen. But in most crimes the notion of a hurt to the state is not arrived at without a good deal of abstraction, and its representation is not, therefore, either immediate enough or vivid enough to justify a purely emotional explanation of the reaction. In any case, by being delegated to special organs and by being clothed in definite forms, such reaction is freed from the dross of vengeful emotion which clings to it only as long as it remains diffuse in society, and acquires that dispassionate character which we regard as an essential feature of justice. We see, then, that M. Durkheim's definition of punishment, as being an organized, yet passionate, reaction, is self-contradictory. Indeed, it is a valid objection to the theory of public vengeance in any of its forms that a passionate justice is a contradiction in terms.

CHAPTER III

THE WILL OF THE RULERS THE SOURCE OF PUNISHMENT

WHILST the theories hitherto studied all regard punishment as the expression, mediate or immediate, of one of the fundamental emotions and impulses of human nature, a group of Italian sociologists has advanced the view that the criminal law is in origin a highly artificial creation of statecraft, a bulwark to their privileges erected by the ruling classes against the onslaughts of the masses. This doctrine, which is supported by the authority of a Ferri, a Colajanni, has been most fully developed by Vaccaro upon whose writings the following outline of the theory is mainly based.

In their origin penal laws were means devised with the sole object of securing and perpetuating the dominion of the free over their slaves, the supremacy of the governing class over all others.

At first it was the universal practice to slay indiscriminately all prisoners of war. Later on the custom grew up of sparing women and children, who, being less aggressive and more docile, were easily reduced to slavery. Finally, when the social organization allowed of it and the art of taming human beings had reached a certain degree of perfection, the lives of adult males were spared too. Mutilations, fetters, blows and other forms of cruelty and torture were now habitually resorted to in order to break their spirit and to make them work; and this process of taming man for the service of man went

on from generation to generation. In this way fear of punishment became in course of time fixed in the human brain-cell, became an organic motive, grew into conscience, into that feeling which causes man to shrink back with horror from the mere contemplation of certain courses of conduct, which makes him recoil before himself and rends his heart with the tooth of remorse. This was the exact moment when the notion of crime first arose. Whilst, then, at first the conquerors, in order to induce the conquered to do certain acts and to refrain from others, actually maltreated and even killed them, it subsequently became possible, thanks to successful taming, to obtain almost as good results by the mere threat of punishment and by other cognate motives of a moral character. And humanity gained tremendously by this change. In the struggle for existence the moral sense must have proved an acquisition of the greatest value. For obviously those groups in which a certain subordination had become organic, that is to say, in which the mere threat of punishment proved, up to a certain point, sufficient to impel the subjects to do, or not to do, certain acts, had, other things being equal, an excellent chance of defeating other groups in which such subordination could be attained only by physical constraint, by means of the chain, of the stick, and of mutilations.

Rules of conduct thus began to form enjoining abstinence from certain lines of action, just because the acts so forbidden were usually followed by painful consequences. When subsequently the causal relationship between the said acts and the painful consequences became constant, such acts came to be regarded as intrinsically hurtful and therefore illicit. If, then, it is certain that the moral sense did not begin to form till after certain acts had been condemned as wrong and actually punished; if the moral sense is, at any rate to

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a large extent, but a product of such disapproval and of such punishment; how is it possible, without committing a grave anachronism, without becoming involved in a vicious circle, to appeal to the moral sense in order to discover what acts ought to be punished ?

The first care of the conquerors was to render secure and unassailable their power over the conquered, and the penal laws were, no doubt, most effective means to that end. Indeed, the conquerors threatened with the harshest punishments any act which tended to subvert the political institutions. During the period immediately following the conquest, the severity of such laws was extreme. Later on, when by means of intimidation, education and artificial selection the parasitical relationship had been firmly established, their rigour could be mitigated.

Having in this way secured their political power, the conquerors next proceeded to protect, by severe punishment, their person and their property. Nay, among semi-barbarous races, theft is generally more severely punished than homicide, and for this reason : the conquerors alone carry arms; there is not, therefore, much risk of their being assassinated, whilst they are in constant danger of being robbed because all the wealth and all the property is theirs.

But how did those laws ever come to be enacted the sole object of which is the protection of the weak ? Not for long could the ruling classes remain blind to the fact that the forces of the masses must become, if properly husbanded and utilized, a source of strength to themselves. Hence after consolidating their political power, and having taken all necessary steps for the protection of their own lives and property, they concentrated their energies upon devising means whereby to turn those forces to best advantage. The most elementary prudence must have taught them that it

was to their own interest to prevent the conquered killing, maiming or robbing each other. And soon the necessity was realized of enforcing by penal legislation, again in the interests of the privileged classes themselves, the practice of self-restraint in their dealings with their inferiors. But as acts done in contravention of such laws did not directly affect their vital interests, but prejudiced them only in a somewhat remote fashion, the punishments by which they were sanctioned were much milder in character and were allowed to be commuted for money payments. Moreover, groups in which the lower orders of society enjoyed immunity from the more extreme forms of oppression were more likely to survive and prosper, when competing with others that wasted, or allowed to go to waste, such valuable resources. Thus natural selection, whilst tending to adapt both conquerors and conquered to conditions favourable to their common survival, restrained within the limits prescribed by stern necessity the sufferings of the individuals within each group. Nature and enlightened self-interest thus combined to compel the conquerors to take some care of their subjects.

It becomes obvious now that those acts, and those acts alone, were forbidden under pain of state punishment, which the ruling classes regarded as highly prejudicial to their interests, and which morality, religion and similar influences were not sufficient to restrain.

The best and strongest members of the defeated race could not adapt themselves to the new conditions of existence, to a life of slavery. Therefore, after a few generations, those only survived and continued to reproduce their race who, being made of a coarser material and gifted with a more pliable organization, succeeded in adapting themselves to an inferior type of life—with the result that a degeneration, both physical and intellectual, ensued.

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If the adaptation of which we have just spoken, were perfect, every member of society would conform in his conduct to the juridical environment, *i. e.* to the established legal order. But since such adaptation is always imperfect and unstable, it follows that a certain number of people oversteps the bounds and enters on a sphere of activity from which the established powers seek to deter the subject by the threat of punishment. The number of such infractions (crimes) within each group depends upon the degree in which the individuals composing such group are adapted to the legal environment in which they are compelled to live and to carry on the struggle for existence. The more perfect that adaptation, the smaller is the number of offences committed within the social group, and vice versa. If the special conditions of life which the juridical environment offers are not too unfavourable, the adaptation involves a comparatively small organic sacrifice and proceeds fairly and satisfactorily. In the opposite case it remains very imperfect, since there are limits to the degradation to which human nature will submit. The phenomenon of criminality is, therefore, but that particular manifestation of a want of adaptation which the established powers regard as a source of serious danger to the interests which they represent. This want of adaptation may be absolute or relative. It is absolute when the legal atmosphere which a given number of individuals is bound to breathe is so oppressive as not to allow them to lead a life worthy of that name. In such a case it is vain stupidity to attempt to stem the tide of crime by the threat of punishment. It is relative if the legal environment, though permitting individuals to live normal lives, yet fails to harmonize with certain tendencies and habits acquired by them or by their ancestors in a superior environment.

Born of egoism, criminal justice betrays its parentage up to this day. Its soul is class selfishness, might posing

as right the spirit which it breathes. It is now, as it has always been, but a safeguard to the privileges of the ruling classes, a means for adapting the many to the interests of the few. Nor is this truth contradicted by the experience that modern penal legislation tends more and more to protect the rights of the lower strata of society. For such protection extends no farther than it serves the purposes of the upper classes. This, at any rate, is the conclusion at which both Ferri and Vaccaro arrive. Colajanni, on the other hand, claims that through a process of gradual transformation penal repression has lost its original character and that it serves now, not the particular interests of the few, but the collective interests of society as a whole.

The theory just expounded rests on a number of assumptions none of which is substantiated by historical facts. It teaches that the soil which criminal justice requires for its growth is a social organization resulting from conquest in war and the subsequent incorporation, with the victorious community, of part or the whole of the defeated race, and founded upon the opposition of free men and slaves, of a ruling aristocracy and a plebeian order. It claims that the first penal laws were commands addressed to the servile masses, and that they were enacted in order thereby to curb their political ambitions and aspirations. And, finally, it lays down that the moral sense is the fruit of the habit of obedience acquired, through fear of punishment, by the lower strata of society, thus implying that it is *their* morality which, in the end, determines the moral tone of the whole community.

The institution of slavery, though widely diffused, has not by any means been universal, and history gives the lie to the contention that criminal justice is the exclusive invention of slave-holding communities. Nor has it ever been shown that the penal law has developed either

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earlier or at a more rapid pace where slavery prevailed. Again, among the lower races, the condition of the slave does not correspond with that picture which the theory of early Roman law and the practice of the American slave states have left in our minds. Even where the captive slave remained an enemy in the sight of law and morals, his descendants, being born within the tribe, were immune from those excesses of cruelty and torture which, according to the theory under consideration, had to leave their impression in the brain-cell, from generation to generation, if fear of punishment was to become an organic motive. Moreover, slavery was at first a purely domestic institution. The slave was an inferior member of the family and subject to the patriarchal jurisdiction of its head. In the public tribunals he had, as a rule, no *locus standi*; there the master, and the master alone, could be made answerable for his misdeeds. A criminal law, the threat of which is addressed to the slaves, is, therefore, an absurdity. In what courts could such law have been administered? Not in the public courts; they had no jurisdiction over slaves. Not *in foro domini*; for here the punishment was determined, not by legal provision, but by the will of the *paterfamilias*. It is true there were checks upon the latter's caprice, moral, religious and, possibly, even legal; but the sanctions applied to criminous slaves were certainly not prescribed by legal enactment. To be judged according to the provisions of the law spells liberty, not bondage. And this was true, and felt to be true, in the cradle of jurisprudence no less than it is to-day. Archaic law, founded as it was upon the customs and traditions of the predominant race and encircled, like them, by the halo of religion, was a thing much too sacred to be shared by the common herd. It might, indeed, extend its protection to the lower orders of society, much in the same way as modern legislation protects the brute creation against

wanton cruelty, but applicable to them it was in no sense. At a certain stage of social development not even all freemen could claim the law as theirs; subjection to the law was then the attribute of full citizenship, in other words, an aristocratic privilege. In the next place, the assertion that the commission of political crimes by slaves and attempts, on the part of the subjugated race, to assail the patrician monopoly of government were the most urgent dangers against which the ruling classes had to guard by the aid of penal laws, is contradicted by the plain teaching of history. Individually, the slaves, unarmed and excluded from participation in warfare and in the deliberations of the popular assembly, had no chance of indulging in treasonable practices of wider compass than those which the criminal law of feudal England described as petty treason, *i. e.* insubordination to the authority of the master. On the other hand, the first organized rising of the masses has generally been prompted, not by a wish to shake off the yoke of political subjection, but by a desire to escape from financial oppression and an intolerable economic situation. Thus patrician usury was the main cause of the first secession of the Roman plebs, and the English peasants' rebellion of 1381 was, in substance, a fight for better conditions of labour. If criminal law were really in origin a political scheme devised by the dominant order for the purpose of consolidating, and rendering exclusive, its privileges, we should expect that an aristocratic form of government was particularly favourable to the growth of penal legislation. Not only is this not the case, but the fact has often been commented upon that the ancient republics, which were pure aristocracies, were especially late in evolving a true criminal law.

We see then how flimsy the whole theory proves if examined in the light of history. Nor is the elucidation of historical truth the real object with which it has been

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elaborated. Vaccaro's genesis of punishment, at any rate, appears to be written with a clear, though unavowed purpose, viz. to lend support to the explanation which he has to offer of criminality as a phenomenon of the modern world, to the view that crime is due to the inability of a race adapted by heredity to a fuller life to accommodate itself to degrading conditions of existence, that the tyranny of society is responsible for the crimes committed in its bosom.

Yet like most erroneous doctrines, the theory under consideration contains just a particle of truth. Penal legislation has often been the means by which a powerful class or a victorious party has safeguarded its self-accorded privileges or the fruits of victory. Nor have aristocracies been the only sinners. When once the masses are admitted to the enjoyment of full political rights and become conscious of their own political power, it is usually not long before they learn the art of forcing the sword of criminal justice into the service of their particular interests. But to be capable of abuse, an institution must first have been in use; before being caricatured, its real features must be familiar.

CHAPTER IV

DOMESTIC DISCIPLINE THE SOURCE OF PUNISHMENT

THE exploded political doctrine according to which the state is but the reproduction, on a large scale, of the family, in the life of which the germs of all public institutions may be discovered, could not fail to ascribe the same homely beginnings to the state punishment of crime. This view of the origin of punishment has been saved from oblivion and given a new lease of life by the results of modern sociological inquiry. "Whence are derived the first punishments inflicted in the name of society? The state has substituted itself for the family and the *gens*. The domestic jurisdiction has served as a model to the first criminal legislators." This is the conclusion to which Kowalevski has been led by his researches into the laws and customs of the Ossetes (Dareste, *Études*, p. 151). Other writers describe the discipline of the house, not as the sole root, but as one among several roots, from which public punishments have sprung. Makarewicz, for instance, recognizes three such sources, viz. public vengeance, sacerdotal jurisdiction and paternal authority; and speaking of the latter, he says: "The most natural process of development makes of the *paterfamilias* an autocratic master. The starting-point of the judicial authority of the Indian rajah, of the Roman *rex* and of the Greek *βασιλεύς*, is the status of the *paterfamilias*. The administration of patriarchal justice has been the beginning, or the model, of the despotic jurisdiction of the tribal chief." According to Steinmetz, parental correction

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has served as a prototype, not to public sanctions in general, but to utilitarian state punishment. "Its possible sources," he writes (*Ethnologische Studien*, ii. 178, 179), "appear to be the power of the parents over their children, of males over females, of the masters over their slaves, of the leader in war over his soldiers. . . We presume that these primitive forms of discipline, which sometimes were very severe, had to prepare the soil for the first beginnings of public discipline and of public disciplinary punishment. . . As long as the child did not receive orders, and did not get a sound thrashing for disobeying them, society knew neither laws nor utilitarian punishments. Here, as in most other instances, the experience of the child determines the conduct of the man." G. Tarde teaches that punishment has been evolved by the blending, in different proportions, of two heterogeneous forms of repression, viz. vindictive repression, as displayed in the feuds between tribe and tribe, and moral repression, as residing in the domestic tribunals. It is from the latter ingredient that state punishment derives its moral character. In the primitive reaction against a wrong done by a stranger "not a trace of moral sentiment, properly so called, can be discovered. The murderer, the thief is not adjudged 'guilty,' and the revenge taken upon him or his group has not the character of punishment." Serious crimes committed in the bosom of the family, such as parricide, raise a storm of genuine moral indignation in the small group, and "the offender is proscribed, excommunicated by the domestic tribunal." These family tribunals are found "in the infancy of all the Indo-European, as well as of all the Semitic, peoples. We see them still flourishing among the Kabyles, among the Ossetes in the Caucasus, and even in China." "In its origin, then, the defensive reaction against the criminal act assumes two different shapes of very unequal compass: the one moral, indignant and yet compassionate; the

other vindictive, hostile and pitiless—a tendency to retaliation, real or feigned, being, however, a feature common to both. Now which of the two is the main source of the criminal law? I claim that it is the former, though I fully recognize that the latter has more often and for longer periods of time served as model to the justice dispensed in the state tribunals, as they gradually, but in the end completely, supplanted both domestic justice and private feuds. It is, however, in greatly varying proportions that the two types, in themselves so utterly unlike, have combined to give birth to the criminal courts in different countries; and this fact alone proves that the evolution of criminal justice has been far from uniform. This variation admits of an explanation. A state is always formed by the more or less violent and extensive annexation of tribes or small peoples, either related, or strangers to each other, in blood, religion, language and historical traditions. When the bond between the tribes is as close as possible and the nation formed by their union is comparatively small, state justice borrows largely from the justice of the domestic tribunal; such was the case in Israel, in Athens and other Greek republics, in Rome at the time of the kings. When the union of primitive tribes results in the formation of a vast yet homogeneous empire, such as Egypt and China, in which the inhabitants of the most distant parts have not entirely ceased to regard each other as brothers, royal justice, without always, or even often, being able to substantiate its claim to be called paternal, betrays yet by certain features its domestic origin. . . . But when hostile and heterogeneous tribes are violently united into a state, whether large or small, by a bond entirely artificial, those who are fellow-citizens in name, being devoid of all feeling of kinship, penal justice proceeds on lines purely military, dealing violent blows right and left and striking off men's heads in a sort of sanguinary fury. Such are

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the large but incoherent empires of Asia ; such the small, but no less variegated, kingdoms of Africa." It is not true, then, that revenge " is the only, or even the main, starting-point in the evolution of punishment. Criminal law has two sources : the secondary, though more apparent source is vengeance ; but its essential source is domestic punishment, the expression of moral blame, the counterpart of remorse " (*Transformations du droit*, pp. 14-21, *passim*).

Supported though it is by sociologists of the greatest eminence, the theory of the domestic origin of state punishment has a speculative rather than an historical basis. Modern research does not by any means bear out the claim that " the most natural process of development makes of the *paterfamilias* an autocratic ruler." As Grosse has shown, the father obtains patriarchal authority only as the inheritor of the authority which formerly belonged to the clan. In the infancy of societies parental power varies within very wide limits ; and so far from being primitive and of natural growth, the absolute and irresponsible rule of the *paterfamilias* does not belong to the stages of savagery and barbarism, but reaches its full development only in the states of archaic civilization, *i. e.* at a period when public punishments were not by any means unknown. Besides, as Makarewicz has rightly perceived, the capricious chastisement inflicted by the domestic tyrant could serve as a model only to a despotic jurisdiction, and the tribal chieftain does not generally bear such unlimited sway as this writer wishes us to believe. On the contrary, " in the primitive tribe the power of the chief is seldom great or even assured " (Hobhouse, i. 61). The absolute ruler of more highly organized communities has, no doubt, an important share in moulding, and in furthering the growth of, the criminal law ; but his will cannot be reckoned among its primitive sources.

Again, the family tribunals which, according to Tarde and others, have been the pattern to which the criminal courts of the state have been fashioned, are met with at two different levels of social development. They are found, co-existing with public tribunals, in properly constituted states, and here, indeed, they appear, in some instances, to be mere depositaries of delegated public jurisdiction. Thus in ancient Egypt they formed part of the judicial hierarchy and exercised a summary jurisdiction over minor offences; and a similar place they seem to occupy in modern China, where an appeal lies to the public courts against the sentence of the domestic tribunal (Pauthier, *La Chine moderne*, p. 256). To this category belong the family tribunals with which we are acquainted among Aryan peoples. Now it is quite possible, though proof positive to this effect is entirely wanting, that these family tribunals were pre-existing organizations which the nascent state found ready at hand and utilized for its purposes. But granting that they flourished before the birth of the state, we are quite ignorant of the nature of the jurisdiction which they then exercised. The family tribunals of truly primitive communities of which we possess any knowledge, those of Sumatra for instance (W. Marsden, *History of Sumatra*, i. 345, 346), deal, not with crimes committed in the bosom of the family, but with wrongs done to a stranger by a member thereof. And if they "proscribe" or "excommunicate" the offender, they do so in order to escape liability in blood or in money for his misdeed. The power of expelling a member who has brought trouble on his family appears here simply as the natural correlative of collective responsibility, and the function discharged by the family council can hardly be termed judicial; it deliberates and decides upon a question of domestic—or shall we say foreign?—policy, pure and simple.

The reader has undoubtedly noticed that the authors

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who describe domestic punishment as one of the sources of public punishment, really mean by domestic punishment two different things. Some writers, *e. g.* Tarde, understand thereby punishment for such acts as are nowadays classed as crimes, perpetrated by one member of the family upon another. Others, like Steinmetz, refer to ordinary parental correction. The objection fatal to the former variety of the theory is that in primitive society even the most heinous of all domestic crimes, parricide to wit, goes entirely unpunished. At a period of social development when the family had to rely for the protection of its rights and interests upon the strong arm of its members, to punish such an act would have meant adding injury to injury, would have meant further to reduce the fighting strength of the little group at the very time when its paramount aim and object must have been to make good the loss just sustained. Indeed, "the only reproach which the slayer of a blood-relation incurs is that he has hurt himself by weakening his own family" (Steinmetz, *Studien*, ii. 164). Wherein, then, does that domestic reaction consist which, it is claimed, lies at the root of state punishment? Frequently nothing at all happens. In other cases the malefactor is disliked and despised by his kinsmen; thus among the ancient Celts, we read (d'Arbois de Jubainville, *Etudes*, i. 67), the murderer of a near relative incurred no other penalty than being slighted by the members of his family. Since Kowalevski has published his researches, the practice of the peoples of the Caucasus has been one of the main props of the theory under review. Now among the Ossetes who formed the immediate object of his studies, "a parricide draws upon himself a fearful punishment: he is shut up in his house with all his possessions, surrounded by the populace, and burned alive" (von Haxthausen, *Transcaucasia*, p. 415; quoted by Westermarck, i. 386). Note, that it is the infuriated populace

that so deals with the wrongdoer; it is obviously a case of public punishment or, rather, of lynch-law. The murderer of a brother or other near kinsman, Kowalevski himself informs us, "becomes an object of such hatred and contempt that all intercourse with him ceases. Nobody will sit down at the same table with him or drink out of the same jug. In these circumstances he has no other choice than to leave his country." Again, the sanction, here social ostracism, is inflicted by the population at large. In neither case is there any trace of domestic punishment. It cannot, however, be denied that among the Ossetes the head of the family possesses a fairly extensive jurisdiction, or rather considerable powers of police, over members that disturb its peace. But we need not enter into further details, for the Ossetes cannot be classed among primitive peoples. Far more primitive is the condition of their neighbours, the Swanetes and the Pchaves, and among the former "the parricide continues to reside in the house with his other relations, without incurring any other sanction than that he has to wear a necklet of round pebbles" (Dareste, *Nouvelles Études*, p. 237), whilst among the latter "the offender continues to live among his people, despised by all, but not otherwise punished" (*op. cit.*, p. 246). Hatred and contempt, then, are the sanctions with which the family, but by no means the family alone, visits upon the offender even the most serious offences committed in its bosom. Surely a vaporous model for the state to copy!

The disciplinary correction of the child by the father has certainly suggested a theory of public punishment, but public punishment itself—never. The educational or reformatory view is but a late after-thought, which, up to quite modern times, has never had the slightest influence on the penal policy of the state.

PART II
HISTORICAL INQUIRY INTO THE ORIGIN OF
PUNISHMENT

CHAPTER I

THE FIRST CRIMES

NONE of the theories which we have so far studied supplies a satisfactory answer to the question : What is the origin of punishment ?—a solution of the problem which can claim to be historically true. One of them, we have seen, is merely an after-thought, elaborated in support of preconceived notions in reference to the modern phenomenology of crime, and it cannot appear surprising if the prejudiced inquirer reads into the pages of history exactly that which he expects to find therein. The doctrine of public vengeance unjustifiably identifies, or, at any rate, without any evidence to that effect, regards as successive stages of the same phenomenon, unorganized and organized social reaction against wrong. The patriarchal view connects domestic correction and public punishment by the bridge of despotic rule, thus relying upon a political principle which is neither primitive nor universal. For the erroneous teaching according to which private revenge is the source of public punishment, a faulty method of investigation is mainly responsible. Authors who adopt this view invariably start with the question : How were such familiar acts of crime as murder, theft, etc., dealt with at earlier stages of human develop-

ment ? Such an inquiry is, of course, perfectly legitimate and has, indeed, led to many highly interesting results, and foremost among them, to the discovery that, in the infancy of mankind and during long periods of legal evolution, those acts had no other consequence than to expose the actor to the vengeance of the injured party and his family. In other words, those very deeds which the experience of our assizes and sessions has associated in our minds, in a pre-eminent degree, with crime as an abstract notion, were not always looked upon and treated as crimes. In the light of this knowledge it must be obvious that the above formulation of the problem will be very unlikely to result in the discovery of the true fount of punishment, but will lead into byways foreign to the subject under consideration. Instead of perceiving this, the advocates of the theory jump to the conclusion that the only reaction which homicide elicited in early society must be the source of the genuine penal reaction against that crime, as we understand it. They assume that, at some time or other, the state substituted itself for the individual as the avenger of wrong, acting at first as the agent of the aggrieved party, but later as the organ of social justice. That the latter transformation, which is disposed of by some intellectual sleight-of-hand, goes to the root of the whole matter and requires historical elucidation, is entirely overlooked.

If our investigations are to rest on the solid rock of historical truth, we cannot do better than to leave behind, for the moment, all questions of How ? and Why ?—the answers to which must always be of an inferential, and therefore of a more or less controversial, character—and to begin our researches with the simple question of fact, Which are the first crimes ?—or what amounts to the same thing—For which acts, if any, are public punishments meted out in primitive stages of society ? We shall refuse the attribute “ public ” to

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any punishments unless inflicted by a social group larger than the primitive clan and, by such conscious self-limitation, renounce the task of evolving punishment *stricto sensu* from that which is not punishment proper; *a fortiori* we shall have to forgo the satisfaction, so dear to the heart of the sociologist, of being able to discover the germs of a social institution in the life of the gregarious animals.

At the very outset of our inquiry we find that among some of the very lowest races wrongdoing is practically unknown, and the basis for a social reaction in the nature of punishment, therefore, entirely wanting. We do not feel justified to conclude from these instances that crime is a curse of civilization; nor are we inclined to advance the thesis that sin is the leaven of progress and that the tribes in question have remained at the lowest level just because this ferment was wanting. Paying no further attention to these little peoples from which we cannot possibly gain any inspiration for the solution of our problem, we turn to that vast store of information collected from every available source by the industry of a Post, a Kohler, a Westermarck, and especially by the pioneer work of Steinmetz. The material thus found ready at hand requires, however, careful sifting before we can utilize it for our purposes. We must erase from the list of alleged instances of public punishments occurring among primitive peoples all examples which belong to any of the following categories—

1. Cases in which the reaction emanates from a social group so small that "public" punishment would be a misnomer.

2. Cases in which the so-called punishment is in truth nothing else than private vengeance, more or less disguised, veiled, modified or mitigated; and it makes no difference that in many of these instances the avenger is supported by public opinion. A consistent applica-

tion of this test disposes of almost all cases in which murder, and of the vast majority of cases in which adultery, is said to be punished by primitive peoples.

3. Cases in which a tribe, too weak or too cowardly to defend one of its members against another tribe whose enmity he has incurred, delivers him into the hands of such tribe rather than to risk an attack by a superior force.

4. Cases in which either the sanction itself or the authority by which it is inflicted, is so indefinite that the repression has to be looked upon as moral and not as penal. On this ground examples of lynch- or mob-law have to be excluded. If, for instance, Steinmetz informs us upon the authority of P. Jones (*History of the Ojibway Indians*, p. 70. 1861), that if, during a famine, an Ojibway partakes of human flesh, the members of the tribe pounce upon him and batter his skull with their clubs, and adds: "The horror of cannibalism here raises public indignation to so high a pitch that the masses, the community itself, inflicts in an entirely unregulated, impulsive, manner, a true popular form of capital punishment" (*Ethnologische Studien*, ii. 342), his own commentary proves that he is wrong in quoting this example as an instance of genuine punishment.

5. Cases in which punishment, genuine enough, is inflicted by the tribal assembly or a tribal court upon "offenders," upon members "who commit wrongs," "who make themselves obnoxious," "whose conduct is particularly bad," "who by their transgressions incur the displeasure of the tribe." Such statements as these, which fail to disclose the nature of the offence or misconduct which is visited with punishment, are obviously much too vague to help us in the solution of the problem.

6. Classes of acts which are treated as crimes only by one or by very few primitive tribes. Where the form of wrongdoing thus publicly sanctioned in an isolated

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instance is only a *species* of a *genus* of offences generally punished in savage societies, it may, indeed, be a valuable illustration of a broader principle. Where, on the other hand, it is the only representative of a whole class, it has to be ignored. For our object is not to collect sociological curiosities, but to gain a wide basis for the discovery of the broad principle or principles of early punishment, and by entering in our catalogue of early crimes acts which are treated as such only in exceptional cases, we should vitiate our conclusions. *E. g.* if we read in Westermarck (i. 172, after Burton, *Two Trips to Gorilla Land*, i. 105) that among the Mpongwe a murderer is put to death by the whole community, or in Steinmetz (*op. cit.*, ii. 344, after Schoolcraft, *Indian Tribes*, ii. 189. 1851) that capital sentence is passed by the village council of the Dakotas for certain aggravated forms of murder, such information had better be entirely neglected. To generalize from these isolated instances would lead us on absolutely wrong tracks, since we know that practically from its cradle and during long periods of its history, mankind all over the globe knew no other kind of reaction against homicide than private vengeance.

7. Instances quoted from peoples which are not really primitive, though our knowledge of the earlier stages of ancient civilizations will prove valuable in throwing additional light upon the meaning of punishment as inflicted by the lowest races and in checking such inferences as we draw from the list of genuinely primitive crimes.

Though many of the examples mentioned by Steinmetz have to be excluded on one or other of the above grounds, we may provisionally accept, as substantially correct, his catalogue of "crimes first punished by the community." It reads as follows—

1. Witchcraft.
2. Incest.

3. Treason.

4. Sacrilege.

5. Miscellaneous offences. To this group offences against sexual morality supply by far the largest contingent. Indeed, the only other crimes occurring in more than very isolated instances among primitive peoples are poisoning and allied offences, and breaches of the hunting rules of the tribe.

It will be convenient, before starting on a detailed examination of these different offences, which constitute the complete criminal code of primitive races, to rearrange them by somewhat modifying the grouping adopted by Steinmetz and changing the order in which they are enumerated by this author, and to study them according to the following list—

1. Treason.

2. Witchcraft.

3. Sacrilege and other offences against religion.

4. Incest and other sexual offences.

5. Poisoning and allied offences.

6. Breaches of the hunting rules.

The punishment of treason is very general even among the lowest races with which we are acquainted; but save in those extremely rare instances in which the chief enjoys large powers in a primitive people, as among the Society Islanders (Ellis, *Polynesian Researches*, iii. 123), in Tahiti in particular (Eugène Delessert, *Voyages dans les deux océans*, p. 251), or among the Msalala (Steinmetz, *Rechtsverhältnisse*, p. 280), where rebellion is a crime, there is only one form of treason which is so punished, viz. treason, as we should express it, by adhering to the public enemies of one's people. As a rule, it is necessary that active assistance be rendered to an enemy at war with the tribe, as by joining his ranks or by a betrayal to him of military secrets; but in some instances refusal to help against an external foe is sufficient to constitute

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the offence. Thus we find cases where withholding the sinews of war is punished, whilst the examples are by no means rare of cowardice in warfare being capitally sanctioned, *e.g.* among the Kansas (Hunter, *Manners and Customs of several Indian Tribes*, p. 306). This twofold aspect of primitive treason calls to mind the familiar passage from Tacitus's *Germania* (c. 12): "Proditores et transfugas arboribus suspendunt, ignavos et imbelles et corpore infames coeno et palude iniecta insuper crate mergunt." The early punishment of treason admits of several explanations. As was pointed out in an earlier chapter, treason in the sense in which it is a primitive crime, is the one instance in which a wrong to the community is at once felt by every citizen, so that its punishment may be regarded, with some semblance of truth, as the organized expression of public indignation. But it is also one of those instances in which the dangerous character of the act is most forcibly brought home to the community, so that the utilitarian conception of the reaction which it excites has at least as much in its favour as the emotional view. But the problem really admits of a solution simpler even than either of those just attempted: he who makes common cause with the foe, becomes a foe himself, and is treated as such. This answer to the question is singularly well illustrated and confirmed by the primitive meaning of the classical Roman term for treason, *perduellio*. The word is derived from *per* in the sense which it bears in *perfidia*, *periurium*, etc., *i. e.* false, wrongful; and *duellum*, synonymous with *bellum*; its original signification being, therefore, a wrongful or unjust war. But "since every war waged by the Roman people was a just war, *perduellis* denoted, quite generally, an enemy of Rome" (Mommsen, *Römisches Strafrecht*, p. 538). In fact, it had the same meaning as *hostis* in its classical sense: "hostis apud antiquos peregrinus dicebatur, et qui nunc hostis per-

duellio" (Festus, voce *perduellio*). It was applied indiscriminately to the foreigner and to the Roman citizen who was fighting Rome. "According to Roman notions, a citizen, by his treasonable act, forfeits his citizenship and is dealt with as an alien enemy" (Hitzig in Mommsen, *Kulturvölker*). And until the practice was modified by the establishment of the *duumviratus perduellionis*, according to tradition by Tullus Hostilius, "the anathema pronounced by the law against the *perduellis* became immediately operative, that is to say, capital punishment could be inflicted without the intervention of the *curiæ*. Every Roman citizen was at liberty to slay a man guilty of manifest treason" (Du Boys, *Peuples anciens*, p. 253). A similar practice prevailing among some of the lower races, it may be questioned whether the treatment meted out to the traitor is not an application of martial, rather than of criminal, law; and even where the traitor is brought to a regular trial and formally condemned and executed, as among the Wyandots (Powell, *Wyandot*, p. 67), it may still be argued that the proceedings are in the nature of a court-martial. However this may be, it is perfectly obvious that as long as the traitor is treated as a public enemy, whether he be slain by the individual warrior or executed in virtue of a judicial sentence, the principle upon which he is dealt with is of a purely utilitarian character.

Witchcraft is probably the first in point of time, and certainly the most universal, of all primitive crimes. The belief in human beings, male or female, capable of controlling supernatural forces, dates back to the infancy of human society and has accompanied mankind far down the path of civilization. As late as 1640, the enlightened author of the *Religio Medici* wrote (part i. sec. 30): "I have ever believed, and do now know, that there are Witches," and not until 1736 was prosecution for witchcraft abolished by British Act of Parliament.

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It appears, indeed, that witchcraft as a crime is almost co-extensive with witchcraft as an article of faith: almost co-extensive, we say, since the public reaction which it excites is sometimes in the nature of lynch-law rather than of punishment. Still, there is not a single primitive criminal code in which it does not find a place, and in a few instances, *e. g.* among the Wagogo (Steinmetz, *Rechtsverhältnisse*, p. 215), the punishment of magic makes up the whole of the criminal law. Sometimes the sorcerer is liable to punishment only if he is believed to have wrought some tangible mischief. Thus killing by occult influences is very frequently a public crime, whilst ordinary murder leads only to blood-revenge; but inasmuch as words have magic power, predicting a person's death is sometimes, by the Cuna Indians for instance (A. Réclus, *Le Panama et le Darien*, p. 212), regarded as equivalent to killing him. Among the natives of the Timor Islands (Steinmetz, *Studien*, ii. 329) and other primitive peoples, making a person ill by magic, even if the disease do not prove fatal, constitutes the *corpus delicti* of a capital offence. Since some of the lower races ascribe every case of sickness and every death to sorcery, their criminal courts would be kept very busy, were it not for the fact that it is generally a member of a hostile tribe who is credited with having cast the evil spell. More usually than harm to individuals, public calamities are attributed to the machinations of the sorcerer. Epidemics are his work among the Aht-Indians (Sproat, *Scenes and Studies of Savage Life*, p. 159) and elsewhere, whilst according to a belief common especially with the African negro tribes (Steinmetz, *Rechtsverhältnisse*, p. 215; Burton, *Lake Regions*, p. 664; Letourneau, p. 90, quoting Moffat), it is he that prevents the bursting of the clouds, should the rainy season be delayed. But in most cases the sorcerer is punished, not for what he has done or is supposed to have done, but for what he is,

for what he knows, and for what he is capable, therefore, of doing. The classical Roman jurist Paulus faithfully reproduces primitive thought where he writes (*Receptarum sententiarum* lib. v., tit. xxiii., ad leg. Corn. de sic. et ven., par. 17 & 18): "Magicae artis conscios summo supplicio affici placuit, id est bestiis obiici aut cruci suffigi. Ipsi autem magi vivi exuruntur. Libros magicae artis apud se neminem habere licet; et si penes quoscunque reperti sint, bonis ademptis ambustisque his publice, in insulam deportatur, humiliores capite puniuntur. Non tantum huius artis professio, sed etiam scientia prohibita est." So great, indeed, is the fear of witchcraft in early society that being suspected of being versed therein spells guilt. But it is not every kind of magic that is so sanctioned. If it is in the power of man to utilize supernatural agencies for the execution of evil designs, he may equally set them in motion for the accomplishment of desirable objects. If the sorcerer who prevents the rain from coming down at the appointed time is a villain of the deepest dye, the rain-maker is the benefactor of his people. If it is possible to cause sickness by occult measures, occult measures may be relied upon to effect a cure. Indeed, the magician is the primitive physician as well as the primitive priest, and frequently he is the recognized minister of public justice too; for often his aid is invoked to discover the author of mischief, often it is he who judges of the suspect's guilt or innocence. A distinction, then, is drawn between "white" and "black" magic, a distinction which, in practice, generally resolves itself into a discrimination between the sorcerer of good repute and the sorcerer of evil repute, or, sometimes, between the official and the unauthorized wizard. There can be no doubt that fear forged the sword with which early society slew the sorcerer. He is done away with because he is a danger to the community. This is, in fact, the *rationale* of his

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punishment according to the testimony of some of the primitive tribes themselves. The Dayak-Biadju, we are informed (Steinmetz, *Studien*, ii. 330, quoting Perelaer) consider it necessary, "in the interests of public safety," to kill any person suspected of being an *Antuën*. In Greenland the witch is executed "because she is a source of danger to the whole community and not worthy to live" (Steinmetz, *ibid.* 334). So great, indeed, is the anxiety to get rid of the sorcerer that on the coast of Moreton Bay his tribe will not hesitate to extradite him to some other tribe upon a member of which he has practised his black art (Lang, *The Aborigines of Australia*, p. 342), that, as a rule, his own kinsmen will make no attempt to deliver him from punishment, but gladly give their consent to his execution, where such consent is required, as among the Hurons (Charlevoix, *Histoire de la Nouvelle France*, p. 283), or even go so far as to carry it out, as is the practice of the Ojibways (Jones, *op. cit.*, p. 146), or, without waiting for the slower process of the criminal law, do him to death themselves, "not to remain in contact with so vile and so dangerous a being," to quote the motive with which the Thlinkits justify such act (Steinmetz, *Studien*, ii. 333, quoting Pinart). Now the explanation which we have just given, and in which most writers upon the subject concur, accounts quite satisfactorily and sufficiently for all those instances in which the sorcerer is punished because he is looked upon as a standing menace to society, and *a fortiori* for those cases in which some actual public calamity is imputed to him. But it does not, at first sight, seem to dispose of those cases in which he is called to account by the tribe for harm done to one of its members. In early societies wrongs to individuals are not generally regarded as matters of public interest. How, then, does the community come to concern itself with murder carried out through the instrumentality of supernatural

forces, while it fails to take notice of murder effected through physical agencies? This apparent discrepancy requires all the more careful elucidation because, as is often asserted, early criminal law disregards motives and means and looks exclusively to the result. The first reason which suggests itself for this discriminating treatment is that whilst a man can defend himself against the attack of an enemy whom he meets face to face, he is helpless against an unknown foe who, from a safe distance, shoots invisible arrows at him, arrows moreover, charged with supernatural energy which no merely human force can resist. Courage and fortitude being the qualities in its members most valuable to the tribe, it is good policy for the community, it may be said, to require the individual to rely on the strength of his own arm in repelling violence with violence, but to step in at the very moment when individual effort no longer avails. To offer this explanation is to give savages credit for an amount of political genius which they do not possess. Again, there is something uncanny in the mere idea of murder by witchcraft, and the sight of the victim could not fail most forcibly to bring home to each of his neighbours the "hodie tibi, cras mihi" and the necessity for dispatching the fiend from whose machinations no one was safe. This argument, however, accounts for action being taken by the tribesmen *ut singuli*—i. e. for those examples in which the sorcerer is lynched, rather than for punishment being meted out to him by the regularly organized tribal authority. In truth, *salus publica* seems to be the principle governing even those cases in which sorcery practised to the detriment of the individual is said to be punishable. On this conception, the true ground of punishment is that the wizard is a dangerous being, dangerous to the tribe as a whole, while the injury inflicted upon the person bewitched is merely in the nature of an overt act that

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affords proof of the actor's evil capacities. The fear of the magician is, after all, but the fear of magic, the dread of those occult forces which he can set free, but which, when once let loose, it is impossible to arrest and control.

Sacrilege, as a primitive crime, means any act supposed to interfere with the material comforts of any of those supernatural beings which the tribe lives in awe of. Killing and consuming a sacred animal in which it is embodied, breaking a fetish-stone, polluting a well in which the dreaded spirit resides, injuring a tree which it inhabits, desecrating a tomb round which the departed soul hovers, destroying an idol, are examples of this offence. It is not difficult to understand why these acts are punished by the community. Since the dawn of religion man has created his deities after his own likeness, and in the realms of psychology and of morals primitive anthropomorphism bears an even wider sway than in the somatic sphere. "There is," as Hume remarks, "an universal tendency among mankind to conceive all beings like themselves, and to transfer to every object those qualities with which they are familiarly acquainted, and of which they are intimately conscious." Accordingly, the savage sees nothing incongruous in attributing human modes of thought and conduct to supernatural beings, even though they be embodied in animals, in plants, or in inanimate objects. They behave in the same manner as he would behave in similar circumstances; they are, like himself, extremely jealous of their rights, and they avenge a wrong, exactly as he would avenge it, not on the aggressor alone, but on the whole social group to which he belongs. Hence the tribe as a whole has to pay the price for an injury done to a supernatural being by one of its members. Now the god, in so far as he has a terrestrial abode and a tangible body, is by no means proof against hurt inflicted by human hands. But his powers for evil are so infinitely greater

than those of any man, or combination of men, that it would be madness to risk his feud. The tribe, then, does what it would do if one of its men had incurred the enmity of a tribe so superior in strength that resistance would appear hopeless from the very outset. To ensure its own safety, it delivers the wrongdoer into the hands of the adversary, or dissociates itself from him by expelling him from the tribe. This is the meaning of punishment for sacrilege; its object is to free the tribe from collective responsibility to the supernatural being for the offence of one of its members.

Primitive religion is so closely interwoven with magic that, in studying religious offences other than sacrilege, we have to take notice of this relationship. Attempts have been made by modern writers to draw a sharp line of demarcation between magic and religion. Frazer contrasts magic, as being the realm of supernatural processes governed by law, so that like causes produce like effects, with animism, the field in which the caprice of spirits has free play. According to Westermarck, the difference between magic and religion turns on the distinction between those supernatural phenomena which, like physical phenomena, are regarded as manifestations of energy that discharges itself without the intervention of volition, and those which are attributed to the will of supernatural beings. However valuable these principles of discrimination may be to the modern student, it seems impossible to apply them with complete success to the faith of primitive man. For in the mind of the savage the two classes of supernatural phenomena pass into each other by imperceptible transitions and enter into inextricable combinations. The spirits themselves appear to be full of magic energy, and one of their most effective weapons are curses, the operation of which is avowedly purely magical. Even at considerably higher stages of religious thought, in the Vedic writings for instance, it

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is not always possible to distinguish between substances charged with supernatural mechanical power and the shadowy personality of demons. So much is certain, the environment in which primitive man lives, land, air and water, are filled with magic forces which the will of man or spirit may set in motion, but which may also be fanned into activity, quite undesignedly, by the conduct of human beings. They are so many potential factors for good and evil, and deeds are classed as lucky or unlucky, according to the nature of the supernatural energy which they cause to discharge. The greater the intensity of the discharge, the wider is the circle within which the shock is felt, the actor himself always being the centre. An act thus may bring misfortune to the actor alone, or it may involve in disaster, together with him, his family, his clan, or his tribe. Courses of conduct which are fraught with serious supernatural danger to the whole of the community are forbidden under pain of punishment, in other words are primitive crimes. But this is not all. The proximate effect of the evil deed is that the doer becomes unclean. Guilt, as we should call it, is represented as being in the nature of a polluting substance with which the offender, as the immediate consequence of his offence, becomes impregnated. The magic material sends forth effluvia which are absorbed both by living creatures and by inanimate objects, and which, if of sufficient virulence, consume and destroy everything with which they are brought into contact. By reason of their great penetrating power, they may act at a distance from the original focus of infection and thus produce results in remote quarters, and where least expected. The wrongdoer, laden, as he is, with contagious matter, is obviously a great peril to the tribe. If the virus be more or less volatile, he can be freed from it by lustrations, fasts and other ceremonies to which magic disinfectant properties are ascribed. But if it be of a more tenacious

nature and not so easy to remove, nothing will ensure the safety of society but the destruction of the offender, or his removal from the community. So far, then, as an act is a crime on account of its baneful magic effects, its punishment is really a measure of social hygiene. And where notions such as those just outlined are cherished, it is quite reasonable, nay it follows as a matter of course, that animals and inanimate things are punished no less than men. The magic element is conspicuous in such offences of a religious character as partaking of forbidden food or drink, for women or children to witness the initiation ceremonies or even to approach the spot where such ceremonies take place, and, generally, infringements of the laws of taboo, though even in these instances it is intimately blended with animistic notions. A good illustration is furnished by the jurisprudence of the Galelas and Tobelorese who punish transgressions of the dietary rules of the tribe because those who indulge in prohibited articles are transformed into *suwangi*, that is, demons who devour human souls (Riedel, "Galela": *Zeitschr. f. Ethnologie*, p. 66. 1885).

The primitive gods are concerned with human conduct in the first instance only to the extent to which it affects their own well-being. Still, by reason of the permanent relationship which subsists between them and their worshippers, acts not directly prejudicial to their interests excite their displeasure in varying degrees, and some are so obnoxious to them that they pour out the vials of their wrath upon the community in which they are committed. To escape chastisement at the hands of the supernatural being, the tribe, then, has no choice but to proceed on exactly the same lines as it does in cases of sacrilege. But whilst, where their own rights are infringed, the ire of the spirits is easily accounted for, it is more difficult to understand why they should trouble about matters unconnected with their own welfare. The most obvious

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explanation, and the one most frequently given, relies on primitive man's anthropomorphic notions. "Every act which the savage supposes to be disliked by the spirit he fears, is one which has in some way become equally distasteful to his own mind" (Wake, i. 334). In order to become obnoxious to the god, it must first be obnoxious to the community. In other words, public indignation is the source of the belief in the divine wrath. It must, however, be clearly understood that even then moral indignation finds expression in punishment only in a remote and circuitous way: an offence against the moral code does not become a crime until it is believed to be as hateful to a higher being as it is to man. The explanation just offered, though undoubtedly correct in a certain number of instances, has a narrower field of application than would at first sight appear, and certainly requires further elucidation, since it is by no means clear how, and upon what grounds, the savage comes to ascribe his own feelings to his supernatural beings. For the spirits which he lives in dread of, unlike the national gods of higher civilizations, are not guardians of morality, or of its primitive equivalent, custom; nor do they identify themselves with their worshippers. In so far, indeed, as they are disembodied souls of deceased tribesmen, the continuance theory sufficiently accounts for their still sharing the indignation which a certain course of conduct excites among the living. But the souls which supply a contingent to the spirit-world are, for the most part, those of ancestors, family ghosts, held in awe by their own kith and kin, but devoid of all power of harming the community at large; and though a mighty warrior or a skilled and successful leader in the chase may occasionally find a place in the primitive Olympus, hero-worship does not generally belong to the earliest phase of religious development. As a rule, the primitive spirits, those at least of which it is thought worth while to take serious

practical notice, so far from being in sympathy with tribal feeling, are conceived as antagonistic demons, as knaves and rogues, as embodiments of all anti-social qualities. To trace to its true source the part they play in the first evolutionary stage of the criminal law, we must advert to another psychological aspect of primitive man. The monotony of savage life has often been commented upon, and any occurrence that breaks it, however trivial in itself, forms the main topic of conversation for days and weeks together. So any human act, in the slightest degree out of the common, is bound to attract an amount of attention, and to impress itself on the memory with a vividness, out of all proportion to its real importance. Soon some unexpected calamity befalls the little community, or some natural phenomenon profoundly stirs the emotions of its members. What more natural than to connect, as cause and effect, the two extraordinary events? To the unsophisticated mind the "post hoc, ergo propter hoc" always holds good. The act has offended some powerful spirit who vents his anger upon the tribe. The fact is apparent; into the "how" and "why" primitive man does not stop to inquire. What interests him is the practical question how to arrest the catastrophe. Every effort is made to propitiate the god; but all attempts prove fruitless. It becomes clearer and clearer that nothing will appease his wrath but the death of him who has incurred his displeasure. For a long time his companions fight against this conviction, which yet grows daily stronger, till at last he is sacrificed. And behold—the earthquake stops, the epidemic dies out, the rain bursts from the clouds. The inference has been verified by the course of events and remains valid. For no one that has seen with his eyes and heard with his ears is likely to put it a second time to the test. The act may have been of a purely a-moral character, one neither approved nor forbidden by custom, for the simple reason,

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perhaps, that it had never been thought of, or because no occasion had ever before arisen for doing it. It is in no sense a wrong, and the fate of the actor is not in the nature of punishment, but a measure of self-preservation forced upon an unwilling community by the iron hand of necessity. But henceforth the act in question is a sin and a crime, and it remains so, even though the particular form of the divine sanction may be forgotten. And any man who in future perpetrates it, is with perfect justice regarded and treated both as a sinner and as a criminal; for he designedly embarks upon a course of conduct which he knows or believes to be hateful in the sight of a god and dangerous to the society in which he lives. The same result may, however, ensue without the intervention of a deity. For an unusual act, like any other uncommon event or unfamiliar phenomenon, is pregnant with magic influences, and a public calamity may be attributed to the baneful mechanical forces which it unchains, quite as easily as to the vengeance of a spirit. *Θαυμάζειν*, astonishment at the unexpected, the strange, the unfamiliar, then, seems to play as important a part in the genesis of magic and of religion, and so indirectly in that of the criminal law, as in the birth of philosophy. So far, our inquiry into the origin of offences against religion amply confirms Sir Henry Maine's thesis that dooms are older than laws, older even than customs; for we have seen how judgments, instead of being based upon custom, may themselves form the germ of custom. But there is another side to the medal. The savage, we know, is hidebound by custom, which regulates every detail of his life and rigidly prescribes his attitude in almost every imaginable circumstance and contingency; and so much is obedience to tribal custom a matter of course that any deviation, however slight, from the established rule of conduct at once acquires the character of an event exceptional, singular and amazing; and thereby becomes liable, in the manner

just expounded, to be brought into contact with religion and magic. It is in this way, we claim, that current rules of morality acquire a supernatural, and mediately a penal, sanction.

If we have enlarged at what might seem undue length upon the problem of religious offences, the reason will at once be apparent if we state that it is on account of their religious and magical significance that most of the crimes which remain to be studied, are punished by primitive societies.

The close association which exists between our sexual life and the religious side of our nature is so well known to the student of the history of religious worship, to the psychologist and to the alienist that it cannot cause surprise if offences against sexual morality bear from the beginning a religious aspect. Indeed, not until comparatively recent times in Christian countries have they ceased to fall within the special province of ecclesiastical jurisdiction. Again, the sensations and emotions to which the reproductive instinct gives rise, and the phenomena connected with its satisfaction are full of mystery to the civilized man no less than to the savage, and at primitive stages of human thought magic properties are attributed to what is otherwise unaccountable in the experiences of the inner life, no less than to strange phenomena in the outside world. No wonder then that the rules relating to marriage are regarded as particularly sacred and that sexual relations between persons not allowed to intermarry are treated as offences of a particularly heinous type. So incest occupies a prominent place in the criminal codes of the lower races, a place which it owes, as Post (*Grundriss*, ii. 388) remarks, entirely to Shamanistic notions, "it being generally believed that incestuous intercourse offends the spirits and brings disaster upon the land." Among the Dayak-Biadju it pollutes the whole village in which it is committed (Steinmetz, *Ethnologische Studien*,

ii. 336, after Perelaer). The Hill-Dayaks make it responsible for every misfortune that subsequently befalls the tribe (Low, *Sarawak*, p. 301). The Macassars and Buginese know no other cause for the failure of the crops (Wilken, in *Globus*, lix. 22. 1891). The southern tribes of North America "looked upon incest as a serious offence against religion, which called down the curses of the gods," and accordingly punished it capitally (Kohler, *Nordamerika*), whilst with the Aleuts the fruits of such intercourse are believed to be horrible creatures, born with seal-teeth, beards and all possible malformations (Petroff, "Report on the Population, Industries and Resources of Alaska," *X Census of the United States*, p. 155. 1884), a public calamity the full of extent of which we shall not appreciate unless we remember that monstrosities are regarded by primitive peoples as storehouses of such quantities of deleterious magic energy that they are looked upon and treated as criminals. If by incest we understand sexual commerce between persons within the prohibited degrees, we must take notice of the fact that in the lower cultural strata the prohibition, as a rule, covers a much wider field than it does in modern societies, sometimes as among the inhabitants of the Mortlock Islands (Kubary, "Die Bewohner der Mortlock Inseln," *Mitteilungen d. geogr. Gesellschaft zu Hamburg*, p. 251. 1878-9), embracing the whole of the tribe, so that incest, as a primitive crime, had better be defined as a breach of the rules of exogamy. But whilst incest in this wider sense of the term exposes the offender practically everywhere to the severest public punishments, the rules of endogamy are, strangely enough, hardly ever criminally sanctioned. The feeling of disgust which the mere idea of an unnatural gratification of sexual desire excites in people of healthy instincts would easily give rise to the belief, one should have thought, that such filthy practices are a source of pollution and of supernatural danger to the

community in which they take place. Yet the primitive criminal tribunals do not appear to take cognizance of offences against nature, whether committed with man or with beast. Again, adultery and seduction are, as a rule, treated as mere private wrongs, in the nature of undue interferences with the proprietary interests of husband and father, the former being regarded as a kind of *furtum usus*, the latter as detracting from the value of the daughter in the marriage market. In most of the instances in which they are said to be punishable, the tortious intercourse is at the same time incestuous, and it is then from the latter quality that the act derives its criminal character. This truth is well brought out by Spencer and Gillen (p. 99) in the account they give of the law governing unlawful intercourse among the Australian aborigines. "If the intercourse," they write, "has been with a woman who belongs to the class from which his wife comes, then he is called *atna nylka* (*i. e.* *vulva* thief); if with one with whom it is unlawful for him to have intercourse, then he is called *iturka*, the most opprobrious term in the Australian tongue. In the one case he has merely stolen property, in the other he has offended against tribal law." There are, however, examples of adultery *qua* adultery, calling forth a public reaction, which, occasionally, as among the Caribs (Steinmetz, *Ethnologische Studien*, ii. 344), takes the shape of mob-law, but more often that of genuine punishment. The Swaheli treat it as a serious crime because it prevents success in the buffalo and elephant hunt (Livingstone, *Last Journals*, ii. 23), the Karens because adultery, no less than rape, spoils the harvest (Mason, "Religion among the Karens," *Journ. Roy. Asiatic Soc.*, p. 150. 1868), the Batak because it brings misfortune to the *kampong* (Steinmetz, *op. cit.*, ii. 357), whilst all over the Malay Archipelago "on great public emergencies persons guilty of adultery or incest are put to death to propitiate the gods" (Ratzel, i. 451).

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More rarely even than adultery is seduction visited with punishment. Both are equally treated as public crimes by the Ckaratshai (Steinmetz, *op. cit.*, ii. 345, quoting Klaproth), while the Malays of Sumatra treat seduction both as a tort and as a crime, as a crime "because the stain must be removed from the earth" (Wake, i. 389). Generally it is looked upon as concerning no one but the father, who either takes revenge or exacts compensation. Nor does it make any difference in the eye of early law if the seducer has resorted to violence in order to attain his object, the Karens, who, as already mentioned, punish rape, being the sole exception to the rule. Whatever other offences connected with the reproductive functions are visited with punishment by one or another of the primitive peoples, magical or religious notions always supply the motive; so procuring abortion is a capital crime among the Baurès because it is followed by an outbreak of fatal diseases in the village (Southey, *History of Brazil*, iii. 207). Indeed, so universal among the lower races appears to be the association of breaches of the rules of sexual morality with supernatural consequences that it is clearly discernible even where it does not fructify in true public punishments. To quote but one example, "the Sibuyan of Borneo regard sexual immorality as an offence against the deities of the tribe, and if a girl becomes a mother before she is married, their anger would be shown against the whole tribe if a pig were not sacrificed to them" (Wake, i. 389). "And even then any one becoming sick, or meeting with an accident within a month afterwards, has a claim on the lovers for damages, as having been the cause of the misfortune; while, if any one has died, the survivors claim compensation for the loss of their relative" (Wake, i. 284).

Primitive toxicology is a branch of magic. The insidious, withal fatal, effects of poisons and the curative

action of drugs are equally attributed, in the infancy of mankind, to supernatural properties imparted to them either in Nature's workshop or in the cauldron of the witch. It is the sorcerer that knows where to find them, how to prepare them, and how to administer them for the good, or to the ruin, of his fellow-creatures. These are the ideas which make of the benevolent magician a medicine-man, of the poisoner an evil-disposed wizard. It is not then public regard for human life, but the general dread of black magic, which causes murder by poison to be included in the catalogue of primitive crimes. Here again, as in the case of witchcraft, it is not always necessary for a conviction that actual harm has been done; among some of the lower races, among the Karens for instance (Mason, *loc. cit.*), mere knowledge or possession of poisons is looked upon as a public danger and punished accordingly. Indeed, so close is the association of sorcery and poisoning in primitive thought that where a savage code is silent about the latter offence, we may yet assume that it is punished upon an indictment for sorcery.

Breaches of the hunting rules and customs form the last group of offences which we have to consider. Sporadic instances of their punishment might be quoted from different parts of the globe. But it is among the American Indians that this branch of criminal jurisprudence reaches its highest and most systematic development. To the red-skins the bison-hunt has always been a matter of supreme importance, an affair of the greatest possible interest to the whole of the tribe. It was, therefore, subject to very minute rules and regulations, and contraventions were looked upon as crimes of so serious a character that the offender was outlawed (Charlevoix, *Journal*, v. 192). The necessity of preserving the means of subsistence of the community would seem to account sufficiently for the inclusion of these offences in the criminal code and for the severe punishment with which

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they were sanctioned. And this impression is strengthened if we remember that, among the motives assigned by primitive races themselves for the punishment of different offences, care for the food supply of the village plays, as we have seen, a by no means inconsiderable part. But in truth between many of the acts punished as transgressions of the hunting laws and ill success in the chase the modern reader can discern as little of a causal relationship as between incest and a bad harvest. Once again are we driven to the conclusion that magical and religious ideas are at play, and we shall not be greatly surprised to learn that the same Omahas who, in appointing special judges to try and execute those who frighten the herd before the chase has begun (E. James, *Expedition to the Rocky Mountains*, ii. 208), seem to pursue a policy quite intelligible to us and apparently free from superstition, yet look upon such offences as partaking of the nature of sacrilege (Dorsey, "Omaha Sociology," *Smithsonian Reports*, p. 367. 1885).

To sum up, our inquiry into the acts first punished as crimes has clearly shown that in every single instance regard for the welfare of the community has supplied the motive for the organized reaction of society. In treason, which, as we have seen, lies on the borderland of criminal and martial law, it was fear for the security of the tribe against external foes. In some instances fear of famine may have served as a contributory cause. But dread of supernatural agencies, of baneful magical influences and of the vengeance of the spirit-world, has been proved to be the main source to which public punishment has to be traced. We thus arrive at the following three conclusions—

Firstly, punishment has been utilitarian from the very outset.

Secondly, fear, not indignation, has been the root emotion in the genesis of criminal law.

Lastly, it was under the aegis of religion that the criminal code was born. In a subordinate way other factors may have helped its seeds to sprout; it remains nevertheless true that it is religious thought, religious fears and feelings which public punishment has to be fathered upon. We are now able to perceive why Sir Henry Maine, whilst finding torts "copiously enlarged upon in primitive jurisprudence" and "sins not unknown to it," was unable to discover the generic type of crime. It is obviously impossible to distinguish sins and crimes as independent classes of wrongs, as sins were the first acts punished as crimes and as they were so punished just because they were sins. We cannot, then, agree with those authorities who, like Du Boys, look upon the religious element as a later importation, engrafted on a pre-existing trunk of criminal law. And if Ferri asserts that crime was subsequently transformed into sin, we are prepared to subscribe to the proposition that sin, without ceasing to be sin, was transformed into crime.

CHAPTER II

THE FIRST PUNISHMENTS

STARTING with the question, "Which were the first crimes?" which engaged our attention in the preceding chapter, we arrived at the conclusion that it is within the circle of magic and religious notions that the origin of the idea of a public offence has to be sought. We shall now embark upon an investigation of the problem: "Which were the first punishments?" and we shall find that its solution more than confirms the results of our previous inquiry. For even in those instances in which the supernatural colouring of a crime has faded, its punishment frequently retains unmistakable marks of its origin.

In the literature of primitive criminal jurisprudence clubbing, hammering, flogging, beating with sticks and with chains, putting to shame, and various fines payable in cattle or in whatever happens to be the currency of the tribe, are enumerated among public punishments. An exhaustive, and at the same time critical, examination, however, reveals the fact that the instances mentioned are all examples of mob-law, of moral condemnation expressed in acts or in words, or of compensation due to the injured party, while of genuine public sanctions, *i. e.* of such as are awarded by the organized tribal authority, there are only two kinds, *viz.* death and exile, the former considerably preponderating. Both are of course modes of ridding the community of the offender.

In order to ascertain the motive which determines primitive societies so to dispose of their criminals, we choose for our point of departure the punishment meted out to the sorcerer and the circumstances attending its execution. For witchcraft has been shown to be a crime among most of the lower races, and its punishment, therefore, offers sufficient data for valid generalizations. Moreover, if the arguments previously advanced are sound and dread of supernatural forces is the mainspring of punishment in the case of sorcery as in that of many other offences, the fate which awaits the black magician cannot fail to throw a good deal of light on the meaning of primitive punishments in general.

“The punishments meted out to sorcerers,” writes Post (*Grundriss*, ii. 395), “can hardly be called punishments. They are acts of annihilation.” This statement is fully borne out by facts. For, as a general rule, the sorcerer himself is done to death, and his wife and children, occasionally all his relatives, share his fate; his house is burnt down or otherwise demolished, and his movable property is destroyed. A sanction so comprehensive as to include the extermination of the culprit, and of all that is his, suggests at once that it is dictated by a desire to remove a taint transferable by contact and by hereditary transmission; and a detailed study of the items of which the punishment is made up will amply confirm this impression. We feel all the more justified in entering upon a minute examination since some of the component parts survive into times when their original meaning has been forgotten.

As regards the sorcerer himself, the sentence is always capital. The manner in which it is carried out varies from tribe to tribe and does not exhibit any particularly suggestive traits, except, perhaps, among the natives of New Caledonia, where the execution ceremonial, as described by Turner (*Samoa*, p. 343), raises a presumption

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that capital punishment takes the form of a human sacrifice. Here the sorcerer, after being condemned in due form, is entertained at a public banquet. He is decorated with a wreath of red flowers, his legs are covered with flowers and shells, his whole body is painted black. All at once he starts up, breaks through the assembled multitude, hurls himself from the cliff into the sea, and is seen no more. The watery grave which here awaits the wizard deserves attention. It is true, this seems to be the only known instance of a primitive people in which the punishment of witchcraft takes the form of drowning. All the more frequent are the examples in which the body of the sorcerer, after the capital sentence has been carried out in some other way, is committed to the sea. The reason is that sea-water is believed by the lower races to be particularly destructive of magic energy; even by merely crossing the sea "the *suwangi* loses his power" (Steinmetz, *Ethnologische Studien*, ii. 329, after Riedel). That is why so often in the infancy of mankind those hot-beds of impurity, monstrous births, are buried in the sea, a custom which lies at the root of the well-known Roman *poena culci*. That is why offences of a specially polluting character are quite commonly sanctioned with drowning, *e. g.* incest among the Dayak-Biadju (Steinmetz, *op. cit.*, ii. 336). In any case, the conception of guilt as a virus which clings to the offender, living or dead, has led to the practice, not by any means rare among savages, and more frequently met with at a higher cultural level, of removing the bodies of executed criminals far from the abodes of the people. Thus in the islands of Nossi-Bé and Mayotte, they are carried into the bush and left there (Steinmetz, *Rechtsverhältnisse*, p. 389); thus in Athens capital punishment for sacrilege and treason was followed by burial in foreign soil. Not only the corpse of the offender, his very name is pregnant with supernatural dangers. Among the inhabitants of the two islands just

mentioned he must never again be spoken of (Steinmetz, *loc. cit.*); in ancient Rome no member of his *gens* was henceforth allowed to bear the same *praenomen*.

The participation in the sorcerer's punishment of his wife and his children has been explained on the ground that, being in the theory of primitive jurisprudence the property of the husband and father, they are, as a matter of course, destroyed along with the rest of his chattels. But, as we shall presently see, the punishment meted out to them is not always capital. Besides, this view fails to account for those cases, rare though they be, in which punishment extends beyond the narrower family circle and includes all persons in any way related to the culprit. Again, it may be argued, a man is most likely to impart his knowledge to his own kith and kin and, even in the absence of definite, systematic instruction, the latter cannot help picking up the secrets of his nefarious trade. This opinion is all the more plausible as witchcraft is the one offence in which not only the deed, but the bare knowledge is punishable. An objection, however, fatal to this view is the fact that occasionally in primitive communities, not to mention higher stages of legal development, crimes are similarly sanctioned of which overt acts form a necessary logical ingredient, whilst knowledge is quite irrelevant. Moreover, if we accepted this explanation, which is clearly inapplicable to the property of the offender, we should have to look out, in order to account for the destruction of the latter, for an entirely different principle of interpretation; and such dualism cannot appear satisfactory where the phenomena to be accounted for are obviously *eiusdem generis*. When once the primitive view of the infectivity of the magic virus is taken for granted, the collective responsibility of the sorcerer's family follows as an unavoidable practical corollary. In the intimacy of domestic life those near and dear to him cannot, except

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by a miracle, escape contagion. Besides, supernatural impurity not only spreads from person to person, it is transmitted from the father to the unborn child. Among the Hebrews the taint of bastardy clings to the descendants "even to the tenth generation" (Deut xxiii. 2). The tragedians of the classical period have preserved for us the Greek version of the primitive theory of heredity, according to which the guilt of the ancestor reappears in his children with both an active and a passive aspect, as a demoniacal impulse to wrongdoing and as liability to suffer punishment, an *hereditas bis damnosa*. In the light of such teaching it appears true that "he acts foolishly who kills the father and suffers the son to live" (Aristotle, *Rhet.*, ii. 21). And the English feudal lawyers, when inventing the doctrine of attainder, which meant corruption of blood and forfeiture of estate, merely revived, for the benefit of the crown, notions as familiar to the ancient Teutonic peoples as to other primitive races. Sometimes the virus conveyed to the children is believed not to mature till they have reached manhood. So in the Babar Islands the sorcerer is executed with his adult relatives, but the children of the family are sold as slaves, "generally to strangers, lest later, out of revenge, they make their owners ill." To their transmarine masters they can never become a source of danger; for, as we have seen, a sea voyage destroys the germ (Steinmetz, after Riedel, *loc. cit.*). In other cases the supernatural impurity is thought to have a predilection for the male sex, in which alone it attains its full virulence, whilst females are either altogether immune, or capable of breeding the contagion in a modified and attenuated form only. Therefore the Aht Indians, whilst killing the magician together with all his kinsmen, sell his womanfolk into slavery (Sproat, *loc. cit.*). But such mitigation of punishment in favour of particular classes of relatives proves the latter groups of instances to be

subsequent deviations from a more ancient uniform type; for truly primitive jurisprudence does not differentiate, but treats all alike.

The demolition of the house and the destruction of the chattels of sorcerers and of other great offenders are likewise precautionary measures against imaginary supernatural dangers. These risks are of a twofold nature. The criminal's property, charged, as it is, with baneful magic energy, is unlucky, *i. e.* bound of itself to bring all sorts of misfortunes to any one who uses it and to the community in which it happens to be; and, secondly, his possessions represent so many vehicles for the transmission, to other human beings, of the impurity which they have imbibed whilst in contact with the culprit. By and by, the criminal's movable property, instead of being destroyed, is confiscated, first *ad usum dei sive ecclesiae*, later *ad usum reipublicae*. But during long periods of legal evolution his house is burnt down or razed to the ground, and survivals of this practice, real or symbolical, are met with until comparatively recent times in the penal jurisprudence of Western Europe (Grimm, *Rechtssaltertümer*, pp. 723 *et seq.*). An institution so universal and so persistent could not fail to court speculation, and quite a number of attempts have been made to account for its origin. According to Wilda, its object was to extinguish every trace and remembrance of the criminal, so that it merely formed part and parcel of an accessory *damnatio memoriae*. We have seen, it is true, that even his name is taboo, and it cannot be denied that the two practices are intimately related. But we are not entitled to conclude that the one was subordinate to the other; both seem to flow equally from the same root idea, from the belief that everything connected, materially or ideally, with the offender is contaminated. Another theory, both ingenious and simple, regards the destruction of the offender's dwelling and goods as a

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natural incident of his banishment and discovers its rationale in the desire to prevent his return by depriving him of his means of subsistence. But if this were the sole obstacle to his coming back, the barrier does not strike us as formidable or insurmountable. The habitations of savages are not palatial structures, and to erect for himself a fresh mud hut or another rude tent is an enterprise in which the criminal might engage at home quite as well as abroad; and empty-handed as he goes, or with the few sticks which he carries away with him as the sum total of his worldly possessions, he is no better off among strangers than in the midst of his own people. In fact, even primitive races have devised more effective measures for keeping away an undesirable companion; the Ckaratshai, for example, when passing sentence of expulsion upon a seducer of women, couple it with a threat of capital punishment should he ever again show his face in the village (Steinmetz, after Klaproth, *loc. cit.*). Besides, in the instances hitherto under consideration the culprit is not expelled from the tribe, but executed; and though in the early phases of criminal jurisprudence destruction of his possessions is ancillary, not only to capital punishment, but also, though less frequently, to banishment, there is nothing to support the assumption, essential to the doctrine under review, that the latter is the older kind of punishment and that its concomitants were transferred to the former, when subsequently introduced. Indeed, what little there is of historical evidence, points all the other way. If further proof were required of the validity of our contention that fear of pollution is the motive which prompts primitive communities to destroy the dwellings of great criminals together with all their belongings, we could refer to the analogous practice, quite common at low cultural levels, of demolishing any house in which a death has occurred, even though from natural causes, a custom undoubtedly due to dread of the

death germ, of that deadly magic contagion which the corpse harbours and promptly imparts to its environment. But perhaps the most direct clue to the meaning of destruction as an accessory punishment is afforded by the form in which the practice prevails among the natives of the Banks Islands. The tribe is here divided into two exogamous halves, and sexual intercourse between members of the same division is looked upon as the most horrible crime. If such an abomination has been perpetrated, the property of the division to which the guilty couple belongs is destroyed by the members of the other division, without a complaint being raised or any resistance offered (Codrington, "Social Regulations in Melanesia," *Journ. Anthropol. Inst.*, p. 307. 1889).

Such, then, are the precautionary measures which primitive peoples find it necessary to adopt against crime fraught with magic dangers, measures which in their ensemble make up the punishment of the sorcerer. In striking contrast therewith stands the sanction with which sacrilege is visited in early societies. The offender is put to death, and there the matter ends; both his family and his property escape. This strict limitation of liability is, at first sight, all the more surprising since the notion of collective responsibility supplies the reason why this offence is punished at all. Yet the paradox is easily resolved, and the isolation of the criminal as an object of punishment flows quite naturally from, instead of being contradictory to, the idea that the group as a whole answers for the misdeeds of its members. There are wrongs which expose the family of the wrongdoer to the vengeance of spirits, viz. such acts as interfere with the rights and comforts of family ghosts. But these domestic deities, as we have previously remarked, are powers for good and evil to their kinsmen alone, and there is no reason why the community should take notice of them or of deeds obnoxious to them. Only such offences claim

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its attention as are directed against supernatural beings common to the whole of the tribe. The tribal gods, when offended, avenge themselves upon the tribe at large, and it is to avert their wrath that the sinner is executed. In its relations with these deities the community appears as an undivided whole, each member answering equally for the guilt of every other. In this common liability the distinction of clans and families disappears; the offender's relatives, near or distant, are merely tribesmen, and their responsibility, just like that of any other tribesman, ceases as soon as the criminal is killed or otherwise excluded from the community.

Whilst persons guilty of sacrilege suffer capital punishment in order that the anger of the spirits may be appeased, there is nothing to show that they are sacrificed to them. It is true, human sacrifices in general do not seem to belong to savagery, but rather to barbarism and to the dawn of civilization. Yet even among the lowest races the practice is not quite unknown in connection with the administration of criminal justice. Unfortunately the sources do not always disclose the nature of the crime for which offenders are offered up to the gods. But, strangely enough, that crime in which, more manifestly than in any other, the ire of a supernatural being supplies the motive for the intervention of the public authority, sacrilege to wit, is not mentioned in any one of the few instances in which we are given more definite information. We have already noticed a form of execution for sorcery strongly suggestive of a sacrificial ceremonial occurring among the natives of New Caledonia; and in this locality a similar fate awaits those guilty of adultery (Turner, *Nineteen Years in Polynesia*, p. 343). Among the African Negro tribes "one of the commonest occasions for human sacrifices is the causing of illness by witchcraft" (Ratzel, ii. 351); so intimately blended are magic and animistic conceptions in the mind of primitive man. In Polynesia

capital punishment for violation of a taboo generally assumes the shape of a human sacrifice (Radiguet, *Derniers Sauvages*, p. 160). The Macassars and Buginese sacrifice the parties to incestuous intercourse to the offended spirits (Wilken, *loc. cit.*).

A supernatural element seems to be the most essential ingredient in almost all primitive crimes. And though magic and religion are undifferentiated at early stages of thought and cannot, therefore, be completely dissociated by the modern student when dealing with primitive institutions into the formation of which they enter, it is yet possible to arrange in a scale, according to the relative preponderance of the one or the other, the offences which make up the criminal code of savages. At the one end of the scale we should have to place witchcraft, which is magic almost chemically pure; at the other sacrilege, in which the theistic aspect is for all practical purposes unadulterated with magic. We shall then discover that to this scale of primitive crimes corresponds a scale of primitive punishments. At the one pole we find annihilation of the offender and of all that is his; as we go down the scale the scope of the sanction becomes narrower and narrower till we arrive at the other pole, where nothing remains but the execution or expulsion of the criminal himself.

There remains yet to be studied the punishment of treason, which, according to some authorities, is the foundation and prototype of all primitive punishment. Every criminal, it is said, is an enemy of his people and is dealt with as such. The manner in which the tribe disposes of those guilty of the most heinous offences, is an exact replica of the treatment meted out to the alien enemy. What happens to the conquered foe? He is killed, his wife and children either perish with him or are reduced to slavery, his property is confiscated. The sanction with which treason is visited is, it must be

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owned, a faithful reproduction of these acts of hostility. But it is not permissible to infer that it has served as pattern to public punishment in general. For, firstly, this view leaves unaccounted for the origin of banishment, certainly one of the earliest sanctions; and, secondly, the property of the traitor, like that of the alien enemy, is confiscated, that of the typical criminal is destroyed. Confiscation *versus* destruction of property seems indeed to be the feature which most clearly marks off the law of warfare and military law on the one hand from genuine criminal law on the other.

Once again, then, the conclusion is forced upon us that primitive punishment is inflicted either to remove the stain of impurity from society or to prevent a supernatural being from taking revenge on the tribe. Its object is in either case expiation—expiation, however, not for its own sake, but with a utilitarian background.

CHAPTER III

ANCIENT CRIMINAL CODES

HAVING investigated the crimes and punishments of savagery, and having thereby ascertained the reasons for the first intervention of the community in wrongdoing, we now proceed to trace the evolution of the idea of punishment through the next following stages, for which purpose it will be useful first of all to compile lists of offences punished by barbarous races and of those which first excited a public reaction among peoples of archaic civilizations. In the case of the latter it is not always easy to distinguish with accuracy and precision between the original stock and later additions. In some instances, indeed, we are fairly well acquainted with the whole course of development of the criminal code from its earliest infancy onwards. Sometimes, again, our knowledge of the history of a people enables us to surmise which of the contents of its criminal code are primitive, which of subsequent growth; *e. g.* where different crimes are subject to different jurisdictions, it is permissible to infer that those punished by the most ancient tribunal are themselves the most ancient. Occasionally, however, an ancient code is the most ancient historical document we possess of a nation, and we must then rely to a large extent upon such intrinsic evidence as it offers, in order to discover the nucleus round which the later accretions have clustered. Here the knowledge which we have acquired of savage criminal jurisprudence cannot

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fail to be of help. In studying the authorities, we have again carefully to apply the maxims of criticism previously laid down. Thus many of the sanctions described in the sources as punishments are found, on closer scrutiny, to be enforceable or remissible at the discretion of the injured party, with the result that the acts so sanctioned have to be excluded from our catalogues, as being torts and not crimes.

Let us start with the criminal law of ancient **Egypt**, which is known to us only in the final shape it assumed after reaching full maturity. If the account given by Diodorus Siculus, our principal authority on the subject, is correct, primitive superstition and enlightened statesmanship must have had equal shares in its production; it looks, indeed, as if a modern code were grafted upon a trunk of primeval growth. The assertion (Wilkinson, *Ancient Egyptians*, ii. 40) that the conscious aim of Egyptian law was the preservation of life and the redemption of the offender, is, therefore, a half-truth. All the offences mentioned by Diodorus were true crimes, and were visited with genuine punishments, on the banks of the Nile. Private vengeance had been suppressed in the dim, distant past; compositions, if they ever existed, had long been superseded; and neither of these systems has left any traces in the criminal legislation as it has come down to us. Every Egyptian was allowed to set the criminal law in motion; and in certain offences—*e. g.* murder, robbery, and other acts of violence—it was the legal duty of eye-witnesses to prosecute the culprit, if the attempts which they were bound to make, under pain of capital punishment, to intervene and prevent the consummation of the crime had proved unsuccessful. The practice of the magic arts, such as the use of incantations, the concoction of philtres, heads the list of capital offences; the *papyrus magicus Harris* describes these practices as the greatest abominations

in the world. Next in heinousness comes sacrilege, which includes such sins as intentionally to kill an animal sacred to one of the national deities, to kill, even accidentally, an ibis, a cat, or a hawk, to evacuate the bowels into the Nile, and furthermore, according to Herodotus (ii. 38), eating forbidden food, revealing the place of burial of the bull Apis, maintaining that Serapis was a man, offering up in sacrifice kine, calves, or other beasts, not before dedicated and marked by the priests. To desecrate a grave, to deviate in the practice of the healing art from the stereotyped rules laid down, for the guidance of the physician, in the books of Hermes, belong to the same category of crime; and to such an extent was custom hallowed that to invent a new dance and to compose a new song were equally punished as religious offences (Plato, *leg.*, lib. ii.). In cases of treason, rebellion, and conspiracy against the state, not only was the culprit himself put to death; his mother, his sisters, and his whole family shared his fate (Plutarch, *Agis and Cleomenes*, ch. lxx.). Other capital offences were perjury, parricide, murder, of a slave no less than of a free man, wrongfully to accuse another of a capital crime, and, finally, earning a livelihood by illicit means and making a false declaration as to one's means of subsistence. The older law is said to have punished with death adultery if committed by a woman of noble rank; in historical times she escaped with her nose cut off. Her paramour suffered phallotomy, one of those "symbolical" or "expressive" punishments in which Egyptian jurisprudence abounds. Other applications of this principle we meet with in the punishment of rape, revealing state secrets, counterfeiting public seals, coining offences, using false weights and measures, forgery, etc.

If next we turn to **Babylon**, a cursory examination of the code of Hammurabi seems to reveal a large body of criminal law scattered through its venerable pages: so

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frequently does the phrase recur, the wrongdoer "shall be put to death"; so numerous are the instances in which the offender suffers mutilation by losing the offending limb. Unfortunately, the code does not always specify by whom, at whose instance, and in what manner the sanction is to be applied. In a good many cases, however, the text provides the key to the solution of this problem. Thus if we read that only in default of payment of the statutory damages is death the fate of the thief (par. 8), or of the manager of an agricultural estate who has converted his employer's property to his own use (par. 253-256), or if we are informed (par. 194) that it is at the suit of her master that a wet-nurse has her breasts cut off for starving to death her charge by nursing another baby without her master's consent, we know that the sanction is in all three cases civil, not criminal. Again, the provision of par. 25, that a thief at a fire "shall be cast into the selfsame fire," can have no other meaning than that the owner may thus avenge himself on the thief; for the fire would probably have long ceased to burn before the offender could be brought to trial. Clause 229, which enacts that if a house collapses and buries its owner under the wreckage, the builder shall be put to death, seems to provide a somewhat severe, but not inappropriate, punishment for the jerry-builder; but if we find, on going on to the next clause, that "if it is the owner's son that is killed, the builder's son shall be put to death," we are no longer in doubt as to the real meaning of either clause; they both merely recognize the *lex talionis*, which belongs, as we have seen, to private vengeance and private law, not to criminal jurisprudence. A fair number of other examples might be quoted in which the sanction is but legalized revenge, and the application of the principle of analogous interpretation to similar wrongs will further reduce the number of true crimes dealt with in the code of Hammurabi. The follow-

ing are the only unambiguous instances of public offences capitally sanctioned: misconduct in the discharge of public offices (pars. 26, 33, 34), for a votary to open, or to enter, a beershop (par. 110), for an innkeeper—"the trade" seems to have been entirely in the hands of women in ancient Babylon—to harbour seditious persons (par. 109) or to serve short measure (par. 108), highway robbery (par. 22), for a woman to be accessory before the fact to the murder of her husband (par. 153), bigamy by a woman left well provided for whose husband is in captivity (par. 133), incest with mother (par. 157) or with daughter-in-law (par. 155). Incest with daughter is the only crime punished with banishment (par. 154). Whether the unsuccessful prosecutor in a trial for sorcery (pars. 1, 2) and the false witness in a capital suit (par. 3) were put to death only at the instance of the aggrieved party or by virtue of a sentence passed by the judge *ex officio*, we have no means of ascertaining. Somewhat hard to define is the legal character of adultery. Par. 129 runs: "If a man's wife be caught lying with another, they shall be strangled and cast into the water. If the wife's husband would save his wife, the king can save his servant." The meaning probably is that the husband's initiative was required to set the law in motion, but that he could not enforce the sanction against his wife's lover alone. If this interpretation is correct, the most ancient code anticipates the provision of several modern continental codes. If it is difficult to distinguish between crime and tort in every case where the sanction is capital, it is quite impossible to do so in most of the minor wrongs. Branding of the slanderer of a votary or of a married woman (par. 127) was certainly true punishment, and so was, in all probability, scourging "in the assembly" for brutal assault on a man higher in rank (par. 202).

We have dealt at considerable length with the Babylonian code in order to illustrate the methods which we

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employ in enucleating the criminal provisions from a general body of ancient law, and the difficulties with which the task is beset. We shall be more concise in our treatment of most of the remaining systems, and especially of **Hebrew** law, which is, to a considerable extent, a subject of common knowledge. The following crimes are capital by Mosaic law, those printed in italics being sanctioned with *kerith* as well: Idolatry, especially the *cult of Moloch*, divination in the name of false gods, sorcery, blasphemy, *violation of the Sabbath*; *sodomy*; *bestiality*, the beast being killed too; *incest with mother, father's wife or daughter-in-law*; *marrying mother and daughter*; *adultery*; ravishing or seducing a "virgin betrothed unto an husband" and for such virgin to be a willing victim; for a damsel to enter matrimony without the tokens of virginity; for the daughter of a priest to prostitute herself; man-stealing; smiting or cursing father or mother, or being a stubborn and rebellious son and incorrigible withal. Apostasy of a city is punished with its utter destruction; the inhabitants and the cattle thereof are smitten with the edge of the sword; the city and all the spoil thereof is burnt with fire, to remain an heap for ever, and not to be built again. *Kerith* is the sole punishment of the following offences: Presumptuously to despise the word of the Lord by designedly breaking any of His commandments; non-observance of the ordinances relating to circumcision, to the day of atonement, or to the passover; consulting wizards; counterfeiting the holy anointing oil or the sacred perfume; offering a sacrifice outside the sacred precincts appointed by law; doing any of the three following things while in a state of impurity, viz. to enter the tabernacle of the Lord, to eat of the flesh of the sacrifice of peace, to discharge priestly functions; failure to undergo ceremonial purification after touching a corpse; eating blood, eating the fat of a sacrificial

beast, eating of the peace-offering on or after the third day; to approach unto a woman whilst she is unclean with the catamenial flow; such forms of incest as are not capitally sanctioned; marrying two sisters. In one instance only is mutilation the prescribed public sanction: a woman who commits an indecent assault upon a man with whom her husband is engaged in a fight, loses her hand; whilst two classes of offenders are ordered by Moses to be scourged: the bondwoman betrothed unto an husband who lies carnally with another man, and the husband who wrongfully accuses his newly wedded wife of having entered his house not a maid. That it was for the *goël* to avenge homicide, and that theft merely founded a claim to damages, are well-known facts. Seduction and rape, if the woman was not betrothed unto an husband, were treated as torts, in talmudic as well as in biblical jurisprudence (Rapaport).

The foundations of **Mahometan** criminal law laid in the Korân are meagre in the extreme, and the doctors are not even agreed on the interpretation of the few texts relating to the subject. "The recompense of those who fight against God and His Apostles, and study to act corruptly in the earth, shall be, that they shall be slain, or crucified, or have their hands and feet cut off on the opposite sides, or be banished the land" (Sûra v.). This passage is held to make apostasy a capital crime, forfeiture of all the property of the offender being in the nature of an accessory punishment, and to leave a choice between death and banishment, as alternative sanctions of rebellion, whilst a wider interpretation of the text includes highway robbery and brigandage as crimes in which capital punishment is permissible. Blood-revenge for murder is expressly sanctioned in Sûra ii. The clause relating to theft runs as follows: "If a man or a woman steal, cut off their hands, in retribution for that which they have committed; this is an exemplary punishment

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appointed by God" (Sûra v.). But this punishment, according to the *Sonna*, is not to be inflicted unless the value of the thing stolen amount to four *dinars*, or about forty shillings. For the first offence, the criminal is to lose his right hand; for the second, his left foot; for the third, his left hand; for the fourth, his right foot; and if he continue to offend, he shall be scourged at the discretion of the judge (Sale, p. 78, note *y*). It is, however, only at the instance of the injured party that the sanction is enforced; theft is a tort, not a crime. Punishments are provided for whoredom, drinking, gambling, and similar favourite sports of pre-Islamite Arabia. It is claimed that the Korân originally contained a clause, now missing, which copied the provisions of the law of Moses relating to adultery and substituted lapidation for immuring, the form of punishment customary among the Arabs in pre-Mahometan times (Du Boys, *Peuples modernes*, i. 286). It has, however, been doubted whether capital punishment was ever inflicted in the early stages of Mahometan law (Wellhausen in Mommsen, *Kulturvölker*). In modern Mahometan law the following three crimes are said to be capital: "kufr," a religious offence which appears to include a multitude of sins; adultery and incest, if committed by persons of the "muhsan" class; and murder of a protected Mussulman. Death as the public sanction of the last-named crime has developed, it is said (Goldziher in Mommsen, *Kulturvölker*), out of the ancient practice of blood-revenge. But such progress seems to have been made in the theory of the law only; for, except where the jurisprudence of the Korân has been entirely superseded by the reception of foreign law, retaliation for homicide still flourishes in all Mahometan countries. Rebellion is sanctioned with banishment, whilst scourging is the recognized punishment for adultery and incest, if committed by persons not belonging to the "muhsan"

order, for casting unjustifiable aspersions upon the conjugal honour and fidelity of a respectable Moslem, for drinking wine, and for a number of smaller transgressions. In Persia the criminal law of the Korân has developed into a simpler and somewhat harsher system. There, since olden times, treason, desertion and refusal of military service, apostasy and theft have always been capital crimes (Dareste, *Études*, p. 116); at a subsequent date sodomy was added to the list; and until quite recently a woman guilty of adultery incurred *poenam culei* (Drouville, *Voyage en Perse*, i. 262).

After casting a glance, in passing, at the old Parthians and Armenians, who knew but four public offences, all capital—viz. treason, desertion, refusal of military service and apostasy (Letourneau, p. 400)—we turn to that most venerable system of Aryan jurisprudence, **Hindu** law. The codes which have come down to us belong, however, all of them, to an advanced stage of legal development. For evidence of blood-revenge and compositions we must go back, far beyond the legal sources, to Vedic literature (Kohler, *Indisches Strafrecht*). Already the Ordinances of Menu provide public punishments for practically all the more serious crimes found in modern codes and, in addition, for many not nowadays regarded as crimes. The Hindu penal system is of a most complicated character, the scale of punishments rising, through a number of grades, from gentle admonition to the most cruel death, as by being devoured by dogs, being cut piecemeal with razors. Fines and forfeitures, which always go to the king, and mutilations by loss of the offending part are the favourite forms of punishment; but publicly putting to shame, as by ignominious tonsure, whipping, branding, imprisonment either with or without fetters, and banishment are also liberally employed. The sanction varies not only with the nature of the offence, but also with the caste to which the offender belongs.

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We shall not attempt to compile from the various authorities a complete list of public wrongs with their respective sanctions. Our aim is rather to penetrate through the superimposed strata to the very foundations of the criminal law, and for the accomplishment of this task we shall rely upon the application of a principle which will be found to hold good, within certain limits, of all ancient legal systems, of the principle that the crimes described in a code as the most heinous offences are, in general, those longest visited with public punishments among the people to which the code belongs. Now in Hindu legal literature the system of "the ten crimes" is often mentioned, a heterogeneous group made up of the following offences: disobeying royal edicts, killing females, mixture of castes, adultery, robbery, impregnation by a man other than the husband, defamation, threatening language, violent assault, procuring abortion. This combination of offences is, however, of late date; it is not found either in Menu or in Narada, to whom Oldenberg (in Mommsen, *Kulturvölker*) erroneously attributes it. It is from the first-named source that we learn what offences were regarded as the most serious ones in ancient Hindu jurisprudence. We read in Menu (ix. 235): "The slayer of a priest, a soldier or merchant drinking arak, mead, or rum, he who steals the gold of a priest, and he who violates the bed of his natural or spiritual father, are all to be considered respectively as offenders in the highest degree, except those whose crimes are not fit to be named." This clause occurs in that part of the Ordinances which treats of "Law, private and criminal." A similar passage is found in chap. xi. (section 55), which bears the heading "On Penance and Expiation," with this modification, however, that in the latter text the associates of the said offenders are placed on the same footing as the actual offenders themselves. The greatest sins, then, are the greatest crimes, and the identification of these

two conceptions in Hindu law is further proved by the fact that expiation and punishment are admitted, as appears from Menu (ix. 236), as alternative means of extinguishing guilt. The inclusion of the associates of great offenders in the later text, in contrast to their omission from the earlier one, is likewise characteristic; for whilst they have committed no wrong for which they could be called to account before the temporal tribunal, they have been contaminated by contact with sinners and, therefore, require expiation. It remains to ascertain what are the crimes "not fit to be named." In Menu (xi. 55) the offences enumerated are declared to be "less than incest in a direct line, and some others." Applying to the concluding words of this sentence the *eiusdem generis* rule of interpretation, we presume that some other offences against sexual morality are meant, a construction which would seem to explain the legislator's reluctance to mention them by name. We shall probably be right in filling the lacuna thus left from the Institutes of less prude Narada who states (xii. 73-75) that one who has criminal connexion with any of the twenty-one descriptions of women specified in the text is said to be as guilty as the violator of his spiritual father's bed. There are, however, quite a number of other crimes capitally sanctioned. Menu (ix. 232), for instance, prescribes the death penalty for "such as forge royal edicts, cause dissensions among the great ministers, or kill women, priests or children, and such as adhere to the king's enemies." Strange to say, "for all sacrifices to destroy innocent men, for machinations with poisonous roots, and for the various charms and witcheries intended to kill, by persons not effecting their purpose," a comparatively small fine only was payable to the king (ix. 290). In the absence of any express provision, we presume that if successful, the culprit was punished as for murder. In the case of a she-poisoner, however, Yajnavalkya

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(ii. 279) ordains as the sanction killing by bulls, after previous mutilation. In Hindu law aggravated forms of murder alone were capital crimes; in the absence of circumstances of aggravation, Menu directs "that for killing a man, a fine, equal to that for theft, shall be instantly set" (viii. 296), whilst according to Yajnavalkya (ii. 277), a homicide incurs the highest or the lowest amercement, the commentary of the *Mitaksara* explaining that the judge must be determined, in the exercise of his discretion, by the social position, character, conduct of the victim and similar factors.

Among all the offences known to Chinese law one group stands out in bold relief: Staunton deals with it under the title "Offences of a Treasonable Character," whilst Alabaster calls the crimes comprised in it "The Ten Felonies"; but it seems that the correct translation of the Chinese original would be "The Ten Abominations." They are—

1. Rebellion; defined as an attempt to violate the divine order of things on earth.

2. Disloyalty to the emperor.

3. Desertion and every act that endangers the external security of the state.

4. Parricide.

5. Massacre in the technical sense of murder of three or more members of the same family.

6. Sacrilege, which is committed by stealing from the temples any of the sacred articles consecrated to divine purposes, or by purloining any articles in the immediate use of the sovereign; similar guilt is incurred by counterfeiting the imperial seal, by administering to the sovereign improper medicines, or, in general, by the commission of any error or negligence whereby the safety of his sacred person may be endangered.

7. Impiety, which is discoverable in every instance of disrespect or negligence towards one's parents.

8. Sowing discord in families.
9. Insubordination of inferior towards superior magistrates.
10. Incest.

The *Ta Tsing Leu Lee*, from which the above list, together with the definitions of some of the offences comprised therein, is taken, remarks that the crime is, in each of these cases, "a direct violation of the ties by which society is maintained," thus drawing attention to the distinction between offences of a public nature and offences primarily affecting individuals. The *Ta Tsing Leu Lee* is of comparatively modern date, being first promulgated in 1644. But "the ten abominations" were sharply demarcated from the rest of the criminal law as early as the Tse dynasty (A.D. 550), being then the only offences the punishment for which could not be commuted for a money payment, but had to be actually carried out. Now in modern Chinese law the commutable offences are certainly genuine crimes, and this is true even of those, such as accidental homicide and inflicting personal injuries (Alabaster, 77), in which the fine is payable, not, as in most instances, to the court, but to the injured party or his heirs; for in every case the sanction is enforced, commuted, or remitted, at the discretion of the sovereign. But in origin the system of money payments for wrongs belongs to private, not to criminal, law, and where it is found in a criminal code, the offences to which it applies are later importations. There can be no doubt that the ten abominations are the most ancient, as well as the most heinous, offences known to Chinese law. The crimes comprised in that list fall quite naturally under three heads: offences against the state, offences of a religious character, and offences against the family. It is in connection with the abominations, and in some other offences which show a great affinity to those mentioned in the Chinese decalogue and which, as we

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have seen in the two preceding chapters, are undoubtedly public offences since the dawn of criminal jurisprudence, that the principle of collective responsibility survives. It attained its widest scope under the rulers of the house of Tsin (third century B.C.), when great offenders were executed together, not only with their own families, but with those of their neighbours as well (Andreozzi, p. 35). Soon, however, liability was limited to "the three classes of kindred," viz. the relations of the father, the wife and the descendants. Repeatedly restricted and extended, abolished and re-introduced, the system has struck too deep roots in Chinese law to disappear permanently. Nowadays it reaches its widest extent in the corporate liability of the whole family for the treason of one of its members. The following is the punishment of treason in modern China: the offender himself is to suffer death by a slow and painful execution; all the male relations in the first degree, above the age of sixteen years are beheaded—by "male relations in the first degree" being meant the father, grandfather, sons, grandsons, paternal uncles and their sons. All other male relations above the age of sixteen, however distant their relationship, and whether it be relationship by blood or marriage, are likewise beheaded, provided that they were living under the same roof as the traitor at the time the offence was committed; the male relations in the first degree under sixteen, and the female relatives in the first degree whatever their age, are reduced to slavery; all the traitor's property of every description is confiscated for the use and service of the government. In rebellion and massacre the offender is executed, his property is confiscated; but the members of his family escape with a milder punishment, slavery in the case of the first-named offence, banishment in the latter. The same punishment is inflicted for two other offences, for murder with intent to mangle and divide the body of the

deceased for magical purposes, and for preparing poisons with intent to apply them to the destruction of man. In the former of these crimes capital punishment takes the form of "death by a slow and painful execution," which we have already met with in the case of treason, but which is also the sanction of massacre, parricide, and murder of a husband.

The oldest code of **Japan**, the *Tai-ho ritsu* (A.D. 701), is largely influenced by the law of feudal China. It distinguishes ordinary and atrocious crimes. The latter are plotting and other offences against the emperor, sacrilege, emigration, murder of a near blood-relation or a near relation by marriage, murder attended with certain aggravating circumstances. All these offences are capital, and the nearest relatives of the culprit are condemned with him, deportation being, however, the severest punishment to which they were liable. In the case of atrocious crimes no distinction was drawn between attempt and consummation. They were, moreover, exempted from the operation of a general amnesty. And whilst it appears that up to an unknown date compositions were permitted and even customary for ordinary offences, the code expressly forbids them in the case of atrocious crimes (Daresté, *Nouvelles Études*, p. 303). One part of the punishment of offences of this class, confiscation of the condemned man's property, has not only survived until quite recent times, but has become incidental to every capital sentence (Letourneau, p. 198). Herein lies the rationale of the custom of *hara-kiri*, by which the Japanese nobleman escapes condemnation in order to secure for his family the succession to his property, in exactly the same way as members of the English landed aristocracy, to prevent forfeiture of their estates, often allowed themselves to be pressed to death rather than to risk a conviction by pleading to the charge laid against them.

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The penal code of the **Mongol** state of Jenghiz Khan, the *Ulong Yassa*, reproduces some of the characteristic features of Chinese criminal law. Once again we meet with the distinction between commutable and non-commutable offences. The latter class includes all serious offences against the state and, since the code was made to suit the requirements of a conquering army, against military discipline. Thus treason, rebellion, every act of disobedience, and espionage, are non-commutable, but so is witchcraft too. Capital punishment is also prescribed for three other crimes, homicide, ravishing a married woman, and theft; but in these instances sentence of death cannot be passed unless the accused has been caught in the act or confesses his guilt. Theft was certainly, whilst rape and murder were probably, commutable. The redemption-money always went to the state.

In ancient **Mexico** attacks upon, and overt acts of irreverence towards, the throne or altar were regarded as the most serious crimes. The traitor was flayed and his relatives within the fourth degree were reduced to slavery, whilst in Tlaxcala his kinsmen up to the seventh degree were put to death. Persons guilty of misprision of treason were made slaves, together with their wives and children. The man who usurped the functions of *cihuacoatl*—i. e. chief justice—was executed, his relations within the fourth degree were banished from the realm. In all these cases the culprit's property was forfeited to the prince. To assume the insignia of royalty, to stir up revolt, to assault or ill-treat a minister of state, an ambassador, or an imperial messenger, were all capital crimes. Cowardice in warfare was punished with death, and so were such offences against military law as selling, or accepting ransom from, prisoners of war, or having sexual intercourse with a female captive. To break the peace by a challenge to fight was a capital offence, and it was even forbidden, under pain of punishment, to

carry arms in times of peace. Again, sorcerers and witches who wrought mischief were put to death; strangulation was the punishment of him who sent another to sleep by magic means in order to purloin his property. Poisoners were executed, and so were accomplices who had supplied the poison (Bancroft, *Native Races of the Pacific States*, ii. 459). The priest who broke his vows of chastity was either sentenced to death or banished, his house razed to the ground, his chattels confiscated (Bancroft, ii. 469). The law threatened with capital punishment those who omitted to denounce a priest guilty of so horrible an offence. If a temple-maiden indulged in carnal pleasures, both she and her seducer were impaled, their bodies burnt to ashes and those ashes committed to the winds; she paid with her life even for secretly conversing with a man. The virtue of lay-girls of good family was, however, similarly protected. Death was the fate of the youth who surreptitiously entered a boarding-school for young ladies (Kohler, *Azteken*, p. 98). Indeed, almost all transgression of the rules of sexual morality were capitally sanctioned. So incest, which crime included, in Aztec jurisprudence, the re-marriage of a divorced couple (Kohler, p. 97). So homosexual practices, whether engaged in by males or females; even wearing the dress of the other sex was a capital crime, probably because generally symptomatic of homosexuality. So rape, so adultery by or with a married woman. For the latter offence capital punishment took the form of stoning, whilst in Quaxolotlan the adulteress was eaten. The husband who continued to live with an unfaithful wife was punished, a law conceived, as Kohler remarks (p. 91), in the spirit of the Roman *Lex Julia de Adulteriis*. Ignominious tonsure was the sanction for procuring women for immoral purposes. Drunkenness was also treated as a very serious offence. Ignominious tonsure, demolition of the culprit's house and loss of

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office were the penalty on a first conviction; on a second conviction, sentence of death was passed. Even a single deviation from the path of strict sobriety was a capital crime in the case of priests, noblemen, youths and women. We have not yet, however, by any means exhausted the list of capital offences. For, in addition to those already mentioned, it included abusing, or raising a hand against, father or mother, moving landmarks, using false measures, squandering a patrimony (Letourneau, p. 117, after Clavigero, *History of Mexico*, i.), and, by a law of Moteuhma, even telling a lie (Kohler, p. 100). Again, death was the punishment for aggravated forms of theft, and the circumstance of aggravation might be found either in the place where the theft was committed, as in a temple or market-place, or in the value of the property stolen, *e. g.* stealing gold or silver. At the time of Chimalpopoca (1415–26), the third king of Mexico, the punishment for stealing large quantities of maize was death, for stealing fowls slavery; but dog-stealing was not an offence, “because a dog has teeth to defend himself with” (Kohler, p. 95). Theft was undoubtedly a public crime in ancient Mexico, though a reminiscence of the times when it gave rise to private vengeance only, survived in the procedure of Itztepec, where the owner carried out the sentence of the court. We read that homicide, even of a slave, or of a wife caught by the husband in the act of adultery, was punished with death (L. Biart, *Azèques*, p. 167), nay, that attempts to murder were as severely punished as murder itself (Biart, p. 201). But murder does not deserve to be classed among public offences in Aztec law if Kohler (p. 88) is right in asserting that the family of the victim were at liberty to pardon the murderer and to keep him as a slave in order that he might procure, by his labour, means of subsistence for those deprived of their natural bread-winner. And the same author’s statement (p. 92), that he who killed another

man's slave became himself the slave of the master of the slain slave, impresses such act with a purely tortious character.

The law of ancient **Peru**, like that of ancient Mexico, was written in blood. Our chief authority is Garcilasso de la Vega, and we learn from him that in the code of Pachacutec, the Justinian of the Incas, the following crimes were capital : treason, rebellion, bribing a judge and for a judge to accept a bribe, blasphemy, seeing one of the "chosen virgins," incest, sodomy, rape, abduction, adultery—which was a genuine public crime, but was punished as a species of theft—fornication, parricide, homicide, arson, larceny, to be a loafer. Prescott (*History of the Conquest of Peru*, i. 59. 1847) adds to this list the following offences : moving landmarks, diverting water-conduits, and destroying bridges. Nor was it always the offender alone that paid the price of his misdeeds. An earlier Inca, Capac-Yupangui, had ordered a whole city to be burnt down because one of its inhabitants had committed an unnatural offence. Truly terrible was the punishment which the law of Pachacutec provided for adultery committed by one of the numerous wives or concubines of the Inca. The guilty couple were burnt alive ; their parents, brothers, children, and other near relatives, even their slaves, were put to death ; their llamas were killed. Besides, all the inhabitants of the town where the act of adultery had taken place, were slain ; the town itself was razed to the ground, and not a tree was left standing in the district. Almost as cruel were the legal consequences of sexual incontinence of the priestesses of the Sun. The Inca might, indeed, introduce into his harem any of these "chosen maidens." But if one of them betrayed an amorous inclination for an ordinary mortal, she was buried alive, her lover was strangled, her native city destroyed with all its inhabitants and the site covered with stones.

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The term originally used in **Greek** jurisprudence to denote crime proper was *ἄγος*, literally an abomination, a wrong that demands expiation. This term of art is applied in Greek literature to the following offences: sacrilege, more especially violations of the right of sanctuary, leaving the dead unburied, treason, regicide, and parricide. It was crimes such as these which fell under the cognizance of the Areopagus, the most ancient Athenian tribunal. It exercised a jurisdiction over all offences against the state and the national religion, of which the chief examples were sacrilege, profanation of the mysteries, blasphemy, magic, treason, desertion, delivering into the hands of the enemy a city or a ship. All these crimes were capital; persons convicted of any of them were refused burial in Attic soil, their property was forfeited to the state, and sometimes, particularly in treason by joining the ranks of an enemy at war with Athens, the culprit's children were executed with him. In all these instances the public character of the wrong was apparent from the first, and every citizen, accordingly, might institute criminal proceedings. Other offences were, from an early date, added to the list of public crimes, *e.g.* stealing corn or cattle—the thief, as in Rome, being hanged—ill-treating one's parents, for which crime the sanction was *ἀτιμία* of the highest degree, which was also the punishment of perjury. A law of Dracon gave every citizen the right to kill on the spot a man accused of murder who dared to offer a sacrifice to the gods or to show his face within any of the sacred precincts. But it was not before Solon that wrongs to individuals were treated as matters of public concern. "The best governed city is that in which every citizen feels an injury inflicted upon any other citizen, and prosecutes it with as much zeal as if he had suffered it himself." These are the words, according to Plutarch (*Solon*, 18), in which Solon enunciated the great principle of the solidarity of

society as against the onslaughts of the criminal, a principle to which he gave effect in his system of legislation, and which was subsequently fully recognized in Attic law. This is the spirit of the criminal law at the time of the great orators, and well might Demosthenes say: "A citizen institutes proceedings, but the really injured party is the state." Of the punishments in use in Athens two have already been mentioned, death and *ἀτιμία*. The latter was of three degrees, *ἀτιμία* in the highest degree being generally held to have been equivalent to *mors civilis*. But it really meant much more than this; for not only was it hereditary in character, passing to the descendants of the criminal, but it excluded him and them from the pale of divine, no less than of human, law. Confiscation of property was incidental to all the more severe forms of punishment, to capital punishment, to *ἀτιμία* in the first degree, to slavery, and also to exile, which though technically not a punishment, but a legally recognized mode of evading condemnation, yet had a good many penal consequences. Legal development, so far as known to us, seems to have run a similar course in other Greek cities. It will, therefore, be sufficient to point out a few peculiarities of extra-Attic criminal legislation. In accordance with the pre-eminently military character of that state, cowardice was, in Sparta, one of the most heinous crimes (Thucydides, i. 5). He who took to his heels in battle lost his rights of citizenship; his marriage was dissolved; he had to go about unshaven and clothed in rags; the first comer might thrash him with impunity; he was even under disability to buy or sell. Lycurgus made celibacy a crime punishable with great severity (Plutarch, *Lycurgus*, 15; *Lysander*, 30); and similar provisions were found in the criminal codes of some other Greek cities. The law of Charondas, which constituted, as it were, the common law of Greece (Dareste, *Nouvelles Études*, p. 29), treated wrongs to individuals

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as torts merely, and laid down a scale of compositions as elaborate as any found in the barbarian codes. But it contained also a few rules of criminal law, remarkable mainly for the nature of the sanctions with which they were enforced. Thus sycophants, besides being heavily fined, were ignominiously paraded through the city, wearing crowns of tamarisks. Deserters and those who had sought to evade service in the field were publicly exhibited for three days, attired in women's garments. At a stage of legal development at which even murderers got off with money payments made to the relatives of their victims, such public sanctions are truly notable. "Broad as it was, the Hellenic genius could yet sink to the level of Jewish bigotry" (Letourneau, p. 340) and would punish a town for a religious offence. The best-known instance is the complete destruction of the sacrilegious city of Cirrha and the consecration of its territory to the Pythian Apollo, in execution of a sentence passed by the amphictyony of Delphi.

Of the public offences belonging to the first stage of **Roman** legal history—*i. e.* to the period preceding the Twelve Tables, two stand out prominently and have attracted most attention, *viz.* *perduellio* and *parricidium*. The etymology of the former, which has already been examined, leaves no doubt that its original meaning was treason by adhering to a public enemy at war with Rome, and such adherence would generally be manifested in one of two ways, by *proditio*, or by *transfugium*. The Twelve Tables seem to have dealt with this crime; for Marcian is quoted in the Digest (48, 4, 3, pr.) as saying: "Lex XII tabularum iubet eum qui hostem concitaverit quive civem hosti tradiderit capite puniri." The origin of the word *parricidium* has been a puzzle to philologists ancient and modern. Priscian writes: "Parricida, quod vel a pari componitur, vel a patre; quibusdam a parente videtur esse." Laurentius Lydus, who favours the

latter derivation, is yet in doubt whether the *a* in *parentes* is short or long, in other words, whether killing *τοὺς γονέας*, one's parents, or *τοὺς ὑπηκόους*, subjects or citizens of Rome, be meant. Festus apparently takes the word to be a compound of *par* and *caedes*; for he writes: "Parricida non utique est is qui parentem occidisset, sed qualem-cunque hominem indemnatum," and in support of his contention he quotes a law of Numa: "si quis hominem liberum dolo sciens morti duit, parricidas esto." Modern learning has added a further series of interpretations. According to Mommsen, *parri* stands for *per*, false, wrongful, according to Löning for *perperam*, *parricidium* meaning in either case *caedes iniusta*, unjustifiable homicide. It has also been surmised that the first two syllables represent the Latin equivalent of the Indo-European *pasá*, kin, *paso*, kinsman, Greek *πρός* (Fröhde). Brunnenmeister, who adopts the latter interpretation, holds that the word meant at first killing a *gentilis*, but that Numa's law gave it a wider signification, viz. murder of any freeman. We do not feel competent to judge of the relative merits and demerits of these different etymological attempts, but, on the current interpretations of the term, the crime must have been either parricide, as we understand the expression, or murder of a kinsman, or murder of a free man in general. The latter construction seems to be supported by Numa's law; but our only authority for the existence of such a statute is Pliny (*Hist. nat.* xviii. 3), and even he leaves us in complete ignorance as to the manner in which the capital punishment provided by that law was executed. "It can scarcely have been by a regular judicial sentence, or we should have some record of a change in the law in this respect; for capital punishment was not practised in historical times in (republican) Rome" (Cherry, p. 60). Brunnenmeister is probably right in assuming that the punishment—*sit venia verbo!*—was *deo necari* by the

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proximus agnatus, that is to say, that Numa's law merely sanctioned blood-revenge. Indeed, there is nothing to show that homicide was a public offence in Rome before the Lex Cornelia de Sicariis. Yet parricide must have been a public crime from an early date. For not only do we read in the Digest (1, 2, 2, 23) that the *quaestores parricidii* were mentioned in the Twelve Tables; several crimes of undoubted antiquity were punished, if not as parricide, at least after the fashion of parricide. Thus Cicero tells us (*de legibus*, ii. 9): "sacrum sacrove commendatum qui clepserit rapsitque parricida esto." It is probable that this ancient crime corresponded closely to parricide in the modern sense of the term, that it gradually came to include murder of other near relatives, that in this way its meaning became somewhat vague, uncertain and floating, until at last the Lex Pompeia defined the relatives whose murder was to be punished as *parricidium*. This view is supported, not only by the analogy of Greek law, in which murdering one's parents was a public crime from a very early period, but by the Roman sources themselves. The text attributed to the Twelve Tables, "qui parentem necasse indicatus erit, ut is obvolutus et obligatus corio devehatur in profluentem," is, possibly, not authentic; but Valerius Maximus, after reporting that the *poena culei*, the punishment of the custodian of the Sibylline books who proved unfaithful to his trust, was subsequently applied to the parricide, goes on to say: "Pari vindicta parentum ac deorum violatio expianda est." Unlawful publication of the sacred oracles, parricide and *sacrilegium*—i. e. theft of property dedicated to divine uses—form a group of ancient crimes, the intimate relationship which they bear to each other being proved by the fact that in each case the offender was disposed of in the same manner as the monstrous birth. They all fell under the competency of the *quaestores parricidii*, and so did *peculatus*, theft of

cattle belonging to the state. But we have not yet exhausted the criminal law of royal Rome. To do any act officially declared unlucky was a capital offence: "quaeque augur iniusta nefasta vitiosa dira defixerit, irrita infectaque sunt; quique non paruerit, capital esto" (Cicero, *de legibus*, ii. 8). The Vestal virgin who broke her vow of chastity was buried alive; her seducer was likewise put to death; if a man saw her nakedness, even though quite accidentally, his life was forfeited (Plutarch, *Num.* 10). *Sacratio* of man and oxen was the punishment for ploughing up boundaries: "qui terminum exarasset, et ipsum et boves sacros esse" (Festus, voc. "Terminus"). This is the first of a series of offences against rural property which play a prominent part in the criminal law of the Twelve Tables, though they were probably punished long before the compilation of that code. "Frugem aratro quaesitam furtim noctu pavisse aut secuisse puberi XII tabulis capital erat suspensumque Cereri necari iuebant," writes Pliny (*Hist. nat.* xviii. 3, 12). The provision of the Twelve Tables (8, 9) is believed to have run as follows: "Si impavit in laetam segetem alterius, noxiam sarcito. Si noctu impavit secuitve sciens dolo malo, suspensus Cereri necator." To bewitch a neighbour's crops, whether by day or by night, with intent to blight the harvest, or in order to transfer them to one's own land was a crime likewise expiated on the *arbor infelix*. And if we can believe Servius (commentary to the Virgilian line, "atque mala vites incidere falce novellas"), the same fate awaited him who cut another man's trees or vines. For causing the death of another by magic or by poison—both these kinds of murder are included in *venenum*, the term used, according to Mommsen, in the Twelve Tables—the punishment was death by poison (Pliny, *Hist. nat.* 28, 2 & 4). The same statute provided *fustuarium supplicium* for a form of *iniuria* called in the Twelve Tables *occentare* and *carmen condere*. Now this clause is

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universally held to apply to gross libel and slander by ribald songs; but though those words are undoubtedly capable of such interpretation, we beg to submit that they are used in the text with their older meaning, viz. reciting incantations, so that the crime in question is injuring another by means of magic formulae. The statute also forbade, under pain of capital punishment, nocturnal assemblies in the city and abuse by a patron of his fiduciary position: "patronus si clienti fraudem fecerit sacer esto." There remain certain wrongs for which death is the penalty provided by the Twelve Tables, but which cannot be regarded as public crimes, since it depended upon the injured party whether he wished to enforce the sanction. So false testimony, the acceptance of a bribe by a judge, and bribery at elections, were prosecuted by the citizen prejudiced by the wrong, and it was he who executed the capital sentence (Mommson, *Römisches Strafrecht*, p. 668). The legal nature of arson (Gaius, in Digest, 47, 9, 9) is doubtful. *Furtum manifestum*, which was sanctioned with *verberatio*, followed by *addictio*, and *iniuria*, for which *talio* was the statutory satisfaction, were certainly private delicts, since it was lawful for the parties to compound. During the three centuries which followed the promulgation of the Twelve Tables, the criminal law of Rome remained absolutely stationary, no fresh crime being added to the early code. Individual acts prejudicial to the commonwealth were prosecuted as *perduellio*, till this term became as elastic and as comprehensive as *crimen maiestatis* under the Empire. It was in fact by an evasion of the famous principle of the Twelve Tables, "privilegia ne irroganto," that republican Rome escaped from the inconveniences of its scanty criminal legislation. *Mos maiorum* was invoked whenever a punishment was to be inflicted, without a precedent, for conduct not forbidden by law. This practice was enormously facilitated by the fact that

the *comitia*, the legislative assembly, were alone competent to try a citizen for a capital offence. Every prosecution, as Maine remarks, virtually took the form of a bill of pains and penalties, "the people, guardian of its own majesty, causing the law to speak even when the law was silent" (Du Boys, *Peuples anciens*, p. 364). Maine regards the Lex Calpurnia Repetundarum as the opening chapter of a new era in criminal law. But it was in the numerous statutes which bear the name of Cornelius Sulla that wrongs to individuals were treated, for the first time in Roman history, as public crimes.

Turning now to the ancient codes of the **Slavs**, we find that the oldest Russian law-book, the *Ruskaia Pravda*, sanctions blood-revenge for homicide and lays down a scale of compositions for other wrongs, but contains nothing in the nature of true criminal law. It is in the code of Ivan III, promulgated in 1498, soon after the expulsion of the Mongols, that the notion of a public offence first becomes discernible. The following are the crimes for which it provides capital punishment: treason, for a slave or serf to kill his master, a crime analogous to old-English petit treason, sacrilege, and *podmetzchek*, an offence roughly corresponding to the Roman *furtum oblatum*. Incendiaries and other malefactors caught in the act might be killed on the spot; but this is legalized revenge, not punishment. The *Sudebntnick*, practically but a new edition of the former code, published by Ivan IV in 1550, admits murder to the list of crimes. In the Servian code of Stephen Dushan, which is two hundred years older than the *Sudebntnick*, homicide is treated as a public offence, being punishable with a fine if unpremeditated, with the loss of both hands if premeditated (art. 66). For certain aggravated forms of murder capital punishment is provided; hanging for the murder of a prelate, priest or monk, burning alive for murdering father, mother, brother or child (art. 69).

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Under the statute of King Otho of Bohemia (1229) the murderer must pay blood-money, varying in amount with the rank of the victim, to the relatives of the latter, unless the crime has been perpetrated in open court, when the assassin is at once sentenced and beheaded. Dalmatian law is obviously in a stage of transition. The traitor receives punishment at the pleasure of the prince, who has altogether a very wide discretion in criminal matters. The sanction for most offences consists in fines payable to the prince, who, in some instances, must hand over a moiety to the community. There are, however, cases in which the injured party takes part, or even the whole, of the money paid by the wrongdoer. Thus the composition for homicide goes to the family of the slain man, the prince having no claim to any portion thereof.

The primitive **Germanic** catalogue of crimes has already been quoted on the authority of Tacitus. Of the five categories of offences mentioned by him only the last requires some explanation. The term *corpore infames* is generally believed to refer to those guilty of filthy sexual practices. But this interpretation runs counter to the well-established fact that it was only under Roman and Christian influences that carnal offences became punishable among Teutonic peoples. We feel tempted to make the suggestion, which is certainly supported by the literal meaning of the words in question, that they apply to monstrous births, to cripples, and generally to individuals afflicted with conspicuous bodily malformations. Tacitus's list appears, however, to be incomplete; for there is good reason to assume that sacrilege and black magic were capital crimes from the first (Brunner, *Rechtsgeschichte*, i. 175), and sorcery, in pagan times, included poisoning (Wilda). But if the Edda, a compilation of a comparatively late date and largely influenced by Christian ideas, is relied upon to substantiate the claim, advanced for instance by Loiseleur (p. 108), that false testimony in a

capital cause was coeval, as a public offence, with those enumerated in the *Germania*, such assertion is preposterous and untenable. In the most ancient Teutonic sources themselves a group of offences, technically called *nithings-works*, stands out in bold relief. They were the only genuine crimes of the period and were all capitally sanctioned. Their distinguishing feature was that the perpetration of the misdeed at once branded the actor as a base, worthless creature; for either breach of faith or stealth was a necessary ingredient in every one of them. The following are said to have been comprised in the original list, or to have been assimilated to *nithings-works* at an early date: treason, whether committed against the king or against the nation, desertion, sacrilege, murder by magic or by poison, killing in violation of a higher peace—*e. g.* that of the *thing*—killing hostages, murder of husband by wife, and vice versa, parricide, murder of other near relatives or of an inmate of one's own house, concealed murder with secret disposal of the body, murder after accepting composition and after taking a solemn oath to keep the peace, killing a man in his sleep, secret theft. Christian morality has been responsible for the addition to the list of *waltraef*, which meant at first spoliation of a warrior fallen on the battlefield, later of a dead body generally, particularly after burial. It is, however, impossible to say whether all of the misdeeds enumerated, and if not all which of them, were in olden times genuine crimes. For the transition from *nithings-weorc* to bootless offence has been very gradual and imperceptible, and, as applied to wrongs against individuals, the term "irredeemable," at any rate on the Continent, appears to have meant no more than that an unwilling party could not be compelled to accept a money compensation, if offered. It may safely be asserted that, taking the *leges barbarorum* as a whole, true punishments are provided for a very limited number of misdeeds only,

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the following alone being treated everywhere as "death-worthy": serious political crimes, such as treason, sedition, desertion, fleeing the country, plotting against the duke, offences of a religious character, magic practices and poisoning, which is looked upon, even in Christian times, not as a species of murder, but as a peculiarly dangerous form of sorcery, and is generally co-ordinated with bewitching cattle and crops; it is noteworthy that in the Anglo-Saxon texts *mordhaed*, *mordweorc* does not mean murder, but poisoning punished on account of its supposed connection with the black arts, as practised in pagan times. Only in isolated instances are offences against individuals treated as public crimes, theft being occasionally, homicide hardly ever, among the exceptions. Saxon law alone among the systems of purely indigenous growth often punishes where other codes provide compositions. Elsewhere a more developed criminal law is found only where Roman notions and Roman rules of law have been adopted, as among the Langobards, the Burgundians and the Visigoths. Generally, wrongs to individuals only founded a claim to compensation, and in the case of irredeemable offences it rested entirely with the injured party whether or not to accept a composition. Nay, even where outlawry was the sanction, it depended originally upon the victim or his family whether the malefactor should regain his peace, so that outlawry cannot be regarded as punishment, but merely as a form of procedure adopted in order to compel the wrongdoer to come to terms with the aggrieved party. By the capitulary legislation of the Merovingian and Carolingian periods the criminal code was considerably enlarged. Highway robbery, man-stealing, theft, homicide, forgery, coining, incest, rape were successively added thereto, many of them being placed under ecclesiastical jurisdiction, as were a number of religious transgressions which the capitularies had erected into public crimes,

Charlemagne going so far as to threaten with punishment those who ate meat in Lent. But this golden age of criminal jurisprudence was of short duration. With the decline and ultimate collapse of the Frankish monarchy it fell into decay. Compositions again took the place of public punishment, and throughout the lawless middle ages the weak and poor alone paid with their bodies for their misdeeds, whilst the powerful avenged with a strong hand the wrongs they had suffered and wronged others in defiance of the law. This was the condition of things in the German Empire till with the *Carolina* effective criminal legislation was revived. In England the germs of the criminal code are to be found in the bootless offences of the Anglo-Saxon laws. "If any one plot against the king's life, of himself, or by harbouring of exiles, or of his men, let him be liable in his life and in all that he has." Thus runs the first criminal enactment (Laws of King Alfred, 4). Another law of Alfred imposed death as the penalty for fighting in the king's hall if the offender was taken in the act. Athelstan (4) made plotting against a lord a capital offence and sanctioned *walreaf* with outlawry, the latter provision being reproduced in *Leges Henrici I* (c. 83, par. 3) in the words: "weilref wargus habetur." A law of Ethelred (vii. 9) enacts "that if any one fight in a church, or in the king's house, then let all he possesses be condemned, and let it be in the king's power whether he have life or not." In the laws of Cnut (ii. 65) we read: "Housebreaking, and arson, and open theft, and open morth, and treason against a lord are by secular law bôtless," an enactment repeated in *Leges Henrici I*, with the addition of "effraccio pacis ecclesiae vel manus regis per homicidium." Breaking the king's peace is mentioned in nearly all the laws, and it need hardly be pointed out that it has become the corner-stone of the whole edifice of English criminal law.

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Our survey of the provisions of ancient codes has made it abundantly clear that the notions which inspired the criminal law in its cradle, have survived into comparatively high stages of its evolution. Offences of a religious character continue to occupy a prominent place, and the desire to wash away the pollution of sin still is, in some system at least, the dominant factor in punishment. Of Hindu law, for instance, it has been truly remarked (Wake, ii. 216) that the test of wrongfulness is impurity instead of the reverse, as modern ideas of morality would lead us to believe. "As fire consumes everything with which it is brought into contact, so the guilt-substance, by its natural operation and by the operation of demons in which it is embodied, brings suffering and death not only to the guilty person, but to whomsoever it clings to;" so Oldenberg (Mommsen, *Kulturvölker*) sums up the conception of guilt in Vedic thought. When Moses prescribes punishment for great criminals, he generally concludes his ordinance with some such phrase as this, "so shalt thou put evil away from the midst of thee," or "from among you," or "from Israel." It is quite in keeping with such views that examples of collective responsibility, sometimes embracing all the inhabitants of the town of which the culprit is a citizen, are found in practically all archaic legislations, that his house, if not the whole of his native place, is razed to the ground, never to be rebuilt, that his movable property is withdrawn from commerce. The Institutes of Menu (ix. 243, 244) direct: "Let no virtuous prince appropriate the wealth of a criminal in the highest degree; for he, who appropriates it through covetousness, is contaminated with the same guilt: Having thrown such a fine into the waters, let him offer it to Varuna; or let him bestow it on some priest of eminent learning in the scriptures." We see that Hindu priestcraft has anticipated the papal *non olet*. Holiness is an antidote to the virus of sin,

and, instead of being destroyed, the criminal's chattels may be devoted to divine uses. This is the meaning of *consecratio*, and "*publicatio* is but a degenerated *consecratio*" (Du Boys, *Peuples anciens*, p. 252). So in later Roman law, when the treasury of the state had taken the place of a deity as the destination of the offender's confiscated property, the proceeds thereof and the fines imposed in criminal causes were spent in the construction or decoration of temples, or in providing public games in honour of a god (Livy, x. 23, 33, 47; Pliny, *Hist. nat.* 33, 4). Animals, no less than men, are defiled by being made participants in crime, and, especially in cases of unnatural offence, they are very generally killed along with the human culprit, or alone whilst the latter is banished, as in Norwegian law, or awarded arbitrary punishment in the discretion of the judge, as in Mahometan law. Fear of magic persists in undiminished strength, and, as before, the organized force of the community is directed towards the repression of the wizard and of his fellow-worker, the poisoner. More than ever is sexual morality enforced by penal sanctions. Unnatural offences come to be regarded, almost universally, as most atrocious crimes, and rape, seduction, adultery, and even simple fornication assume, more and more frequently, the character of public wrongs. Treason has now acquired a wider meaning. It is no longer necessary, in order to incur punishment, to make common cause with a foe engaged in warfare with one's country, or to commit a serious breach of martial law; at this stage the internal security of the state is guarded as jealously. Plotting against the sovereign or against the established order of government, rebellion, sedition figure prominently in all the codes, emigration and leze majesty in some of them. No longer, however, are offences against invisible powers and attacks directed against the social organism itself the sole concern of the criminal law. In the course

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of legal evolution, as traceable in the codes of ancient civilizations, avenging justice descends from its ethereal heights and commences to take notice of injuries suffered by the individual citizen. But strange to say, wrongs to property are punished long before wrongs to the person; theft has become a public crime at a period when the manslayer is still face to face with the family of the slain man alone. Slowly and painfully the criminal law begins to safeguard by public sanctions the life of the subject, at first only lives regarded as specially sacred, then ordinary lives temporarily enjoying a special protection; but it is not till a high cultural level has been reached that the sacredness of human life *in abstracto* is recognized in criminal legislation.

The causes responsible for the successive accretions to the criminal code supply the key to the meaning of punishment at different epochs in social history. Factors too numerous have been at work to allow of a detailed examination of each of them. No doubt the application of the fundamental notions to new fields has in itself led to a considerable expansion of criminal law. We may, for instance, be sure that the motive for the punishment of drunkenness in Mahometan, in Chinese and in Mexican law arose within the sphere of magic conceptions, alcohol, like other poisons, being credited, on account of its peculiar action, with supernatural properties. Again, by extensive interpretation new classes of acts were brought under the definitions of original crimes. Legal fictions have been resorted to from the infancy of the criminal law and have proved valuable expedients for furthering its growth. Among the Hurons, we read (Steinmetz, *Ethnologische Studien*, ii. 343), people who, for one reason or another, became a nuisance to the village, notorious thieves, adulterers, disturbers of the domestic peace of their neighbours, those who intermeddled with other people's affairs, persons who engaged in suspicious correspondence with strangers, were accused of possessing the evil eye or of

practising the black arts. Similarly, Neuhaus calls the accusation of sorcery "the Kaffir state machinery to get obnoxious subjects out of the way." Both among the Red Indians and among the African Negroes we may distinguish, to use modern legal phraseology, between real and constructive sorcery, the latter covering a miscellaneous assortment of misdeeds which have nothing to do with sorcery, but are, by legal fiction, prosecuted and punished as such. We have already seen how Roman jurisprudence stretched the sense of the term *perduellio*, which originally meant adherence to an alien enemy, till it covered every act prejudicial to the state, and how *mores maiorum*, precedents purely fictitious, were appealed to in order to justify the punishment of wrongs not provided for in the criminal law. Regard for the welfare of the commonwealth was here undoubtedly the impelling force. Public policy may utilize the penal code to protect the citizen from harm in circumstances in which he is incapable of protecting himself effectively. The punishment of nocturnal offences, the same wrong, when committed in the light of the day, going unpunished, may, perhaps, be so accounted for, though the fact must not be overlooked that he who works in darkness, or in the dark, is suspected of using, or of co-operating with, the powers of darkness. The severity of Teutonic law on *nithingsweorc* admits of a similar explanation. But the principle in question certainly underlies the punishment of theft in Mexican law, where dog-stealing is not an offence "because a dog has teeth to defend himself with." Among all the influences, however, which have helped to promote the growth of criminal law, three have been mainly instrumental in shaping the course of its development. They are—

1. The Evolution of Religion,
2. Kingship,
3. The Institution of Peace.

CHAPTER IV

THE INFLUENCE OF RELIGIOUS EVOLUTION ON THE EVOLUTION OF PUNISHMENT

As mankind advances from savagery to barbarism, and from barbarism to civilization, the spirit-world assumes more and more tangible shape, till at last the featureless phantoms which are primitive man's objects of veneration have been transformed into such clearly cut anthropomorphous deities as inhabit the Olympus and the Valhalla. The religions of ancient civilizations have their sources in hero-worship and Nature-worship. But whether in origin ghosts of former leaders of men or deified powers of Nature, the gods are now brought into intimate relation with the national life of their worshippers; they become guardians of their morals and guarantors of their corporate welfare. It is easy to see how a departed chief or ruler continues to evince a profound interest both in the conduct and in the welfare of his people. In the moralization of the Nature-gods the conversion of magic into religious conceptions must have played an important part. Among the lower races, we have seen, certain wrongs, offences against sexual morality in particular, are believed to cause, in some unexplained supernatural way, failure of crops. At a higher cultural level, when the fruits of the land are looked upon as the bounty of Mother Earth, Gaea, Tellus, Demeter, Ceres, a bad harvest comes to be regarded as the visible sign of her anger, the act which kindles her wrath, as a sin against that deity, and the virtue of which such act is a violation,

as one of her special attributes. Thus Vesta, who in origin is but the Earth-Mother under another name, becomes the goddess of chastity.

It is still only offences against themselves which the gods avenge. But the gods are no longer the self-centred, selfish beings that do not easily take offence unless their own material comforts are interfered with. They have identified themselves with the community in which they dwell, share in its aims and aspirations, are concerned about its fate, and feel as an injury to themselves every act prejudicial to the public weal. The god of war leads his earthly hosts into battle; the enemies of his followers are his enemies, and he who makes common cause with the foe is not only a traitor to his people, he is a traitor to the war-god as well. Offences against the external security of the state, which were, perhaps, crimes before they were sins, now become sins as well as crimes and are henceforward punished because they are sins. It would not, however, be correct to assert in general terms that offences against society are converted at this stage into offences against the gods. Society is an abstract idea which the untrained mind of races just emerging from barbarism is hardly capable of forming; and only where the danger of an act to the commonwealth is so obvious as, for instance, in joining an alien enemy, does the notion of a crime against the state immediately arise. It is in the common worship of the national gods that a people first discovers its national unity and becomes conscious of its corporate existence. Even attacks upon established government and the constitution of the state are conceived, in the first instance, as acts of impiety against the national deities, as partaking of the nature of sacrilege. In ancient Greece and Rome such notions survived well into the classical period, and writers never hesitate to describe conspiracies against the republic as plots against the religion of the state. "Rebellion," says the *Ta*

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Tsing Leu Lee, "is an attempt to violate the divine order of things on earth"; that is to say, a purely political offence is explained by reference to things divine. It is quite true, the anger of the gods is but a reflex of the indignation which a course of conduct excites in the minds of their worshippers; to be obnoxious to a higher being, it must first be obnoxious to man. But its moral valuation upon earth is not sufficient of itself to annex to the act a penal sanction. The human judgment must be confirmed and ratified by the heavenly tribunal before it can find expression in a rule of criminal law.

To become enforceable by punishment, then, a rule of conduct must make a return journey to the abodes of the immortals. The ascension escapes the observation of men; its coming down to earth remains deeply engraven in their minds and gives birth, before long, to the belief that the law is divinely revealed. This is an article of faith common to all peoples of archaic culture. Twice did Thoth, the Trismegistos of the Greeks, the personification of divine intelligence, visit Egypt, bringing down with him on both occasions the law to be obeyed by its inhabitants, and the sacred books of Hermes were its code of laws until the latest period of its history. Brahma taught the laws to his son Menu in a hundred thousand verses, which Menu explained to the primitive world in the *Dherma-Sâstra*. Jehovah dictated the law to Moses, Allah to Mahomet. Themis, the assessor of Zeus, was the source of those early dooms which were older than law and made law. Minos had learnt from Zeus the laws which he gave to the Cretans; inspired by Minerva, we are told by Valerius Maximus (i. 2), Zaleucus became the legislator of Locri. Similarly, Lycurgus, Numa, and other ancient lawgivers claimed that their systems emanated from a divine source. It is not, therefore, without good cause if Plato opines that to disobey the laws means to disobey the gods.

The offended deity still turns in his anger, not only against the individual offender, but against the state in which the wicked act is perpetrated or tolerated. The idea that a single citizen may by this impiety bring utter ruin on the whole of the nation, is one particularly slow to die. When the statutes of Hermes were mutilated, enlightened Athens went in fear and trembling lest the sin of the one be visited on all. The preamble of a Bâle statute against cursing and swearing, dated 1490, recites as a fact of experience that "God avenges such wickedness upon mankind with many secret punishments and divers public calamities, such as wars, famines, deaths, hailstorms, frosts, and bad harvests." The great problem to be faced, then, is how to avert the catastrophe which threatens the people. The priests were naturally called upon to appease the divine wrath, and they thus became the first judges in criminal causes. The belief that the law was divinely ordained, further strengthened the sacerdotal monopoly and proved a formidable obstacle to the secularization of the criminal code; for the sacred texts were in the keeping of the priests, who alone had access to their mysteries and became their sole interpreters. Indications of the intimate relationship in which dispensation of criminal justice stood to the discharge of sacerdotal functions, are, accordingly, found in the early records of most ancient peoples. We learn from Aelian (*Var. Hist.*, lib. xiv., c. 34) that in Egypt the tribunals entrusted with jurisdiction over causes which concerned society and public order were chosen, from the remotest antiquity, from among the priestly order—the priestly colleges of Memphis, Thebes and Heliopolis sending ten members each to the supreme court. Among the Hebrews, though the judiciary was secular (Exod. xviii. 21) and elective (Deut. xvi. 18), the supremacy of the priesthood in criminal matters is expressly recognized (Deut. xvii. 8, 12); moreover, every judge is God's representative on

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earth (Deut. i. 17), and the court is, for this reason, in several passages (Exod. xxi. 6, xxii. 8, 28; Deut. xix. 17), called *elohim*. In Hindu law criminal jurisdiction appertains to the king, but it is a function of an essentially religious character; for, in punishing the guilty, "he performs, as it were, a perpetual sacrifice," "each day a sacrifice with a hundred thousand gifts" (Menu, viii. 303, 306). Among the Teutons the administration of punitive justice, both in war and in peace, was the prerogative of the priests. "Ceterum neque animadvertere neque vincire neque verberare quidem nisi sacerdotibus permissum, non quasi in poenam, nec ducis jussu, sed velut deo imperante, quem adesse bellantibus credunt" (Tacitus, *Germania*, c. 7); and again, "sacerdotes quibus tum" (*i. e.* at the *thing*) "et coercendi ius est" (*ibid.*, c. 11). In Gaul the Druids were the supreme judges in criminal, as well as in civil, causes. The gods themselves invested the Athenian Areopagus with its judicial powers, as we learn from the *Eumenides* of Aeschylus, where the traditional history of the origin of that most ancient criminal court is given at length. Historical evidence that in olden times the punishment of criminals fell within the province of the priest, is afforded by the fact that when the sovereign powers of the king were divided among the nine archons, the duty of conducting the preliminary inquiry in criminal matters and of presenting the case to the Areopagus devolved on the second archon who succeeded to the supreme pontificate. The priest appears to have been the sole judicial organ of ancient Etrurian society. But already in the opening chapters of Roman history the temporal power is seen invested with criminal jurisdiction, that of the college of pontiffs being restricted to certain religious offences committed by members of ecclesiastical corporations, the Vestal Virgins for instance. Yet though the king alone pronounced on the guilt or innocence of an accused person,

the pontiff was the necessary adjunct of secular justice. For the sentence did not become effective till, by the terrible formula of the *sacratio*, he had given it its supreme sanction, and it was he who carried it into execution.

Not among the Romans alone did the execution of criminals form part of the official duties of the priest. Savage communities, we have seen, in order to escape the vengeance of the spirits, put the offending member to death or expel him from the tribe. At the stage now under review the belief gains ground that the surest way to appease the ire of the deity is to offer up to him the individual that has incurred his displeasure. Capital punishment thus assumes the form of a human sacrifice, the immolation of the victim naturally devolving on the priesthood. The term *devovere* is applied, in Exod. xxii. 19, to the execution of sinners; in 2 Sam. xxi. 1, 9 we are told how seven of Saul's sons were hanged "before the Lord" that the famine might cease with which Jehovah had visited upon the people the guilt of Saul and of "his bloody house." "The Hebrew *cherem*," says Prof. Kuenen (*Religion of Israel*, i. 290 *seq.*, quoted in Westermarck, i. 439), "is properly dedication to Jahveh, which in reality amounted to destruction or annihilation. The persons who were 'dedicated,' generally by a solemn vow, to Jahveh, were put to death, frequently by fire, whereby the resemblance to an ordinary burnt-offering was rendered still more apparent." Polytheism, in its evolution, assigns to each deity the control of a special department of human activities, and the criminal is sacrificed to the particular god whose sensibilities he has hurt by his misdeed. Thus in ancient Mexico the man who stole gold or silver vessels was flayed and offered up to Xipe, the patron-god of the goldsmiths (Bancroft, ii. 458). Thus in Rome certain forms of theft of agricultural produce were an outrage on Ceres, to whom the thief paid the penalty on the gallows, whilst the son

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wanting in filial piety was sacrificed to the penates. Nowhere, indeed, is the original connection between public punishments and human sacrifices more apparent than in the criminal law of ancient Rome. The oldest Latin word for punishment itself is *supplicium*, a term derived from the posture of the victim, when about to receive the fatal blow, thus affording unmistakable proof that the law at first knew no other than capital punishment, and that the latter was sacrificial in character. Again, sentence of death was called *sacratio*, and “*sacratio*, like the Greek *ἀνάθημα*, meant the deliverance of a person to a deity” (Mommsen, *Römisches Strafrecht*, 901), the criminal being always dedicated to the god against whom he was supposed to have sinned, by some such formula as “*sacer esto Jovi Capitolino*,” “*sacer esto Diti*.” Hence a convicted criminal was *homo sacer*; “*homo sacer* is est quem populus iudicavit ob maleficium” (Festus, voc. *sacer mons*), and a criminal statute is called *lex sacrata*: “*sacratae leges sunt, quibus sanctum est, qui quid adversus eas fecerit, sacer alicui deorum (sit), sicut familia pecuniaque*” (Festus, *ibid.*). Quite apart from the knowledge to be gained from these terms of art, sufficient information relating to the details of the execution is furnished by the authorities not to leave any doubt that it was carried out with sacrificial rites. From the veiling of the head to the descent of the hatchet every step was accompanied by mysterious formulae, of which a few have come down to us, and the whole procedure was “a faithful reproduction of the immolation of an animal” (Mommsen, *op. cit.*, 918). Like the *sacratio hominis*, the *consecratio bonorum* was effected by means of a complicated religious ceremonial. If the incontinent Vestal was buried alive, the intention was to offer her up in the flesh to Tellus, the goddess against whom she had sinned. Among the Teutons criminals were not merely executed, but sacrificed to the gods. In Scandinavia, at any rate,

they were beheaded or had the spine broken on the stone of sacrifice, or were drowned in a sacred pond; there, as elsewhere, the rope too was regarded as a sacred instrument (von Amira, *Zweck und Mittel*, 58, 59; Maurer, *Bekehrung des norwegischen Stammes*, ii. 195, 196). The capital jurisdiction of the Swedish *blodgodars* was founded on the immolation of the offenders, which formed part of their sacerdotal functions (Du Boys, *Peuples modernes*, i. 64). The Lex Frisonum provides (*Add.* iii. 12): “qui fanum effregerit et ibi aliquid de sacris tulerit, ducitur ad mare, et ibi in sabulo, quod accessus maris operire solet, finduntur aures eius et castratur et immolatur deis quorum templa violavit.” There is evidence that the Franks sacrificed to the gods thieves previously convicted (Brunner, *Deutsche Rechtsgeschichte*, i. 175). In Gaul the punishment of criminals was to be burnt alive in honour of the gods; “supplicia eorum, qui in furto aut latrocinio aut alia qua noxia sint comprehensi, gratiora dis immortalibus esse arbitrantur; sed cum eius generis copia deficit, etiam ad innocentium supplicia descendunt” (Caesar, *de bello Gallico*, vi. 16).

But is the sinner always an oblation acceptable to the gods? To force upon them an unwelcome gift would mean to add insult to injury. In some cases the form of punishment employed is such as at once to leave the deity his choice, *e. g.* where the offender is exposed in a leaky skiff or sent to sea in a rudderless boat. In other instances, as among the Western Teutons (Brunner, in Mommsen, *Kulturvölker*, and *Deutsche Rechtsgeschichte*, i. 176, ii. 468), the divine will was ascertained by means of an ordeal which preceded the sacrificial act. This is not the ordinary ordeal, which is evidentiary in character and serves to test the guilt or innocence of an accused person. Here the culprit is already convicted before the deity is appealed to, the sole object of the appeal being to discover whether the god will receive him as an offering.

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The same idea underlies the provision met with in more than one ancient system of law, that a criminal is to be pardoned if one or more attempts to execute him have miscarried. The Scottish *Regiam majestatem*, for instance, enacts (iv. 18): "Si latro suspensus fuerit et postea cadat de furca, quietus erit ulterius de furto." From the results of the ordeals rules would be evolved in course of time defining with precision the classes of offenders whose blood the deity will, or will not, accept.

If the gods raise no claim to the head of the culprit, it does not follow that he escapes scot-free. A sacrifice offered and rejected does not appease the divine wrath. To avert the calamities with which the offended god would otherwise avenge himself on the state, the accursed person must be got rid of. But it is not enough to expel him from the city and to exclude him from his native soil. Those bonds must be formally broken which, in the sight of the deity, make him one with his people. At this stage, accordingly, excommunication, the religious isolation of the offender, becomes the dominant idea in exile. The exact meaning of the Hebrew *kerith* is a matter of speculation and of dispute among the learned; but under whatever further disabilities the sinner who had incurred that punishment may have been labouring, so much is certain that he was "cut off from the presence of the Lord" (Lev. xxii. 3), "cut off from among the congregation" (Numb. xix. 20). In Hindu jurisprudence interdiction is a sanction applied with the avowed object of preventing the community contracting the contagion of guilt from great criminals who refuse or fail to undergo the prescribed purifications and expiations. Funeral rites are performed for the sinner, as if he were dead. A pot of water is overturned, and the words at the same time uttered: "I deprive N.N. of water." The person so excommunicated is henceforth precluded from all intercourse with the pure (Oldenberg, in Mommsen, *Kulturvölker*).

Both in Rome and in Greece exile was not looked upon as a punishment. "Exilium non supplicium est, sed perflugium portusque supplicii. Itaque nulla in lege nostra reperietur, ut apud ceteras civitates, maleficium ullum exilio esse multatum," says Cicero (*pro Caecina*, 34); and the same is true of the Greek *φυγή*. Yet in either country the quasi-voluntary abjuration of the realm was followed by a solemn exclusion from the religious cult. In the well-known *aquae et ignis interdictio*, "aqua" meant the lustral water, "ignis" the sacrificial fire (Festus). Similarly, the Spartan exile was cut off from that fire (Herodot., vii. 231), and Sophocles (*Oedipus Rex*, 229, 250) has preserved for us the terrible formula pronounced against the Athenian fugitive from justice: "Let him flee the country and never again enter the temples. Let no citizen speak to him nor receive him; let none allow him to join in his prayers or sacrifices. Let no man offer him the lustral water." "He who took meat or drink with him, or merely touched him, must purify himself, says the law" (Plato, *leg.* ix.). We have mentioned in the preceding chapter that *ἀτιμία* in the highest degree meant *interdictio sacrorum* as well as *mors civilis*. It is remarkable that both in Rome and in Greece exclusion from the community was a necessary preliminary to the execution of a capital sentence; the ties which bound the offender to society had to be formally severed even before death finally broke them. The act by which the Roman convict was "a republica eiuratus" was certainly of a religious character; "lex horrendi carminis erat," says Livy. It is probable that the erasure of the name of the condemned Athenian from the list of his *demos* had, originally at least, a similar import. The outlawry of druidic Gaul was excommunication pure and simple; the criminal was excluded from the sacrifices, with results described by Caesar (*de bello Gallico*, vi. 13) as follows: "Quibus ita est interdictum, ii numero

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impiorum ac sceleratorum habentur; ab iis omnes decedunt, aditum eorum sermonemque defugiunt, ne quid ex contagio incommodi accipiant, neque iis petentibus ius redditur, neque honos ullus communicatur."

Immolation and excommunication of the offender are undoubtedly the most effective means, but they are not the only means, of placating an irate god. The transgression may be of a venial character, and expiatory rites are then sufficient to rehabilitate the wrongdoer in the eye of the deity. The idea of substitution suggests itself at an early date, and the scapegoat takes his place on the altar of sacrifice. The goodwill of the god may be recovered by liberal offerings, or lustration may be resorted to, to wash away the impurity of guilt. We thus arrive at the distinction between wrongs which rouse the divine wrath to such a point that nothing but the blood of the culprit or his removal from the community can avert a calamity, and wrongs which may otherwise be atoned for, in other words, between sins which are, and sins which are not, crimes. It is not always the gravity of the offence that makes the difference; a competing right or a competing duty may preclude a sin from attaining to the dignity of a crime. Herein lies the reason why homicide is so late in finding a place in the criminal code. The primitive view is well expressed by Mrs. Eastman, who says (*Dacotas*, p. 65): "When murder is committed, it is an injury to the deceased, not a sin against the Great Spirit." Whilst the savage regards homicide as nothing but a tort to the slain man to be avenged by the family of the latter, the progress of moral evolution has erected it into an offence against the national gods as well. But the right of the victim to be avenged and the right of his relatives to avenge him, hallowed as they are by immemorial custom, stand in the way, for long periods of time, of the claim of the deity to the head of the offender. The belief thus arises that to appease the divine anger

nothing more is required than for the assassin to undergo ceremonial expiation, or that the community is safe if he leaves the country till the miasma of sin has become sufficiently dilute to be cleansed away by purificatory rites.

“Ah! nimium faciles, qui tristia crimina caedis
Fluminea tolli posse putatis aqua.”—OVID: *Fast.* i. 2.

Though homicide, then, is a sin, private vengeance prevents its becoming a sin heinous enough to call for public punishment. Where the custom of revenge does not enter into competition, the gods demand and get their pound of flesh. Murder committed in the bosom of the family excites no reaction on the part of the other kinsmen, and parricide, accordingly, becomes a crime at a comparatively early date. But even within the sphere of crime proper there is room for expiatory measures other than punishment. A death-worthy offence has been committed; the culprit has escaped or is unknown; a public sacrifice or some other purificatory ceremony is required to propitiate the deity and to remove the taint from the people. In the face of damning proof of his guilt Publius Horatius is acquitted by the *comitia*; the gods have been deprived of their due, and atonement has to be made for the city (Livy, i. 26). In these instances ritual purgation is in the nature of a penal substitute resorted to where the infliction of punishment is either impracticable or inexpedient. There are, however, systems of ancient law in which other modes of conciliating the offended god are recognized as equivalent to public punishment, with the result that the criminal who has made his peace with the unseen powers can no longer be called to account in the tribunals of the state. Before the Spanish conquest of Mexico, the Aztecs, once in the course of their lives, confessed and were absolved by their priests. This religious absolution had a legal effect;

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once granted, it was held to extinguish all crimes previously committed and criminal liability even to the temporal power. Long after the conquest, Indians charged with crimes would hand to the court certificates of confession from their curates and would plead absolution in bar of criminal proceedings (Prescott, *op. cit.*, Introd. i. 54; M. Chevalier, in *Revue des deux Mondes*, t. ix. livr. 15, Mars 1845). Moreover, every four years at the Tezcatlipoca feast, a general remission of sins was proclaimed, which, probably, afforded a complete protection against prosecution for past offences and operated as a general amnesty besides (Kohler, *Azteken*, p. 84). According to Islamitic doctrine, repentance manifested by the voluntary appearance of the culprit before the imam or before the *cadi* effaces his crime in the sight of God. And since social justice has no rights against a man other than those which it holds of God, it ought not to proceed against him whom Allah himself has forgiven. In Hindu jurisprudence penance and expiation mitigate temporal punishment even for the most heinous offences. "On such of those four, as have not actually performed an expiation, let the king legally inflict corporal punishment, together with a fine" (Menu, ix. 236). But "criminals of all the classes, having performed an expiation, as ordained by law, shall not be marked on the forehead, but condemned to pay the highest fine" (Menu, ix. 240). The recognition by the state of the equivalence of ceremonial practices and punishments appears perfectly rational if we remember the principle which, at this stage, governs public punishment itself. It is inflicted with the sole object of warding off such public calamities as are expected to result from the wrath of the god offended by the crime. If the latter has been appeased by other means, it would be gratuitous cruelty to make the culprit suffer. The essence of punishment lies in the protection of the community, and not in the infliction of an evil

upon the person that undergoes it; and though the public sanctions in use, viz. death and exile, are obviously felt by him as evils of the first magnitude, such effect is merely accidental, and not at all intended. In this view the ancient theory of punishment and the modern doctrine of social defence meet.

For long periods of time the idea survives that the state is collectively answerable to the gods for the crime of any one of its citizens. When at last it gives way to the recognition of individual liability, to the principle that the wrongdoer alone is responsible for his misdeeds, the belief that punishment is divinely ordained has struck roots too deep to lose its hold upon the mind of man. The state, in striking down malefactors, is now looked upon as fulfilling a divine mission. Social punishment has been divested of its utilitarian character and has become a blind instrument of divine justice. The vengeance of the gods is fearful in proportion to their might, and their lieutenants on earth, not to be remiss in the discharge of their duty, faithfully copy the divine original. Whilst, before, punishment never overstepped the limits prescribed by the necessity of accomplishing a definite object, its harshness and cruelty now knows no bounds. Moreover, the scope of the mandate is extremely wide, the powers of the agent being sometimes conceived as coextensive with those of the principal. Punishment then is no longer circumscribed by the capacities for suffering of the criminal as a finite being; the soul itself becomes vulnerable by the sword of public justice. Thus the true end of the Chinese punishment of death "by a slow and painful execution" is to destroy the future, as well as the present, life of the offender, to prevent his existence either as a man or as a recognizable spirit. Again, criminal legislation is no longer content to prescribe the sanctions to be enforced in this world; it determines the punishments, too, which the transgressor is to suffer after death,

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sometimes, as in the Ordinances of Menu, with a casuistry bordering on the grotesque. The close assimilation of social to divine justice and the idea that the magistrate, in punishing offenders, acts, not merely as the delegate, but as the plenipotentiary of the deity upon earth, also account for the belief that temporal punishment is a complete atonement for sin as well as for crime. "Men who have committed offences, and have received from kings the punishment due to them, go pure to heaven, and become as clear as those who have done well," says Menu (viii. 318). Similar notions underlie the teaching of the medieval Church that the body of the heretic must be consumed by flames if his soul is to be saved from eternal damnation.

CHAPTER V

THE INFLUENCE OF EARLY KINGSHIP ON THE EVOLUTION OF PUNISHMENT

THE constitution of primitive communities is purely democratic, the chief being, at the best, *primus inter pares*. In the course of evolution, however, the powers of the latter constantly grow, till a stage of despotic rule is reached in the history of most progressive communities. Now, a people whose infancy has been nurtured in an atmosphere of self-government can never entirely forget its past, cannot grasp the idea of absolute authority residing in the hands of a mere mortal, but persists in regarding omnipotence as an attribute of its deities alone. As soon, therefore, as the chief or king becomes invested with unlimited powers, he necessarily ceases to be human and is raised to the dignity of a god. In Loango the king is called *samba* or *pongo*, *i. e.* god. In the Sandwich Islands he is the incarnation of the deity (Vaccaro, *Genesi*, 54). Among the Natchez the chief was regarded as a superhuman being (Letourneau, 51, quoting Charlevoix); the rajahs whom the tribes of the Kuchis obey, have sprung from a divine stock (Dalton, *Ethnology of Bengal*, 293); in the theocratic kingdom of Tibet the monarch is a divine personage, reputed immortal. In Polynesia "the chief is believed to be made of material superior to that out of which simple mortals are fashioned" (Letourneau, 58); "the high position of the prince being expressed in a number of ceremonies, putting him on a

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level with the gods ” (Ratzel, i. 291). The same hieroglyphic symbol expresses kingship and divinity ; so completely assimilated to the gods was the Egyptian Pharaoh, “ the living image of Ammon ” (Thonissen). The Hindu king was formed “ of eternal particles drawn from the substance of Indra, Payana, Yama, Surya, of Agni and Varuna, of Chandra and Cuvera. And since a king was composed of particles drawn from those chief guardian deities, he consequently surpasses all mortals in glory. . . . He is a powerful divinity, who appears in a human shape ” (Menu, vii. 4, 5, 8). In the Middle Kingdom the emperor is venerated as “ the Son of Heaven ” and is the recognized mediator with Heaven, his father. No less pretentious were the claims of the Mikado. The Inca, “ the Son of the Sun, ” governed from on high the mortals, his subjects. The Aztec ruler was descended from the gods, a god himself, well able to control the forces of Nature ; and it was, therefore, quite in the fitness of things that, when taking the coronation oath, he engaged, *inter alia*, to cause the rain to fall at the proper season, to give his land good harvests, and to prevent floods (Antonio de Solis, *Conquista de Mejico*, i. 494). To the Greeks the king was not exactly a god, but, at any rate, “ the man most powerful to conjure up the wrath of the gods ” (Sophocles, *Oedipus Rex*, 34), a sacred being—*βασιλεῖς ἱεροί*, says Pindar,—“ the man but for whose intervention no prayer was efficacious, no sacrifice acceptable ” (Fustel de Coulanges, p. 208). Similar notions underlay primitive kingship in ancient Rome ; and when after more than four centuries of republican government all political power became once more concentrated in one hand, the Caesars had, by a transparent fiction, to become *divi*, had either to be deified in their lifetime, or, at any rate, to be clothed with an indefeasible claim to posthumous apotheosis, if a foundation, comprehensible to the subject, was to be found for their autocratic rule. So indissoluble has

proved the association, in the human mind, of unlimited power with divine beings. "Where religion is too advanced for the actual deification of the king, as in Western Europe, he may yet be God's representative" (Hobhouse, i. 62). When, therefore, on the ruins of the feudal structure the new despotism raised its head, the doctrine of the divine right of kingship was coined, and "the king who could not be God Himself proclaimed himself at least God's vicegerent" (ibid.). Even a Filmer could find no better apology for the absolutist pretensions of the Stuarts.

The immediate consequence of the bestowal of divine honours upon the monarch is that every act of rebellion against his authority, every mark of irreverence to the throne assumes the character of sacrilege. In Polynesia, to speak disdainfully of the prince or of his government was a sin so heinous that nothing short of a human sacrifice could atone for it (Ellis, *Polynesian Researches*, iii. 123). Under Chaka, the Kaffir ruler, every sneeze or clearing of the throat in the tyrant's presence was punished with death, and so was every dry eye at the death of a member of the royal house (Ratzel, ii. 444). He who made a disparaging remark about the Inca incurred capital punishment as for blasphemy (Letourneau, 105, quoting Zarate, *Pérou*, ii. 71). In the Greek city-states, during the monarchical period, treason against the king was called *ἀσέβεια*. The Digest (lib. xviii., tit. 4. 1) explicitly states that *crimen maiestatis* is assimilated to sacrilege. In the Byzantine Empire the technical term for this offence was *καθοσίωσις* (Mommsen, *Römisches Strafrecht*, 540).

We have seen that in the early phases of social development acts specially apt to provoke the anger of one of the deities are punished as crimes. When once the sovereign has taken his seat among the immortals, conduct obnoxious to him naturally tends to acquire the same legal character. At first but one god among many, he

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becomes, before long, the only one that has to be reckoned with in the sphere of criminal law. For the will of other supernatural beings, whether a mere echo of man's own moral impulses or revealed through signs and wonders, is discovered by their worshippers in an indirect and circuitous fashion, is divined rather than ascertained, and, therefore, but imperfectly known. The commands of the man-god, on the other hand, are uttered in no uncertain voice and in a language intelligible, not only to a priestly aristocracy, but to the humblest subject. And whilst the mills of other deities grind slowly, the divine ruler in his wrath strikes instantly, promptly, sharply. So a stage is reached when the whole criminal code is reduced to one single offence, revolt against the king's omnipotence. The intrinsic differences between the various forms of wrongdoing disappear; for they constitute all alike overt acts of leze majesty, and disobedience to the command of the prince is the sole ground of punishment. Thus the ancient Peruvians "said that a culprit was not punished for the delinquencies he had committed, but for having broken the commandment of the Ynca, who was respected as God" (Garcilasso de la Vega, *Royal Commentaries of the Yncas*, bk. ii., ch. 12). The same theory formed the basis of Japanese criminal law (Montesquieu, *Esprit des lois*, vi. 13).

When the despotic ruler has taken the place of the gods as the fountain of punitive justice, criminal law threatens to break away from current morality. For while the will of the other deities vaguely, it is true, yet on the whole faithfully, reflects the social valuation of human conduct, the sovereign, "un être à part au sommet de l'édifice," is less than they are imbued with the traditional sentiments of the community, less influenced by popular feeling, a law unto himself in his splendid isolation. Criminal law thus ceases to be evolved out of the soul of the people and acquires the character of a

command imposed upon it from without. Again, it is no longer transgressions of the law alone that are visited with punishment. The royal oracle issues not only decrees general in their tenor, but specific commands for particular occasions as well, and to disobey an order given *ad hoc* is to revolt against the authority of the absolute master quite as much as to break one of the rules promulgated by him. Nay, every act distasteful to him, whether previously forbidden or not, becomes an occasion for the infliction of punishment. As the caprice of the prince henceforth stands for the law of the land, so judgments and sentences are entirely governed by his will and pleasure. And whereas the gods were satisfied, as a rule, with the blood of the offender, the tyrant gloats over the sufferings of him that has incurred his displeasure. The answer which Tiberius gave to the wretch who, in the midst of his tortures, prayed for the finishing stroke, "How dare you think that I am already reconciled with you?" faithfully portrays the mental attitude of the despot towards criminals.

In the preceding chapter we have learnt that in the common worship of the national gods a people becomes aware of its existence as a nation. But it is in the person of the prince that the organized force of the community first takes tangible shape, that the idea of the state becomes incarnate. The king, as the personification of the state, is not, however, at this stage differentiated from the king as an individual being, divine or human. Thus offences against the established order are conceived as directed against the concrete person of the ruler, and other crimes are punished as acts of disobedience to his personal will; in either case the affront, though to a person in authority, is to him personally. This erroneous identification of two radically different aspects of the king has powerfully stimulated the growth of criminal law. The train of thoughts which culminated in the

practical recognition of the maxim, "L'état c'est moi," was, no doubt, considerably facilitated by the fact that the divine ruler was naturally regarded as the absolute owner of the land and of all that is thereon, a notion which survived long after the monarch had laid down the mantle of the god. Among the Natchez everything belonged to the chief, men and things. In New Zealand the prince was undisputed eminent proprietor (Letourneau, p. 57). In the legal language of Java theft is called "crime against the king's property," unlawful wounding "wounding the king" (Waitz, i. 444, 445). Among the Mongols, Pallas reports (*Nachrichten über die mongolischen Völkerschaften*, i 194), a man who takes another by the hair is punished, not for having done that person a wrong, but because the hair belongs to the king. In Japan, cutting or maiming a subject is wounding the prince, or regicide (Spencer, *Principles of Sociology*, ii. 522). And similar views were entertained in Dahomey, in Morocco, in Abyssinia, in Persia, and elsewhere (see instances quoted in Post, *Anfänge des Staats- und Rechtslebens*, 123-125; *Afrikanische Jurisprudenz*, i. 115-118; Bastian, *Rechtsverhältnisse*, 152). Where the subjects and all their belongings are chattels of the prince, wrongs to the person and wrongs to property alike become infringements of his proprietary rights, in the first instance torts merely which he avenges in exactly the same manner as an ordinary citizen would avenge an outrage to himself. But since the monarch disposes of the whole force of the state, of resources infinitely greater than the mightiest of his subjects, his vengeance is both boundless and irresistible, descends upon the culprit like lightning from the clouds, whilst his unlimited powers and his exalted position render him proof against retaliation, even after he has been divested of the sacrosanctity of a god. In vindicating his own rights, the king incidentally vindicates the rights of his subjects, and the seeds are

sown of that cardinal doctrine of criminal law that offences against individuals may be public wrongs. We now clearly perceive the reason for the historical fact, often commented upon, that criminal law is slow to grow upon republican soil. Even a people of the legal genius of the ancient Romans did not arrive at the notion of an injury to the state through an injury to the individual till the republic had ceased to exist in everything but in name. Again, the king's jurisdiction is at first looked upon in the light of a private right, the share which he takes in the composition, as a reward for his trouble in adjusting the quarrels of his subjects, in the light of a personal perquisite. The portion appropriated by the monarch steadily grows, till in the end he claims the whole, with the result that, before long, the act which engenders the liability to make payment comes to be regarded as a wrong to the sovereign, the fact that it ever was a wrong to the subject sinking into oblivion. Civil jurisdiction is thus superseded by punitive justice, the crime has merged the tort. And finally, it may already here be remarked that a violation of the king's peace, which is the foundation of English criminal law, was originally conceived as an insult to the king personally, which it was for him to avenge.

What are now public wrongs were, then, in the early stages of monarchical government private wrongs against the prince which he avenged, and at first avenged with his own hand. In Central America (Bancroft, *Native Races*, i. 770), in Polynesia (Post, *Anfänge*, p. 275), on the banks of the Gaboon (Letourneau, p. 71, after P. Barret) and of the Congo (Post, *Afrikanische Jurisprudenz*, i. 257) and in other parts of the Dark Continent (*ibid.* i. 113, 114) the chief himself carried out the sentence, and where he delegated this function to one of his subjects, the official so entrusted with the vindication of his honour and of his rights became "not in form only the chief

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dignitary of the court" (Ratzel, ii. 547). At any rate, it is for the ruler to determine whether his authority has been defied, whether his rights have been infringed; it is he who judges the accused person. And so the doctrine shaped itself, which has become a constitutional maxim of the modern state, that the sovereign is the fountain of justice, that justice emanates from the king. Again, the caprice of the despot is the sole measure of vengeance to be wreaked upon the offender. In the language of feudal criminal law, the wrongdoer is "in ducis potestate," "in manu regis," "in misericordia regis," "dans le mercy du seigneur." But since the king alone is supposed to be prejudiced by the offence, he, as the aggrieved party, is of course at liberty to waive his remedy and to remit the sanction. In this view is to be found the historical origin of the right of pardon as a prerogative of the crown. A pardon might be granted either freely or *sub modo*; that is to say, the sovereign could impose terms as a condition of his consenting to forego his right of revenge. Absolute rulers were not slow to perceive how easily the exaction of penalties could be converted into a source of income, and whenever the royal treasury threatened to become exhausted, new offences would be coined with a view to replenishing the exchequer. In this way the penal code grew by leaps and bounds; fines and forfeitures became prominent among public sanctions, and what we now call criminal law proved a valuable patrimony of the crown. So deeply rooted was the idea that offences are violations of the personal rights of the monarch and that he had an individual interest in their repression that in different parts of the world the king could only punish crimes committed during his own reign. So in Cambodia, so in ancient Wales. The lawlessness during an interregnum in the Holy Roman Empire bears witness to a similar doctrine, and in England, up to the accession of Edward II, the king's peace was in abeyance from

the death of one sovereign till the coronation of his successor.

At last the sovereignty of the crown dissociates itself from the individual rights of the ruler, and the punishment of crime becomes an attribute of the former. Those acts and forbearances which formerly were in the nature of personal obligations to the king, now become duties which the subject owes to the state. Criminal law has become nationalized. But absolutism leaves behind a new principle of punishment, the principle of determent. Monarchical justice is nowhere a lenient one and often resorts to savage cruelties in repressing trespasses against the ruler. For it is the consciously adopted policy of the despot to strengthen his authority, to protect his rights and to safeguard his interests by striking terror into his subjects.

CHAPTER VI

THE INFLUENCE OF PEACE ON THE EVOLUTION OF PUNISHMENT

AMONG the Slavs the administration of justice was one of the forms of worship of Prowe, the god of justice and of peace. Slavonic mythology thus aptly symbolizes the great historical truth that the desire for peace was the main cause which led to the establishment of courts of law. The nascent state dealt exclusively with its own affairs and did not include among its functions the repression of wrongs between individual and individual, between family and family, between clan and clan. If, later on, it began to evince an active interest in these matters, it was because the custom of revenge, with its never-ending blood feuds, was a constant menace to public order and sapped the strength of the young commonwealth. In their conflicts with other societies those communities were sure to prevail and to survive which, unweakened by internal strife, offered a compact and united front to attacks from without. At first the public authority is content to act as mediator, intervening either of itself or at the instance of one or the other of the contending parties, in order to adjust their quarrel and to settle the amount of compensation. A share is claimed by the state as a commission for its trouble in bringing about a reconciliation between the parties (Kemble, Maine), or, perhaps, as the price payable by the malefactor either for the opportunity which the state secures for him

of redeeming his wrong by a money payment (Wilda), or for the protection which it affords him, after he has satisfied the award, against further retaliation on the part of the man whom he has injured (Henke). That this is the original meaning of the Germanic *fredus*, *fredum*, *fretho*, of the Anglo-Saxon *wite* or *fridesbôt*, and that the desire to penalize the offender was not the end with which these payments were exacted, is proved by the fact, among others, that where the parties came to terms and settled their differences without invoking the aid of the public authority, the latter never demanded a portion of the compensation privately agreed upon. The subordinate character of the fine which goes to the state is rendered apparent by the provision met with in many Teutonic sources, and particularly in the northern codes, that where both *bôt* and *wite* are due, the former shall always be paid first, so that where the property of the wrongdoer does not suffice to satisfy both claims, the victim shall get his damages. The aim of the law was clearly to assuage the passions of the latter lest the public peace be disturbed. In a few isolated instances fiscal interests prevailed and the parties were forbidden to compound without the intervention of the tribunals. So the Grâgås enacts that in the case of graver injuries the agreement of the parties shall be subject to the ratification of the courts; without the authority of the *all-thing* the parties shall not compound for homicide and large wounds. But as a general rule the community, far from insisting upon the co-operation of its organs in the conclusion of the bargain, is only too glad if its members succeed in amicably settling their differences. It is to prevent bloodshed and violence that the state first steps in of its own initiative, and jurisdiction becomes compulsory when the aggrieved party is forbidden to avenge himself upon his adversary until the merits of the case have been investigated by the public authority. Even then the proceedings have the

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character of a civil suit, their object being to determine whether the plaintiff is entitled to his remedy. But the victim is not bound to come into court as long as he is willing to pocket the affront; and if he fails to take action nobody else will. Indeed, the law does not start with forbidding those acts which we now call crimes, but addresses its command to and threatens with its sanction the man who, in avenging a wrong, contravenes its provisions. The first legislative acts which deal with disputes between citizens restrict in various ways, in the interest of the peace of society, the right of revenge, by narrowing the circle of persons entitled to exercise it (e.g. *Ruskaia Pravda*), by prescribing a time limit to its exercise (Grâgâs), by requiring the avenger to give preliminary notice to a government official (Japan), or publicly to proclaim his deed as soon as it is consummated (Grâgâs, *Lex Ripuaria*, *Decretum Tassilonis*), or first to establish his right before the organs of the state (Laws of Alfred). In the end private revenge is altogether forbidden. It may still be left to the person prejudiced by an act of illegitimate revenge to set the law in motion and to enforce the sanction, which may consist in higher *bôt* or in twofold *weregild*. Finally, however, the state itself brings to justice the man who wreaks vengeance in violation of the law. To inflict even the most grievous injury upon another is still regarded at this stage as a mere tort; but to take the law into one's own hands, and to retaliate upon the aggressor in an unauthorized manner, is treated as a breach of the public peace and punished accordingly. In other words, unlawful self-redress, not crime in the modern sense, is visited with penal sanctions. As Henke rightly remarks, "among barbarous peoples the function of the judge is not to strike the offender, but to protect him against the vengeance of his victim."

The desire for peace, then, has been the impelling force which caused private vengeance to be superseded by

jurisdiction, and to that extent it has been operative, as an organic principle in legal evolution, among all races that have emerged from barbarism; but it must be clearly understood that primarily it exhausted its function in the generation of civil law. Among the Teutonic peoples, however, peace as an institution has undergone a peculiar development and has a history of its own, closely associated with the origin and rise of criminal law. In olden times liability to bear the feud of an adversary was the natural state of things, immunity from his vengeance, peace, an exceptional condition, intimately connected with the religious life of the people. The *thing* was held at the time of the high festivals in a place which one of the deities had chosen for his abode. Divine worship and sacrificial rites formed as important a part of the programme as the transaction of public business. Before the proceedings were opened, the priests cast lots to ascertain whether the gods favoured the meeting, and invoked their blessing on the assembly, at the same time proclaiming the "peace of the *thing*." The army was led by the god of battles; it was preceded by divine emblems, brought forth from the depth of the sacred woods, and was accompanied on its march by the priest, the guardian of the "peace of the army." The peace which reigned throughout the land during sowing and harvest time seems to have had an economic rather than a religious basis and was, accordingly, less sacred than the former two. Whilst the peaces hitherto mentioned were all temporary in character, certain localities were permanently protected. The peace of the sacred woods and of the pagan temples was transformed, after the Germanic tribes had been converted to Christianity, into the peace of the church. In his own house every man, even the *homo fidosus*, the malefactor, enjoyed the same immunity; his house was indeed his castle, and in the language of the Norsemen, in which *grid* denoted both

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peace and house, the close association of the two ideas in the minds of our forefathers has become crystallized. "The peace of the house was probably founded on religion" (Wilda). The protection which it afforded extended beyond the actual homestead and covered an area around it varying in circumference with the rank of its owner and reaching its maximum in the case of the king. "The king's presence," writes Palgrave (*Rise and Progress of the English Commonwealth*, i. 284), "imparted peace, not only to his residence, but to a considerable district around it. Three miles, three furlongs, and three acre-breadths, nine feet, nine palms, and three barley-corns, constituted the mystical radius of the verge, which was reckoned from the town or mansion where the king held his court; and within this ambit the protection by royalty was to remain unviolated." The king's peace, then, was not of a purely local nature, not only an attribute of the royal palace. It emanated from the king's person, enveloping all around him in an atmosphere of peace, and followed him wherever for the time being he happened to take up his abode. Nor is the king's peace the only peace with a personal aspect. The heathen priests, and later the Christian clergy, were sacrosanct. And as between ordinary citizens immunity from violence could be secured by agreement, by a peace sworn in solemn form.

A breach of the peace was in the first instance an atrocious wrong to the person in whom such peace was vested, and founded a claim to damages. So if a man were treacherously attacked by an adversary who had pledged himself to keep the peace, he could exact *bót* from the latter. The owner of the house was entitled to compensation for violence done to his guest whilst under his roof. And if a man were slain in his own dwelling, twofold *weregild* was payable to his family. A public peace conferred a right to peace on all the inhabitants, severally, of the district in which it reigned. In the Isle

of Gothland the highest peace was therefore known even in Christian times as "all men's peace," and the personal operation of public peace is well brought out in *manhælg*, the term of art for it in the Scandinavian sources. *Bôt* and higher *weregild* were the sanctions enforceable at the suit of the person prejudiced by its violation, and process of outlawry lay against the recalcitrant malefactor who refused to fulfil his obligation. In so far as a public peace was hallowed by religion, its breach was a deadly sin and would be treated as such by the community; the culprit was sacrificed to the offended deity, or, if the god rejected the offering, he would be expelled and driven into the forest. It is a moot question whether a breach of a peace purely secular in character was ever visited with punishment before the king had become the depository of the peace of the people. We read, indeed, of outlawry in connection with this subject, and many authorities of high standing hold that it was a genuine public sanction, founded upon the principle of retaliation, he who has disturbed the peace being himself deprived of its blessings, the man who violates the law being put outside its pale. But it is not quite clear whether outlawry for breach of a secular peace was in use, at this stage, for any other purpose than as a means of enforcing the claim of the individual thereby wronged. Again, it is said that the commonwealth, as being the party interested in the preservation of the public peace, exacts a fine from the wrongdoer in the same way and upon the same principle as the individual demands damages for breach of a private peace; and *fredus*, *wite*, it is claimed, is nothing but the fine thus payable to the state. But we have already seen that, according to the better opinion, this does not appear to be the original meaning of these terms.

The king's peace, we have found, was at first partly personal and partly local. In either aspect it was a purely individual right vested in the ruler, infringements of

which gave rise to a claim analogous to that which the subject could enforce against the man who broke the peace of his dwelling-house, with this difference, however, that by reason of the king's exalted position the sanction was incomparably more severe and often entirely in the discretion of the monarch. Thus the laws of Ine enact (art. 6): "Si quis in regia domo pugnet, perdat omnem suam hereditatem, et in regis sit arbitrio, possideat vitam aut non possideat." And similar provisions are found in the Laws of Alfred (art. 7), of Etheldred (vii. 9), of Canute (art. 60). With the growth of royal power the sovereign became, among all Teutonic peoples, the guardian of the public peace, the peace of the king as an individual blending with the peace of the king as representative of the state. In this process of amalgamation the national peace was assimilated to, and absorbed by, the older king's peace and was thus converted into a personal right of the monarch. Feudalism, which clothed the ruler both with a personal, quasi-contractual right over his subjects and with a quasi-proprietary right over the land comprised in his dominions, materially helped to bring about this confusion. Nowhere was the national peace, after the king had become its protector, so completely divested of its public character as among the Anglo-Saxons. In this, as in so many other instances, however, an apparently retrograde step has marked the dawn of an era of progress. But if the peace of the people, in being converted into the king's peace, ceased to be *publici iuris*, it did not for that lose its religious flavour. We read in *Leges Henrici I* (c. 81) of *pax Dei et domini*, and it was *treuga Dei* which Maximilian I proclaimed throughout the Holy Roman Empire. A breach of the public peace could not now fail to be looked upon as a contempt of the king for which he would demand satisfaction, a view firmly established in this country about the beginning of the tenth century (Stubbs, *Constitutional History*, i. 183). Compensation being at that period the

regular mode of atoning for injuries, the sanctions for violations of the king's peace generally assumed the form of fines and forfeitures; and since the court-fees for adjusting quarrels between subjects likewise found their way into the royal treasury and came to be regarded as personal perquisites of the king, the difference between the two classes of payments seems to have become obliterated, and the terms *fredus* and *wite*, deflected from their original meaning, were now applied to both indiscriminately. The king's peace was not at first, any more than the peace of the folk had been, an institution either universal or permanent. Soon, however, the monarch acquired the privilege of proclaiming his peace in any particular locality, independently of his presence, and of conferring it as a favour upon particular persons. Especially frequent were the occasions when he bestowed it, for a consideration, on persons who had got into trouble, and thus afforded them his protection against the vengeance of their neighbours. It was under the Conqueror that the whole of this country was for the first time put under the king's peace (Hallam, *Middle Ages*, ii. 427), and a proclamation to the same effect was henceforth regularly made at the accession of each new king and remained in force during his reign. The consequences were great and far-reaching; for it now became an offence against the crown for any one, at any time and in any place, to commit an act of violence within the realm. The royal courts were established to enforce the king's peace, and before these the sovereign prosecuted as personal insults breaches of his peace. This, according to both Bracton and Britton, was the original meaning of Pleas of the Crown; to avenge the affront to the king remained for a long time the object of procedure by indictment. Where a breach of the king's peace was at the same time a wrong to the individual, the suit of the subject had priority to the sovereign's right of proceeding by indictment. But wager of battle being an incident of

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private prosecutions, the subject was, as a rule, only too glad to forgo his remedy in favour of the king's suit, and appeals for crimes other than homicide rapidly fell into desuetude. In the time of Edward I some violence was still essential to constitute a wrong a breach of the peace, and so a plea of the crown. But soon afterwards the practice grew up for the injured party, in order to escape liability to trial by battle, fictitiously to allege that the offence was committed "*contra pacem domini regis*," an averment which the accused was not allowed to traverse, even though there was no suggestion of violence having been actually used. It is not possible here to trace at length the evolution of the king's peace in this country; to attempt to do so would mean to write the history of English criminal law. To such an extent was a breach of the king's peace the very essence of a crime that, until a recent statute (14 & 15 Vict. c. 100, s. 24) altered the law, an indictment was bad if it omitted the words "against the peace"; for without this phrase it was held not to charge any offence. "Why was this? The real reason was that the averment that every offence was 'against the peace,' which in turn had become a mere formality, was originally the real statement of the crime with which the accused was charged" (Cherry, p. 94). In the end the king restored to the state what had originally belonged to the people, and he restored it right royally with hundredfold interest. The king's peace became once more the national peace, a peace richer in content, wider in scope, fuller in meaning than the old peace of the folk had been. What had been offences against the king are now public offences, and it is as head of the commonwealth that the sovereign prosecutes criminals.

That proceedings instituted with a view to the preservation of the peace were prompted by utilitarian motives need hardly be mentioned.

CHAPTER VII

CONCLUSIONS

THE results of our inquiry into the origin of punishment may be summed up in the following theses—

1. It is not true that in the beginning there was but one law in which the germs of civil and criminal jurisprudence lay undifferentiated. Civil and punitive justice are not, therefore, comparable to a double trunk growing from the same root. They arise from independent sources and resemble two rivers which run in parallel beds, the one at certain points of its course sending tributaries to the other.

2. Revenge is the source, not of punishment, but of rights to redress for wrong enforceable by civil action, to damages in kind or in money, of private, not of criminal, jurisdiction. When the courts first interfere in quarrels between subject and subject, they merely decide whether a tort has been committed for which the plaintiff is entitled to exact revenge or pecuniary compensation. In the case of certain wrongs liability to the aggrieved individual is later supplanted by, but not transformed into, punishment.

3. Public indignation certainly finds expression in a passionate reaction of society against wrongdoing. But there is no evidence to show that punishment proper has to be fathered upon mob-law.

4. Penal legislation has often been made to serve the particular interests of the ruling classes or of a victorious political party. But history gives the lie to the assertion

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that punishment was in origin a weapon forged by an aristocracy of conquerors with which to defend their privileges against the onslaughts of the conquered masses.

5. Nor is the position tenable that the state acquired criminal jurisdiction as the inheritor of the disciplinary powers of the *paterfamilias*, that the domestic tribunal has served as model to the criminal courts of the state. The analogy between parental correction and public punishment has been a late discovery, the theory of reformation, which is its fruit, arising within the same range of ideas as the doctrine of paternal government.

6. The acts first punished as crimes were such as imperilled, or were believed to imperil, the safety of the community, either by jeopardizing its security from external foes or by exposing it to supernatural dangers, to the vengeance of the spirit world, to the risk of contracting the pollution of guilt, to public calamities resulting from the quasi-mechanical operation of those occult forces which the deed sets in motion. Fear, then, has been the root-feeling in the genesis of criminal law.

7. Destruction of the offender, possibly with all that is his, and expulsion from the commonwealth are the oldest forms of punishment, the end with which it is inflicted being in either case the elimination from society of him who is a source of danger to it as long as he remains in its midst. Punishment is in origin a measure of social hygiene. The suffering which the application of the sanction involves is accidental, not intended, and is not consciously made to exceed the amount necessary for the accomplishment of the object of punishment.

8. Factors innumerable have helped to erect upon such meagre foundations the imposing structure of criminal jurisprudence. Three of them, however, have exercised the most decisive influence upon the course of its development, viz. the evolution of religion, the rise of kingship, and the institution of peace.

9. In the primitive conception of crime a religious element is predominant, and it was through the religious associations with which they were hallowed that even the two last-named agencies were brought into contact with criminal law.

10. Whilst the spirits whom primitive man worships are completely absorbed in their own affairs, advancing religious thought and feeling converts the national gods both into guardians of national morality and into the legislators of their people. Conduct obnoxious to man is now punished as being obnoxious to the deities, and immolation and excommunication of the culprit become the orthodox modes of averting from the state the wrath of the offended god. When at last moral evolution replaced collective by individual responsibility, the religious aspect of crime was too deeply embedded in the mind of man to be uprooted all at once. Henceforth the state, in punishing criminals, acted, not in self-defence against a supernatural danger no longer existing, but in the fulfilment of a divine mission; and boundless as the wrath of the deity itself are the sufferings which the state inflicts in the name of the outraged god.

11. Clothed with divine honours the king enters the arena of primitive justice. Disobedience to his command is sacrilege. At first but one god among many, he becomes before long the only one that has to be reckoned with in the sphere of criminal law. The law now flows exclusively from his will, and every act of transgression is an act of revolt against his omnipotence. This view persists even after the despot has lost his divine halo. He then appears invested with two sets of rights, those which belong to him as an individual and those which he enjoys as head of the state. Early political thought fails to perceive the fundamental difference between these two classes of rights; they blend completely, and the monarch thus becomes the main channel through which notions

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primarily belonging to private law find their way into criminal jurisprudence. Every offence is now regarded as an insult offered to the king personally, and is avenged by him in the same way as the subject avenges injuries suffered. The ruler is not slow to discover that one of the most effective means of safeguarding his interests is to strike terror into his subjects, and the principle of determent manifests itself in those horrible mutilations and refined cruelties characteristic of the penal system of absolutism.

12. The first fruit of the desire for public peace has been the establishment of civil courts. The conduct of the man who refuses to submit his case to their jurisdiction, and persists in taking the law into his own hand, more than any other stultifies the efforts of the young commonwealth to preserve order by suppressing strife and bloodshed. Unlawful self-redress is, therefore, the first wrong visited with public sanctions in the interest of public peace. Peace was at first a temporary condition proclaimed on special occasions or an attribute of particular localities or of certain persons, or classes of persons. Where kingship rises above the level of primitive chieftaincy and develops into either absolutism or feudal sovereignty, the ruler is generally clothed with a peace of his own. Among the Teutonic peoples, the Anglo-Saxons in particular, the king's peace gradually absorbed all other peaces. Still, it continued to be looked upon as a personal privilege of the monarch, which in its evolution ran through the same developmental stages as other personal rights of the king.

13. The community first punishes those acts only which prejudice its own security or bring about public calamities, *i. e.* offences against the state and offences against religion. Not till a comparatively late date does the notion arise of an injury to the state through an injury to the individual. In the birth of this idea moral and religious influences may

have had a share. Concern for the peace of society undoubtedly led to the suppression, by means of public punishments, of acts of violence as between citizen and citizen. But the king, who in vindicating his own rights incidentally became the champion of the rights of his subjects, has certainly been the principal medium through which public sanctions were annexed to acts which before had been treated as private wrongs only.

14. Punishment has been from its cradle utilitarian in character, " a display of the power of society in the service of social self-preservation " (Merkel). Primitive commonwealths sought to attain their object by the elimination of the offender. Despotism, as we have seen, resorted to the principle of determent. It was in an age which had lost the key to the true relation in which primitive crime stood to religion that punishment for the first time ceased to serve practical temporal ends and was turned into a blind instrument of blind religious fanaticism.

BOOK II
THE PHILOSOPHY OF PUNISHMENT

Ask the man in the street why a thief is sent to prison, and in all probability you will receive one of two answers : he will say, "because he has stolen," or "because it would not be safe to allow him to remain at large." These homely replies illustrate the two fundamental principles which have competed, since Grotius's time, for supremacy in the theory and practice of punishment. The substance of the rival doctrines has been compressed into short formulae, borrowed from the writings of Seneca : according to the one we punish "quia peccatum est," according to the other "ne peccetur."

Grotius defines punishment as "malum passionis quod infligitur ob malum actionis," as the infliction of pain on a person *because* he has done wrong, and the school of which he may be regarded as the intellectual father has steadfastly adhered to the view that the ground of punishment must be sought in the criminal act itself, its justification in the culpability of the offender. Punishment is "the correlate" (Grotius), "the equivalent" (Berolzheimer), "the supplement" (Bradley), of guilt, and is inflicted upon the evil-doer because he deserves it. Its function is "pensatio mali cum malo," "to dissolve the vinculum juris to which crime gives rise, by meting out to the transgressor his due" (W. S. Lilly), to adjust and close an account by discharging the debt which he has incurred. Grotius indeed, goes so far as to compare punishment with the fulfilment of an implied term of a contract; it is a consequence which the criminal by the commission of the act has accepted and assented to.

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In any case, he pays the penalty because he owes it, and for no other reason. Punishment, then, has its root entirely in the past; it is an end in itself and does not serve any extrinsic purpose.

Plato (*de legibus*, xi. 934) and countless writers since have found it impossible to accept the position that mere regard for an immovable past should supply a sufficient motive for the infliction of punishment. They resent the assumption that evil must be met by counter-evil in the shape of pain to the wrong-doer, and ask with Beccaria: "Le grida di un infelice richiamano forse dal tempo che non ritorna le azioni già consumate?" It does not stand to reason, they argue, that the state should set up and keep going a complicated and costly machinery whereby deliberately to cause suffering to any class of citizens, unless it be in the sure and well-founded expectation that good will ultimately result from its operation. The justification of punishment must, therefore, be sought in some future advantage, and, since it is the function of the state to serve the ends of society, in the social benefits which it vouchsafes. By its fruits alone can it be justified, as a rational means for the furtherance of the objects of the state, whatever these may be.

In German legal philosophy the rival schools are known as "absolutists" and "relativists," because the latter account for punishment by a *relatio ad effectum*, the former by an *absolutio ab effectu*. But these expressions hardly convey the proper meaning to the English reader. It is obvious that if the ground of punishment lies in the misdeed, if crime cries aloud for punishment, punishment becomes a necessity, and the state has no choice in the matter, but is under an absolute obligation to chastise offenders. If, on the other hand, punishment is inflicted only because it is useful, the limits of its utility prescribe the limits of its application, and it is for the state to determine how far it can be administered with advantage

for the accomplishment of the desired object or objects. Were it not for the technical meaning which they have acquired in metaphysics and in ethics respectively, the terms "necessitarian" and "utilitarian" would aptly describe the two doctrines. Again, since the one regards punishment as an end in itself, the other as a means for the attainment of an extrinsic purpose, we might, but for our horror of barbarisms, call them "autoteletic" and "heteroteletic." On the whole we think it best to choose the terms "transcendental"—with an apology to Kant—and "political," which, as will soon become apparent, draw attention to the most fundamental difference between the two classes of theories.

Of late years science has taken the bold step of challenging the value of punishments altogether. Whilst they agree with the advocates of the political doctrine in the demand that crime must be suppressed in the interests of society, the apostles of the new criminological movement claim that punishment, having proved a very imperfect, if not an entirely useless, instrument, ought to be abolished, or at any rate given a quite subordinate place in a system of social defence, founded on a careful study of the etiological factors which are at work in the making of criminals. A critical examination of this view cannot well be omitted from a modern work on punishment.

The philosophy of punishment has, therefore, to be studied under the three following headings—

1. Transcendental theories of punishment.
2. Political theories of punishment.
3. Theories of modern criminology.

PART I

TRANSCENDENTAL THEORIES

Fiat iustitia, pereat mundus.

WE have seen that the view according to which punishment is an end in itself, the guilt of the actor its sole motive, postulates, when consistently adhered to, punishment as the necessary consequence of crime. This necessity is fully recognized and insisted upon by all the most prominent writers of the transcendental school. Their doctrines differ only in the source to which they trace the obligation of the state to strike down offenders, and the nature of that superior authority to the dictates of which the organ of society has to conform, supplies, therefore, the principle of classification of their theories.

1. It is in the fulfilment of its divine mission that the state dispenses punitive justice. To punish criminals is a religious duty. This is the **theological** view of punishment, of which the most uncompromising advocate is Joseph de Maistre.

2. The stain of guilt must be washed away by suffering in fulfilment of one of those metaphysical laws the meaning of which man, as a finite being, cannot comprehend, but to which he must yet conform, since his own infinite nature makes him part of the order of the universe of which that law is an expression. This is the **expiatory** theory of punishment according to the version of Joseph Kohler.

3. The moral law, which is binding on all rational beings, prescribes that crime shall be visited with punishment. The conception of punishment as a **moral necessity** has found in Kant its classical interpreter.

4. Crime postulates punishment as its necessary **logical complement**. This is the root-idea of Hegel's theory of punishment.

5. A misdeed displeases and continues to offend our sense of harmony as long as it remains unrequited. It is the function of punishment to resolve the discord and so to satisfy an urgent want arising within our **aesthetic consciousness**. The best-known advocate of this doctrine is Herbart.

A detailed examination of these groups of theories will form the subject-matter of the five following chapters.

CHAPTER I

THE THEOLOGICAL VIEW

THE law of theocracies is conceived as given by the national god to his chosen people. It is a mixture of rules of positive law, of positive morality and of ceremonial observance. The difference between crimes, acts of immorality and sins disappears; for the gist of every offence, whatever its nature, is that it constitutes a breach of a divine command, an act of disobedience to the will of the supreme being.

Christianity starts with the separation of the functions of church and state. Yet from the first all temporal power is regarded as a delegation of divine power, and more particularly in discharging his punitive functions the sovereign is looked upon as wielding the sword of divine justice. "He is the minister of God, a revenger to execute wrath upon him that doeth evil." On this text is founded the doctrine of punishment of both Tertullian and St. Augustine, the penal theory of the Canon Law: "*Qui malos percutit in eo, quod mali sunt, et habet vasa interfectionis, minister est Dei,*" as well as that of medieval jurisprudence. Thus we read in the Introduction to the ancient Law Book of Jutland: "In punishing or executing evil-doers, he (the king) is the minister of God and the protector of the law." Strengthened by the political doctrine of the two luminaries, according to which the power of princes is derived from the visible spiritual head of the church, this view

of punishment was generally adopted; but it survived after the temporal rulers had successfully asserted their independence of the holy see, and St. Paul's text has supplied the rationale of punishment to more than one modern author. According to Friedrich Julius Stahl, the state is the external manifestation, upon earth, of the divine order. The ten commandments are its foundations, and these it is that the criminal attacks. In punishing him, the state exercises a right which is an emanation of divine justice. Lucien Brun defines punishment of criminals by the state as "a delegation of the divine prerogative of punishing wrong." But the author in whose writings this theory is carried to extremes, is Joseph Marie de Maistre. The rule of earthly kings is the "temporal government of Providence." "Flesh and blood are guilty, and Heaven's wrath is kindled against flesh and blood." Since the sovereign is God's representative, the first attribute of his princely power is to strike down the guilty, to provide punishments, to exercise, with the utmost rigour, the power of life and death. The hangman, then, becomes the central idea in De Maistre's theory. The executioner is a being *sui generis*, and, though in appearance like other men, yet "fit only for the discharge of this single function." "In order that he may exist in the human race, a particular decree, a special fiat, must go forth from the creative power. His birth is like unto the creation of a world." Blood alone can redeem what blood has sinned; but the blood of the innocent washes away the guilt of the sinner. When a crime has been committed, blood must flow, and if its author cannot be found that of a scapegoat must be shed. Thus it is divinely ordained, and man has but the choice between blind obedience to the will of God and a futile, self-devouring struggle against it.

A theory which rests upon faith alone, may satisfy the mind of a theologian. To the philosophical or

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legal inquirer a doctrine which refers him to the unknowable for the solution of his problem, can never be acceptable. He may well be allowed to ask why the Lord should require mortal hands to avenge his outraged majesty, and why he has not deigned to endow man with the full store of his divine wisdom if he entrusted him with a function to the proper discharge of which omniscience is a necessary condition. For, on this view, the range of human punishment must be as wide as that of divine justice. The scope of the criminal code would be co-extensive with God's law, and we should have to revert to the view of ancient theocracies which were, at any rate, consistent in obliterating the boundary line between crime and sin. In the execution of its divine mandate, the state would have to punish not only overt acts, but wrongful desires and wicked thoughts, and would have to revive, however imperfect an instrument it may prove, the most stringent inquisitorial system. On the other hand, a theory which, in the hands of a De Maistre, represents the Deity as a Moloch who exacts of his worshippers human sacrifices to appease his wrath, and which, even in its more mitigated form, declares the infliction of evil to be divinely ordained, without at the same time assigning an ultimate good to which evil is subservient, runs counter to the modern ideal of a supreme being. The right to punish merely in order to punish we do not concede even to God. And if, according to St. Thomas Aquinas, the saints rejoice at the sufferings of the damned souls, "*ratione alicuius adiuncti, considerando in eis divinae iustitiae ordinem,*" the associated idea may, in the consciousness of the blessed, overshadow the notion of evil; it fails to take away its sting in the mind of modern man.

The theory which regards God as the fountain of punitive justice, appears, however, also in another form in which it escapes from the last-mentioned difficulty.

The god who delegates to temporal rulers the office of chastising criminals, is here not the god of wrath, but the god of love. Karl Daub's *System der theologischen Moral* may be taken as the prototype of writings in which this idea is expressed. The supreme principle of every law is love; for every law emanates from God, who is love. It is true, men, prompted by considerations of expediency, may enact statutes; but such statutes are not laws. Like every other law, criminal law is divine in origin, and the spirit which it breathes is the spirit of love. It is, therefore, utterly wrong to call punishment an evil; it is a boon, a blessing, even though the person who undergoes it, may fail to perceive it as such. One would have thought that this line of argument must necessarily lead to the reformatory view of punishment. And, indeed, we find that Karl Christian Friedrich Krause, who starts from very similar premises, arrives at a series of conclusions which express the reformatory ideal in its loftiest form. Not so Daub. To him punishment is a blessing, though possibly a blessing in disguise, because it takes off the criminal the burden of a guilty conscience. We are here on the threshold of the expiatory view of punishment which lurks in the background of the theological doctrine whatever the formula in which it is enunciated. But more often in modern philosophy the theological learning of expiation is toned down to metaphysical speculation, and the theory appears in a mystical garment, in which we shall study it in the following chapter.

CHAPTER II

THE EXPIATORY VIEW

IN primitive communities, the notion of crime blends with that of sin. "Sin," writes Prof. Westermarck, "is looked upon in the light of a contagious matter which may be transmitted from parents to children, or be communicated by contact." Guilt, moreover, attracts another miasma "which injures or destroys anybody to whom it cleaves," the curse of a god. In this way any number of innocent persons—nay, the tribe as a whole—may have to suffer for the sin of an individual member. What more natural than to avert that danger by destroying or driving away the person charged with the infective germ? Death and exile, therefore, suggest themselves as suitable means for the purification of the community, long, perhaps, before any intention to punish the offender became associated therewith. For these primitive punishments are in origin probably but measures of social hygiene, comparable to the destruction of microbe-carriers or to the isolation of fever-patients at the hands of our sanitary authorities. The wish to retain the wrongdoer within the tribe may have suggested other processes, which subsequently developed into punishments, but which were primarily meant to free him from the polluting substance, to disinfect him. So we learn from the author above quoted that "beating and scourging was in certain cases originally a form of purification, intended to wipe off and drive away a dangerous contagion. . . . And though the pain inflicted on the person beaten was at

first not the object of the act, but only incidental to it, it became subsequently the chief object." Such purificatory processes as involved the infliction of pain upon the evil-doer, were, no doubt, among the sources of early punishments. It is easy, then, to understand how the idea arose that punishment washes away the sin both from the individual wrong-doer and from the community at large. Punishment is not, indeed, the only means for attaining this end, ablutions and other ceremonial rites, sacrifices, penance, almsgiving and prayer being regarded at different stages of human thought to be equally efficacious for the purpose. But whenever the primitive mind attributes to punishment cleansing properties, the catharsis is not looked upon as the final object of its infliction; purification is conceived merely as a measure for ensuring the safety of the community. In other words, the primitive theory of expiation is eminently utilitarian in character.

In course of time the theory has lost its utilitarian basis, and expiation has become an end in itself. But the view that suffering washes away guilt, has never quite lost its hold over the human mind. "He that hath suffered in the flesh hath ceased from sin," says St. Peter. "Deep, unspeakable suffering may be called a baptism, a regeneration, the initiation into a new state," writes George Eliot. And though thousands of years of intellectual and moral development separate the primitive tribesman from the modern philosopher, the rationale of punishment supplied by more than one contemporary writer does not differ so very much from the theory evolved in the infancy of mankind. Substitute in the latter, for the mixture of magic and anthropomorphism which fills the place of religion in primitive stages of civilization, a compound of pantheism and mysticism, and you get the theory of punishment which Joseph Kohler enunciates in his work, *Das Wesen der Strafe*.

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“ Besides the harm which directly results from it, the immoral contains a second baneful element : it resembles a virus that not only destroys the limb first invaded, but spreads and affects other parts of the body—a contagion which multiplies and gradually infects wider and wider areas. The reaction against the immoral is, therefore, twofold : it is either a reaction against its primary mischievous effects, or a reaction against the germ of the immoral and against those more remote baneful consequences that lie in its lap. This latter reaction is the penal reaction. All immorality may entail punishment ; but it is not fit that the state should punish all possible forms of immorality ; state punishment is appropriate only where the immoral merges in the illegal. Punishment consists in the infliction of an evil ; and the question must arise how it is that the infliction of an evil constitutes an effective reaction against the virus contained in the immoral—how it comes about that humanity at large and in its corporate existence is benefited by the sufferings of one of its members. The answer is both simple and certain : it must be sought in the expiatory, purificatory, not to say hallowing, action of pain. . . . Of all evils death is the one which offers the most complete atonement. For by death the individual is not merely painfully affected ; it is broken, destroyed, cut off from its base ; it disappears in the fountain of all being, never to be seen again. . . . And, finally, if we inquire into the deeper cause of the healing powers which suffering possesses, we are thrown back upon the most profound ultimate problems of philosophy ; we are confronted with the question : What is the cause of all being ? What the cause of the pain of existence ? To me it seems certain that this principle is intimately connected with the cause of all individualization. Every pain is an attack upon individuality. In suffering the individual withdraws from its advanced position to the base of all

being. Suffering in every shape and form promotes integration, arrests differentiation. Therefore, every pain, in extinguishing part of the individuality, extinguishes part of the guilt of individual existence, and death balances the account of individualization, by annihilating individual existence."

"The significance of expiation lies in purification, in catharsis. It is a purification, not of the individual alone, but of humanity as a whole. Mankind which sighs aloud on account of the misdeed, is delivered therefrom, and the poison poured into mankind by the misdeed is consumed, is neutralized by its antidote. Mankind groans aloud over the enormous misdeed; it revives when the guilty head has fallen. To regard purification and catharsis as limited in its effects to the individual, is to overlook the organic unity of mankind, is to forget the terrible ravages which disease of a single cell works in the whole body. . . . Expiation by pain, then, is a purification, a catharsis, not restricted in its action to the individual member, but saving, by its health-giving properties, the organism as a whole."

It would be superfluous to examine all the articles of faith to which Kohler subscribes. For our purpose it is enough to discuss the theory of expiation, when reduced to its simplest proportions, when expressed in the formula: By undergoing punishment the criminal atones for his crime; for pain effaces wrong. Since it is something in the composition of wrong that is to be neutralized by punishment, every wrong calls for punishment. But only certain classes of wrong are to be visited by the state. We are, therefore, entitled to know which is the point at which the wrongful merges in the criminal; and this is the first question which the advocates of the expiatory view leave unanswered. Every crime consists of two elements, one external, the other internal. It is granted by the staunchest supporters of the theory of atonement

that punishment can have no effect upon the former : it cannot undo the physical act nor its mischievous consequences in the visible world. What it is supposed to counteract is the mental, the moral aspect of wrongdoing; in other words, it is claimed that punishment destroys guilt. Primitive materialism which regarded guilt as a polluting substance, cannot be accused of absurdity if it attempted to wipe it off by material means such as the infliction of physical pain. But we moderns to whom guilt is a purely moral evil, are puzzled if we are told that it is counteracted by a physical evil. It is true, physical pain may lead to pain of conscience, punishment to repentance, and repentance, it may be said, extinguishes guilt;—but surely not unless it brings about the reformation of the offender. Now the theory which we are discussing, has nothing in common with the reformatory view of punishment. Its adherents either explicitly reject the latter, *e.g.* Kohler who stigmatizes it as the product of a sickly humanitarianism, or, at any rate, they make it perfectly clear that for them the state of the moral sentiments of the wrong-doer does not count; that for punishment to produce its full effect it is sufficient that it be inflicted; it need not even be accepted as just by the guilty party. In short, reformation is the cure of the criminal, expiation the cure of crime, as such, by punishment. As to the *modus operandi* of punishment in cancelling guilt, various explanations have been offered. But they are either mere re-statements of the question or arguments pregnant with transparent sophisms. As a specimen the theory of Arnold Kitz may serve : Every offence against the moral law results from the will yielding to the desire for pleasure. The contrary of the satisfaction of this desire is suffering evil. The will that was turned aside from the path of virtue by the allurements of pleasure, is, therefore, by the infliction of pain, moved in the opposite direction and thus brought back to the road of rectitude. “ What the will has sinned, the

will has atoned for." Punishment has "rescinded" the wrong. If we wished to criticize this theory, we should have to point out, *inter alia*, that the desire for pleasure is the motive, not only to wrong-doing, but to much perfectly innocent conduct, if not to human action *universaliter*; that whilst Kitz makes the will the meeting-place of moral and physical evil, to us the will appears always in the rôle of an agent, never in that of a patient; that if desire for pleasure formed the gist of the offence, its satisfaction by the consummation of the act must have been the most effective means of extinguishing it, and punishment would be justified, as an antidote of desire, only in the case of unsuccessful attempts at wrong-doing. But it is useless to discuss in detail an argument intended to elucidate that which is incapable of elucidation. For no intrinsic relationship can subsist between moral guilt and bodily suffering; they are incommensurable magnitudes, and attempts to express the one in terms of the other must for ever remain as futile as attempts to square the circle. Indeed, most of the followers of the theory of atonement, instead of explaining how a certain amount of suffering, endured under compulsion by the guilty, will exactly balance the malice which prompted the criminal deed, are content to appeal to our inner life for a confirmation of their view. And an undeniable fact it is that suffering reconciles us to the sinner and causes us to forget or, at least, to pardon his misdeed. How, then, is it that in our consciousness two elements are allowed to compensate each other which, as a matter of fact, are utterly heterogeneous and entirely unconnected? Are we unconsciously reproducing trains of thought transmitted to us from generations long gone by and kept alive among us by the Christian doctrine of expiation? This may be a partial explanation of the riddle. But the true solution of the problem must be sought, I apprehend, in our own emotional life. The crime excites in us a feeling of horror and of hatred against

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its perpetrator. Human suffering evokes our pity, and it does so even if the sufferer is an object of detestation to us. The feeling of sympathy thus aroused tends to neutralize, and after a certain point is reached, to overcome the antagonistic sentiment stirred up by the offence. The more heinous the wrong, the greater our ill-will against the actor; the more severe must also be the sufferings he endures in order to induce an amount of compassion sufficient to balance and to obliterate our aversion against him. Now it is a psychological law that the mind tends to project its own processes into the phenomenal world. In this instance we seem to go one better and to translate the play of our psychic forces into objective truths of the metaphysical order. Thus the extinction of antipathy by sympathy is transformed into an extinction of guilt by pain, and the equilibrium in the state of our emotions becomes an equilibrium in the absolute order of the universe. This, I take it, is the true foundation of the doctrine of expiation. It is, however, noteworthy that our pity is excited, not only by pain inflicted upon the guilty by way of punishment, but by any kind of suffering they undergo, even if it comes upon them independently of all human agency. Suffering of a sufficient degree of intensity, endured by the offender, whatever its cause or its source, ought, on the theory of atonement, to be a ground of exemption from punishment. Those who support the theory, are not consistent enough to draw this conclusion. But it is characteristic that when we see an evil-doer in agony and distress, we call his suffering his due punishment without always being alive to the fact that we are using allegorical language. And finally, if the account which we have given of the real basis and of the true meaning of the expiatory theory is correct, its critics are justified if they claim that it is merely an apology for giving vent to our ill-will against the wrong-doer.

CHAPTER III

KANT'S THEORY

“THE right of administering Punishment is the right of the Sovereign as the Supreme Power to inflict pain upon a subject on account of the Crime committed by him.”

“Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted, *has committed a Crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the subjects of the Law of Things. Against such treatment his Inborn Personality has a Right to protect him, even although he may be condemned to lose his Civil Personality. He must first be found guilty and *deserving punishment*, before there can be any thought of drawing from his Punishment any benefit for himself or his fellow-citizens. The penal Law is a categorical Imperative, and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the clear measure of it, according to the Pharisaic maxim : ‘ It is better that *one* man should die than that the whole people should perish.’ For if Justice and Righteousness perish, human life would no longer have any value in the world.”

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“ But what is the mode and measure of Punishment which Public Justice takes as its Principle and Standard ? It is just the Principle of Equality, by which the Pointer of the Scale of Justice is made to incline no more to the one side than to the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. . . . This is the Right of Retaliation (*ius talionis*); and properly understood, it is the only Principle which in regulating a Public Court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty. All other standards are wavering and uncertain; and on account of other considerations involved in them, they contain no principle conformable to the sentence of pure and strict Justice.”

“ Even if a Civil Society resolved to dissolve itself with the consent of all its members, . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain on the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.”

“ Punitive Justice (*iustitia punitiva*) in which the ground of the penalty is moral (*quia peccatum est*), must be distinguished from punitive *Expediency*, the foundation of which is merely pragmatic (*ne peccetur*) as being grounded upon the experience of what operates most effectively to prevent crimes.”

These extracts from *The Philosophy of Law* contain a full account of Kant's theory of punishment. It may be summarized in the following few sentences: There exists a categorical imperative to punish criminals by an application of the *lex talionis*. Punishment does not serve any end or purpose; it is an end in itself.

Kant's thesis that the penal law is a categorical impera-

tive, at once raises a difficulty. For in the *Grundlegung zur Metaphysik der Sitten* he lays down that there is but one categorical imperative, though he expresses it in three different formulæ—

1. "Act only on that maxim whereby thou canst at the same time will that it should become a universal Law"; or, "Act as if the maxim of thy action were to become by thy will a Universal Law of Nature."

2. "So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only."

3. "Act according to the idea of the will of every rational being as a universal legislative will."

If these propositions express the only categorical imperative, and if yet the criminal law is said to be a categorical imperative, the only possible solution is that the punitive imperative is contained *impliciter* in these formulæ, and is, therefore, analytically deducible therefrom. Now, inasmuch as the rules of conduct prescribed by the criminal law are part and parcel of the moral law, they obviously fall under the sway of the categorical imperative. But the latter governs only the canons of conduct as such, and not the sanctions by which they are enforced. It might, indeed, be said that it must cover the latter likewise; for he who wills the rule must also will that obedience to such rule be enforced. Of criminal law conceived as part of municipal law, that is to say, as being founded upon the command of a sovereign or superior, this line of argument holds good; for positive law, as the creature of the sovereign or state, derives the whole of its obligatory force from the sanctions annexed thereto. This is not, however, Kant's view of the penal law. In the *Kritik der praktischen Vernunft* he takes great pains to make it quite clear that the idea of punishment is not an essential ingredient in the conception of crime; that it is not by reason of the penal consequences

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which it entails that an act is a crime; but that the act constituting a crime is forbidden because it is an evil in itself, quite irrespective of its consequences. To hold the contrary view would be "to reduce the will to a mechanism destructive of freedom." But even without this explicit statement it is clear that the train of thoughts above developed is quite incompatible with Kantian doctrine. The moral law is binding, because it is "the principle of a will which of itself conforms to reason" (*Grundlegung zur Metaphysik der Sitten*), the command of "practical reason directly legislative" (*Kritik der praktischen Vernunft*): and an autonomous will, of course, knows neither lord nor master. The latter difficulty could be overcome if we suppose Kant to have conceived the criminal law as a body of rules of conduct laid down, under pain of punishment, by the noumenal self for the guidance of the phenomenal self. This definition, however, could explain and justify self-punishment only, not punishment by the state; and it would leave unanswered one last, and in my idea fatal, objection, namely the following: the proposition that assent to the rule implies assent to the sanction, rests on the assumption that the sanction is something subsidiary, that it discharges a function merely ancillary as a means for compelling obedience to the rule, and that it is not an end in itself. Thus understood, the punitive imperative is, in Kantian phraseology, a hypothetical, and not a categorical, command. With Kant punishment is not the complement but an integral part of the moral law; not a mere sanction, but a direct application, an immediate realization of the law of duty.

According to Kant, the categorical duty to punish is a supreme *a priori* principle of practical reason which, just because it is primitive and final, neither needs, nor is capable of, analysis or proof, but has to be accepted as a fundamental, though inscrutable, law of our moral

nature. Few men, I think, will assent to this categorical imperative once it is clearly understood what it means. It is a command amounting to nothing less than this : "Return evil for evil. Return for evil an equal amount of evil. Inflict evil, not that good may come out of evil, but inflict evil for evil's sake." Such a canon of conduct, far from being acceptable as an intuitive command of our moral nature, is repugnant to all our moral instincts and is condemned with no uncertain voice by our moral judgment. And if our philosopher goes on to teach that there can be neither pardon nor mitigation of punishment, that the soul that sinneth it shall die, and shall die at the hands of civil society even if such society were on the point of dissolution, he seems to be carried away by a blind moral (or immoral ?) fanaticism equalled only by the religious fanaticism of a Joseph de Maistre and his worship of the hangman.

In truth, on Kant himself the conception of punishment as an absolute and ultimate command does not seem to have dawned as an intuition ; it appears to have forced itself upon his mind as a conclusion from the two following propositions—

1. Deeply rooted in our soul is the conviction that the universe is founded on justice, that pain is the fruit of evil-doing, a feeling, as Sir Edward Fry expresses it, that there is a fitness of suffering to sin.

2. Even in the criminal the human personality has to be respected ; he must never be dealt with as a means subservient to the purpose of another.

If, then, the wrong-doer is to be made to suffer, and if yet his sufferings must not be made to serve an ulterior object, punishment must be an end in itself, an absolute imperative of duty.

It is not difficult to show that the conclusion does not by any means follow from the premises. First of all, the belief in a moral government of the world is an article of

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faith, shared by a large proportion of mankind, but not necessarily compelling assent. In founding punishment upon what is esteemed, in the face of the frequency with which wickedness apparently prospers, one of the hardest riddles of the universe, Kant seems to explain *ignotum per ignotius*. For Kant the absolute necessity of a causal relationship between evil-doing and suffering is a final principle of practical reason from the dictates of which no rational being, not even the Deity, can escape. But then the necessity ceases to be a moral law and becomes a metaphysical postulate; and in the giddy heights of metaphysical speculation anything may be necessary. Moreover, as a metaphysical proposition, the assertion of a necessary connection between sin and pain bears upon a relationship actually subsisting, not upon one to be established; and there is a wide gulf between the "Is" and the "Ought" which Kant has failed to bridge over. It may, indeed, be doubted whether Kant realized to the full the width of this chasm. For though he does not go so far as to assert, as does Leibniz, the solidarity and ultimate identity of the natural consequences of vice with the punishments provided by law, though he actually repudiates, in the *Rechtslehre*, the opinion which would flow as a corollary from this view, that where vice has brought about its own punishment, no further punishment ought to be awarded by judicial sentence, he yet sees a strong analogy between what in Bentham's terminology are called physical and political sanctions. Granting, then, that in the immutable order of things the wages of sin are sorrow, surely this law must be operative without human intervention, and it is not easy to see, unless we fall back on theocratic notions, why the state should constitute itself the organ of the dispensations of Providence. And if the criminal receives no more than his due if the evil which he has done recoils upon him, why should the arm of human justice be raised to smite him?

As Leslie Stephen remarks, the sentiment that the moral order would be out of joint if wrong-doing does not lead to pain, is quite compatible with a horror of inflicting useless pain upon any one.

In the second place, the maxim that "the criminal must not be dealt with as a means subservient to the purpose of another" is converted into the postulate that "punishment must never be administered as a means for promoting another good," in other words, that it must not be made subservient to any purpose whatsoever. The second proposition is obviously not identical with the first; for punishment may be made subservient to the purpose of the evil-doer himself. Thus, on a purely reformatory theory, the aim of punishment has its root in the guilty person alone. And even if punishment is conceived as serving the objects of society, it may be said to serve the objects of the criminal too; for, inasmuch as his true self is a social self, he shares in, and partakes of, the rational aims of society.

Even if we adopt the doctrine of the categorical punitive imperative, two difficulties, both relating to its scope, remain yet unsolved. Firstly, if it is an absolute duty to punish evil-doing, the criminal code ought to be co-extensive with the moral law. Kant's answer to this objection would be that in our consciousness certain wrongs bear a distinguishing mark that singles them out, with unmistakable clearness, as appropriate objects of punishment. But this reply postulates a criminal code eternal and immovable as the starry sky above, a view at once contradicted by the fact that the catalogue of crimes varies with time and place. And, secondly, a categorical imperative is *ex definitione* addressed to the will of all rational beings. The execution of the criminal law would, therefore, be incumbent as a duty upon the individual. Why, then, is the state alone armed by Kant with the sword of punitive justice?

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Having found Kant's theory so full of flaws and pitfalls, we may well concur in the opinion of Henke that "it would never have gained a following were it not that a categorical imperative forms an excellent ingredient in ostensibly philosophical speculation, a dazzling cloak eminently fit to cover our ignorance." Even in Kant's own system the categorical imperative of punishment is introduced as *deus ex machina* for the one and only purpose of supplying a rationale of punishment. For it is in flagrant contradiction with the whole of his ethical system. The latter being founded upon the doctrine of moral autonomy, on the principle that we ought to obey the moral law only out of respect for that law, the act itself, one would have thought, constitutes its own and only possible reward and punishment. And it is in accordance with this doctrine that with Kant the notion of punishment is quite extrinsic as to that of crime. But if, in spite of this, he maintains (in the *Kritik der praktischen Vernunft*) that punishment ought to be connected, as a consequence, with wrong by the principles of a moral legislation, in other words, that it is incumbent, as an absolute duty, upon the state to carry into effect the principle of retaliation, it looks as if we find Kant sacrificing unwittingly on the altar of utilitarianism which he has evinced so much zeal to demolish. Moreover, Kant sees the sole justification of legal compulsion in the fact that constraint, in being applied to the wrong-doer, removes an obstacle to freedom, and he regards it as legitimate only in so far as it serves this purpose, viz. the protection of legal rights. Now punishment surely involves compulsion and restraint; how, then, can it be justified if inflicted without an end to justify it as a means? And, finally, as soon as he descends from abstract speculation to the consideration of concrete instances, Kant becomes unfaithful to his own maxim. In the *Kritik der praktischen Vernunft* we read: "Suppose a man to pretend

that his sensual impulses became irresistible whenever the object of his desire and an opportunity for satisfying the same presented themselves. Imagine that a gallows were erected in front of the house in which he finds that opportunity, in order to hang him as soon as he had gratified his lust, and ask yourself whether he would not control his inclination. It cannot long remain in doubt what the answer would be." Again, in the *Einleitung in die Rechtslehre* he quotes a supposititious case, made famous by a dictum of Lord Bacon's, to the effect that, assuming two persons who have been shipwrecked get on the same plank, and they find that it will not bear both, either of them is justified in shoving the other off, and is not responsible if his friend gets drowned in consequence. Kant says: "There can be no system of criminal law that awards capital punishment" to the actor in such a case. "Such a law could not possibly produce the effect intended. For the threat of an evil as yet uncertain (death by judicial sentence) could not outweigh the fear of an evil" (of equal magnitude) "apparently certain (death by drowning)." As a matter of fact, two systems of law, at least, do not excuse the actor in such a case: in English law, after the decision in *R. v. Dudley and Stephens* (1884), the celebrated case of the crew of the *Mignonette*, he would be guilty of murder, whilst in *Commonwealth v. Holms* the judgment of an American court practically amounts to this, that the two men on the raft were bound to toss up as to which should go. As a matter of theory, it is obvious that Kant's *ratio decidendi* in both his cases was not the categorical imperative, but a view of punishment which clearly foreshadows Feuerbach's ingenious theory. In thus becoming, by his very inconsistency, Feuerbach's intellectual father, Kant has rendered a greater service to legal philosophy than by his doctrine of a categorical punitive imperative, which, after all, explains nothing and illuminates nothing.

CHAPTER IV

HEGEL'S THEORY

HEGEL develops his theory of punishment in sections 95-104 of the *Grundlinien der Philosophie des Rechts*. The following passages contain an outline of his argument.

“ A first act of constraint, implying the use of force by a free man, and violating the concrete embodiment of freedom, namely, law as law, is crime. It is a negative-infinite judgment complete in scope, inasmuch as it negates not merely the particular, the subjection of an object to my will, but also the universal, the infinite as involved in the predicate ‘mine,’ the very capacity of being clothed with rights ; and in doing so, it operates, not by influencing my intention (as in the case of fraud), but against my intention. We are here in the sphere of criminal law.

“ An accomplished violation of the law as law is a positive external fact ; yet intrinsically it is a nullity. This nullity is rendered manifest by the annihilation of such violence likewise accomplishing itself as a fact. This means the realization of the rule of law in the necessary process of its overcoming its own violation.

“ The nullity consists in the pretension to have abolished law as law. For law, being absolute, cannot be set aside. Hence the manifestation of crime is intrinsically null, and this nullity is the essence of the effect of crime. But what is null must manifest itself as such, that is to say must declare itself to be violable. The criminal act is

not the primary and positive, punishment supervening as the negative. It is the negative, and punishment is, therefore, but the negation of a negation.

“The violation has a positive existence only as being the particular will of the criminal. The violation of this will in its concrete existence means, therefore, the extinction of crime, which would otherwise have established itself as valid, and the restoration of the rule of law.

“The violence which the criminal experiences, is not only intrinsically just—as being just, it must express his own absolute will, the reality of his freedom, his law; it is also just as a right against the criminal himself, founded on his will as concretely realized in his act. For his act, as the act of a rational being, must contain a universal principle, must establish a law which, by his act, he has recognized as binding on himself, and he has no cause for complaint if he is subsumed under a rule which is his own law. . . . In that the punishment is regarded as flowing from his own law, the criminal is honoured as a rational being.

“The annihilation of crime is retaliation in so far as it implies the injury of an injury, and in that as the crime in its manifestation has a definite qualitative and quantitative content, its negation, in becoming manifest, must be similarly definite. This notional identity, however, is an equality in the essential and inherent, not in the specific, character of the injury—an equality in value . . . as the inner identity of things specifically different.

“Crime and avenging justice represent the visible outer form of the development of the will, as occurring, first of all, in the opposition of the universal, absolute will and the particular will claiming independence of the former. Next, by rising above the opposition, the universal will is turned back into itself and has become an absolute reality. Thus law, in establishing its validity

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as against the individual will, is being realized through its own inherent necessity.”

This text obviously requires a good deal of explanation. Indeed, hardly a single sentence is intelligible unless interpreted in the light of Hegel's general philosophical system. It will, therefore, be necessary to elucidate his actual meaning, before proceeding to criticize his theory.

“Rationality, viewed abstractedly, consists in the thorough unity of universality and individuality.” Man acts rationally if, and only so far as, he brings his own personal will into complete harmony with the universal will. The concrete expression of the universal will is Law. Hence follows that rationality, “taken concretely, consists in action determined by universal laws.” Now law, as the immediate concrete expression of the universal will, is independent of the state and, if not anterior to, at least coeval with it. The state, Hegel tells us, is not an antecedent condition of justice; indeed, in the *Rechtsphilosophie* the theory of rights and wrongs precedes the theory of the state. But inasmuch as punishment is the form which justice assumes in the state, we must inquire into the relationship which will and law bear to the state. The state, according to Hegel, is the realized self-conscious will of man raised to the plane of universality which belongs to it by its own nature. “The state is the march of God in the world; its ground or cause is the power of reason realizing itself as will.” Thus the law of the state is the law of reason, the actualization of the universal law. In the state the individual finds a revelation of his own larger and better self. Therefore the laws of the state are his own laws, and only by conforming to them can man conduct himself rationally. “It is the absolute purpose of reason that freedom should be actualized.” True freedom is, then, attainable only through voluntary obedience to the law of the state. Disobedience to that law constitutes “wrong.” Doing

wrong means opposing the individual will to the universal will. The universal alone is rational. Acting wrongfully, therefore, is acting irrationally. Now it is one of the fundamental tenets of Hegelian philosophy that "that only is real which is rational." Wrongful conduct, being irrational conduct, is unreal. Thus we arrive at the proposition that wrong is a mere nullity. What is true of wrong *generaliter* must *a fortiori* be true of crime which is the climax of wrong-doing. Unlike civil injury, crime not only infringes individual rights of another, but attacks his very personality. For crime involves the exercise of violence. Being a voluntary act, and freedom being an attribute of the will, it is a manifestation of the freedom of the actor. To use force against another means to interfere with his rights against his will; and it is immaterial whether the criminal act is directed against his person or against his property; for a man's property is but the aggregate of objects into which he has projected his will. In either case the criminal negates the freedom of the offended party, *i. e.* his very capacity of being clothed with rights. Crime, then, is an attack of freedom upon freedom and, therefore, self-contradictory. But more than that: by his act, the criminal proclaims, louder than he could by words, a rule of conduct founded on the assertion of freedom in the actor and its negation in his fellow-creatures. For the act of a rational being can never be an isolated phenomenon, universality being an attribute of rationality. His maxim of conduct must, therefore, pretend to universal applicability. In doing so, it enters into competition with, claims validity against, and seeks to supersede the general law which is based on the affirmation of the freedom of all rational beings. The criminal's particular law, which we may call the law of licence, is at war with the universal law, the law of freedom. But since the latter is the immediate manifestation of practical reason, and therefore, absolute,

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indefeasible and the only reality, the law set up in opposition to it must be a nullity, a phantom, a mere negative. In the conflict of the particular law with the universal law the latter must manifest its reality by rendering apparent the hollowness of the former. The particular law owes its phantom existence to its being derived from the act of the will of a rational being. In the criminal's will crime has its only positive existence, and here it has to be attacked in order that its nullity may be made manifest. We have seen that crime is an act of violence, an act of the will negating freedom. The criminal will has, therefore, to be negated in order that freedom, the rule of law, may be re-established. And it is negated by the negation of the essential attribute of that will, of its freedom. Freedom can be negated only by constraint; and constraint thus applied is punishment. The function of punishment, then, is to negate crime, the negation of law, and through the double negation involved in the process the rule of justice reaffirms itself. "By turning back to itself out of its negation, law becomes actual and valid, whereas at first it was only an implicit potentiality." Punishment, then, is the necessary condition precedent to the realization of law. Inasmuch as the objective will is reflected in the self-consciousness of all rational beings, that of the criminal himself included, the latter, in suffering punishment, but obeys his own law. As against him, the *legem sibi dixerat ipse* holds also good in another and more subjective sense. By his deed, we have seen, the criminal has set up a law peculiar to himself, viz. the law of force, and his punishment is but a particular application of his own legislative act. In that a principle of conduct is deduced from his crime, he is honoured as a presumably rational being: from the act of a madman, an infant, a brute no one would derive a universal maxim. Punishment is retaliation, intrinsically as being an injury of an

injury; extrinsically because punishment must vary in (negative) value with the negative value of crime if it is to annul and cancel the latter. It is true, in its essence crime is an infinite-negative judgment, and, therefore, incapable of standardization; but in the region of the finite it has a definite and variable content. Here the ideal identity of crime and punishment is obscured. What is postulated, therefore, is not equality of these two phenomenally incommensurable quantities, *i. e.* material *talio*, but equivalence, equality in value, which represents the inner identity of things specifically different.

The critical student of Hegel's theory cannot fail to be impressed, first and foremost, by the peculiar notions which he entertains of the fundamental conceptions: State—Law—Crime.

The definition of the state as the realized ethical spirit Hegel has borrowed from Plato; and he is only the mouthpiece of Hellenic ideas, if he goes on to assert that the individual can attain rationality only by complete subjection of his particular will to the general substantive will as actualized in the state; that the end of the state "has the highest right over the individual, whose highest duty in turn is to be a member of the state." Hegel himself warns us in the *Phänomenologie des Geistes* that the highest realization of the state, that in which it is the universal which completely sums up the individuals that compose it, may be considered as being in the past or the future. But whenever he deals with the state in its concrete relations, he becomes forgetful of this limitation, forgetful of the high value which modern thought sets on individual personality. Yet only as seen with Hegel's eyes, only as being the actuality of universal reason, can the state take it upon itself to realize reason by annulling unreason, *i. e.* by the punishment of criminals.

Law, to Hegel, is the objective spirit in itself, the transcendent solidarity of all rational beings, the general

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will, the rule of reason, the realm of freedom. It is the law of humanity as a whole and at the same time each individual's own law, since it expresses the will logically implied in intelligences as such. It is not imposed upon man as the command of a higher power, but flows from his own specific nature as destined to freedom.

“Es ist nicht draussen; da sucht es der Thor.
Es ist in dir; du bringst es ewig hervor.”

And it derives its authority from the fact that man must fulfil it in order to realize his higher, his rational self. It is binding because it is inherently reasonable, reasonable in the sense of a logical proposition: it is impossible to deny its validity without falling into a contradiction in terms. Truly a lofty conception! But, unfortunately, Hegel identifies the law of reason with the Prussian Criminal Code.

Hegel's conception of crime involves a number of propositions which we shall examine as we proceed.

1. “A crime is an act of violence.” According to Hegel, the use of force is the distinguishing feature of crime, as compared with civil injuries and more particularly with fraudulent wrongs. This definition is obviously too narrow: it identifies crime with what we call crimes of violence, the genus with the species, and entirely ignores those public offences in which not force, but negligence or fraudulent intent enter into the *corpus delicti*.

2. “Crime is an attack upon the freedom of the individual.” Why? Because it is an attack upon a man's person or property, the immediate or mediate embodiment of his will. Now a man's freedom has, rightly or wrongly, been held to consist in the aggregate of his rights. Hegel's limitation of the term to personal and corporeal rights appears arbitrary, though no doubt necessary from his standpoint, since incorporeal rights,

not being materialized in tangible things, cannot become the object of an act of violence. Furthermore, though Hegel sees in every crime an attack upon law as law, the point of attack to him is always the individual as the vessel containing the universal. The large and important class of offences of a public nature can, therefore, find no place in the Hegelian criminal code.

3. "Crime is a denial of the idea of freedom." The assertion that in violating the freedom of one particular individual, the offender negatives freedom *in abstracto*, in other words the freedom of all rational beings, implies that the object of the attack is a matter of utter indifference to the criminal; that all he cares about is to commit a crime, no matter upon whom. This may be so in a limited class of cases, *e. g.* petty thefts, but it is certainly not true of all, nor of the most heinous, acts of crime.

4. "Crime is an attack upon law as law." According to our philosopher, law in itself is inviolable; it can be attacked only in its concrete manifestations, in the form of particular rights. And that, for Hegel, every violation of an individual right amounts to an attack upon law as law we may infer from his statement that in a civil action there is no violation of rights as such, but only a question in whom a certain right resides, while in a matter of criminal law there is involved an infraction of right as such, which, by implication, is a denial of the whole sphere of law. This distinction is not tenable; for a wilful breach of contract, though giving rise to a civil cause only, amounts to a most emphatic violation of a definite right, and the same holds good of wilful torts. As to the "how" and "why" the breach of a single paragraph of the penal code should amount to a negation of the idea of law, Hegel fails to offer any explanation. Instead of adopting this view, unsupported by argument, on the mere authority of Hegel, we shall attempt to

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trace the idea to its source. As a matter of philosophic speculation, it is platonic in origin; for Socrates insists in the *Crito* that the wrong-doer destroys, so far as in him lies, the order of reason. It also accords with the philosophy of the New Testament which teaches that he that offendeth in one point, is guilty of all. As a matter of history, it is the theory of crime of early absolutism which Hegel adopts and adapts to his purposes, the view that the essence of crime is that it constitutes an act of disobedience to the will of the ruler. On the principle of absolutism: "L'état c'est moi," disobedience to the will of the prince becomes disobedience to the will of the state, and this transformed into its Hegelian equivalent becomes disobedience to the universal will, *i. e.* to law as law. In other words, the criminal is considered and treated as a rebel. As a doctrine of jurisprudence, the assertion that crime is the negation of law as law rests on a confusion of terms. "Wrong," used as an adjective, signifies the contrary of the adjective "right," from which the abstract noun "Right," the synonym of justice, is formed. "A wrong," *i. e.* an unlawful, act is a violation of "a right," of a capacity or faculty residing in a definite person. Ensnared by the ambiguity of the words "right" and "wrong," Hegel is led to blend their dissimilar meanings. Thus a crime, being "a wrong" in its most aggravated form, is conceived as an attack, not merely upon "a right," *i. e.* a particular right, but upon "Right" *in abstracto*, upon justice, upon law as law. That the erroneous identification of those disparate objects, suggested by the identity of the terms in which they are expressed, lies at the root of the proposition which we are discussing, is made apparent in the writings of Hegel's most distinguished modern disciples. "A wrong is the contrary of Right," says Köstlin, whilst we read in Hälschner: "Crime as a form of wrong is, first of all, the contrary and the contradiction of Right." In claim-

ing that the breach of a single rule criminally sanctioned amounts, by implication, to a denial of the whole body of law, Hegel offends against one of the most fundamental rules of logic which forbids to infer the general from the particular, to generalize from one single concrete fact. If we come to test the Hegelian thesis in the light of actual experience, we find that a negation of the legal order may justly be attributed to those enemies of society who have deliberately chosen a career of crime, and who are prepared to go to any length in order to accomplish their criminal purposes. But to concede this is something utterly different from concurring in the assertion that every criminal act, even if it is an isolated phenomenon in the life-history of the offender, amounts, by implication, to a denial of the rule of justice; and it is surely a grotesque view of the situation to see in every wretch that leaves the dock of the Old Bailey with a conviction recorded against him a Prometheus raising his head in defiance of Olympian reason.

5. "A crime is an act of legislation." As being an act of the will of a rational being, it must embody a maxim which at any rate the criminal wishes to proclaim as law. Here we have the categorical imperative with a vengeance, the categorical imperative transformed into a categorical statement of fact. It is no longer, as with Kant, the criterion of the rationality of an act that it can be erected into a rule for the guidance of all men. According to Hegel every act of a rational being contains a universal principle; in other words, every act of a rational being must be treated as a rational act—even if such act bears, on Hegel's own teaching, the hall-mark of unreasonableness on the face of it, as being the manifestation of the particular will in its opposition to the universal will. In attributing to crime the universality, even if only the subjective universality, of law, our philosopher applies to unreason the rule of reason. Truly

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he sees method in madness, system in unreason. The particular law of the criminal enters into competition with the general law. As against the state, the offender plays not only the part of the rebel, but also that of a rival legislator, promulgating the law of force against the law of freedom, the law of unreason against the law of reason, the law of evil against the law of good. Now, in spite of the recognition, by Aristotle, of a class of men who are the very incarnation of badness (*κακία τέλεια καὶ ἀπλῶς*), it may be doubted whether any rational being can ever adopt evil, merely as evil, for its guiding principle and, in steering the barque of life, consistently take its direction from the beacon of wrong. In any case, this is not the habit of mind of the ordinary criminal. Far from contesting the validity of the general law by opposing to it a system of his own creation, the average offender fully realizes the wrongfulness of his conduct, at any rate both before and after the deed is done, even if at the time of its commission passion should prevent him from seeing it in its true light; and in understanding the wrongful character of his act, he impliedly acknowledges the universal law as entering into him. Indeed, incapacity to appreciate the wrongful nature of the act, so far from being a characteristic mental attribute of the criminal, is treated in more than one system of law as a factor negating responsibility. In short, crime is not a law, is not intended by the criminal to become law, and could never acquire the mere semblance of law, even if the criminal wished to proclaim it as such.

6. "Crime is a nullity." Only what is reasonable has a right to exist. Crime, being irrational, ought not to exist, and since it conflicts with the universal, the realm of reason, it is doomed, by an inherent necessity, to come to grief, to be overcome, to be annihilated. This is the idea which Hegel clothes in the formula that crime is a nullity. As a mere figure of speech, this phrase might

be allowed to pass unchallenged; but since it forms one of the corner-stones in the Hegelian construction of punishment, it is necessary to point out that the assertion that a thing calls for its obliteration, implies the affirmation, not the negation, of its existence. Crime is not a bare naught; it is something positively bad, an actual violation of the law, a real disturbance of the social order.

7. "Crime is a judgment." The same crime that advances all the extravagant claims hitherto discussed, is all at once degraded to a judgment, an infinite judgment it is true, nevertheless a mere judgment, an erroneous judgment. And the criminal who has hitherto paraded in the guise of the rebel and of the legislator, turns out, on being unmasked, to be an ordinary mortal guilty of nothing more than an error of judgment, a logical inconsistency. It need hardly be said that here, as throughout his analysis, Hegel misrepresents the psychological genesis of crime by treating human conduct as being determined by considerations of the intellectual order alone, and entirely ignoring the influence of the emotions upon the will.

From crime thus defined Hegel deduces punishment as a necessary logical consequence. The demand for punishment is as absolute, as imperative with Hegel as it is with Kant. But here it is no longer a question of moral duty: crime has to be punished because it postulates punishment as its necessary logical complement. Crime is a nullity. What is null must manifest itself as such, and punishment is the *demonstratio ad oculos* of the nullity of crime. This proof has to be furnished since crime, borrowing from will the cloak of reality, is likely to deceive the uninitiated by its phantom existence; the function of punishment is to destroy the illusion. The nullity of crime consists in the attack upon, and the attempt to usurp the place of, law, whilst law is, in its very conception, incapable of being wounded or ousted. Why, then, it may

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be asked, should Justice, in her very nature inviolable, move out of her dignified repose in order to strike, merely because a dog barks where he cannot bite? Hegel's answer to this objection is: "Because by destroying wrong, Right verifies itself as a necessary factor in reality." The ultimate object of punishment, then, is the establishment of the validity of the rule of law, which before had existed as a mere contingent possibility;—obviously a moral, not a logical end. So the moral law, though carefully hidden behind the scenes, turns out, after all, to be the central figure in the play of Hegelian dialectic. Here again the disciple confesses what the master has taken pains to conceal; for we are told by Hälschner that "whatever definition be adopted as expressing the proximate conception of law, punishment as a legal institution is incapable of explanation unless law itself is regarded, not as the creature of the subjective will, but as a force of the moral order of the universe." Granting, however, that it is incumbent upon the state as the realized ethical spirit to actualize justice by tearing the mask from crime in order to show that there is no face behind it, it remains to be seen why the infliction of an evil, the exercise of restraint, should be necessary for the purpose. Punishment being, in the Hegelian view, in its essence demonstrative, one would have thought that a declaration by the state that crime is a delusion, should amply suffice. The claim that "a community can hardly express an idea in words, and hence an external physical act is the most natural vehicle for its thoughts" (Miller), is untenable; for the community, the state not only can, but does, speak through an authorized mouthpiece, viz. the judges. To understand how Hegel escapes from this difficulty, we must follow him deeper into his logical labyrinth. Crime, the naught, has a positive existence in the will of its perpetrator, though even here it is in substance a mere negative. The liberties

which our philosopher here takes with mathematical symbols, calls for special notice since his theory of punishment ultimately resolves itself into an algebraic equation. Crime is the negation of freedom by its perpetrator. Punishment is the negation of his own freedom. The double negation of freedom is tantamount to its affirmation, *i. e.* to the assertion of justice. It would seem, at first sight, as if the negation of freedom started by the actor would become accentuated by being continued in his own person. But Hegel's view is that by negating the criminal's freedom, you negate his will; and since it is his will that negates freedom, punishment, by extinguishing his will, extinguishes the source of the negation of freedom. The notion underlying all this sophistry is probably this: The will of the criminal, in attacking another's freedom, has overstepped its legitimate limits; punishment, in restraining his will within its lawful bounds, restores the *status quo ante delictum*. Returning to Hegel's version of the process, we are confronted with the question how restraint applied to the body can extinguish the crime or logically negate the antagonistic will in which alone the wrong has its positive existence. It cannot possibly be Hegel's meaning that punishment produces this effect by leading the offender to repent and to find his better self; for Hegel categorically rejects as superficial the reformatory view of punishment. On the other hand, genuine spontaneous repentance ought to exclude punishment. For in the will of the reformed criminal crime no longer exists; and since it has no reality outside his will, it has ceased to exist altogether and can no longer be negated or annulled. To the question how punishment destroys crime in its roots, Hegel offers us no answer; and his followers are only playing with words if they tell us that punishment has this effect because wrong is in the self in which will and body are united, or if seeking refuge behind

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Schopenhauerian notions, they assert that the body is but the incarnation of the will.

Punishment flows from crime and is just because it realizes the will of the criminal himself as that of a rational being. This is Hegel's paraphrase and explanation of the well-known Kantian proposition that "the undeserved evil which any one commits on another is to be regarded as perpetrated on himself." It has been understood to mean that the criminal is being served as he would say any one should be served, whom he saw acting as he had done, in any case where his own person was not engaged; and that as a reasonable creature he could not avoid recognizing as deserved, when inflicted upon himself, a punishment which he would unhesitatingly acknowledge as merited when inflicted upon another person. This interpretation is erroneous; for it represents the offender as consenting to the application to himself of a pre-existing law, not as himself laying down the law; in other words, it regards him as an impartial judge *in propria causa*, not as a legislator. To Hegel, as we have seen, the criminal appears as the embodiment of two laws, both emanating from his will; and punishment is his subsumption under both of them. Inasmuch as the universal is realized in him, the law of reason is the law of his will. In as far as he is a criminal, his will enacts the law of force, *i. e.* the law of unreason. Punishment, then, is the simultaneous application of the law of reason and the law of unreason; it is reasonable in its unreason, and it is so in order that the law of reason may prevail: a dialectical somersault not easy to match! Having pointed out this inconsistency in the doctrine, let us now look upon punishment as the recoil, upon the criminal, of the force issuing out of him. The law of force is the law of unreason, and it is certainly not dignified for the state to descend to the level of the criminal and to answer the fool according to his folly. "The mummery

which puts a crown of thorns upon the head of the offender, as the symbol of his legislative dignity, is cruel sport" (Laistner). And if Hegel claims that the state honours the criminal by adopting his maxim, it may be replied that society has no occasion to honour the criminal, though it is bound to respect in him the human personality, a postulate utterly disregarded by Hegel's theory of punishment, which now strikes us as the incarnation, not of the force of logic, but of the logic of force.

As to the measure of punishment, Hegel's teaching is far in advance of that of Kant. It is true he discovers a certain similarity between punishment and retaliation in that they both imply "the injury of an injury." But the analogy fails for want of a genuine *tertium comparationis*; for the meaning of the *lex talionis* is not "the injury of an injury," but "an injury for an injury." And if he goes on to postulate equivalence of crime and punishment, without supplying a standard of value, the result of his disquisitions, translated into the ordinary language of forensic practice, appears to be nothing more than the homely rule: "The greater the crime, the heavier the punishment."

Having criticized the Hegelian notions in detail, we must now take a bird's-eye view of his position as a whole. Hegel's theory of punishment turns out to be but the application, to the idea of Justice, of his general dialectic method, of that process of reconstruction which takes place by the alternate production and removal of contradictions. The absolute idea is to him the soul of reality. But in the content of consciousness it is present implicitly only. In order to become explicit, it must go out of itself, particularize itself, oppose itself to itself, that it may reach the deepest and most comprehensive unity with itself. So law, at first a mere potentiality, has, in crime and punishment, to go through a double negation in order to assert its reality. As it is

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an immanent impulse of rationality to actualize itself continually in human experience, it is an absolute end of human reason that justice establish its validity. And since both crime and punishment are necessary links in the process, a strange conclusion is forced upon us, as the outcome of Hegel's doctrine : Crime ceases to be something accidental that ought not to be and ought never to have been ; it becomes a necessary element of the moral order. So again punishment, instead of being merely a necessary evil,—necessary because, and provided that, crimes are committed—is erected into a categorical necessity. In other words, our moral nature demands that crimes be committed in order that punishments may be inflicted. And it becomes clear at once that Hegel is unfaithful to his principles if he concedes to the sovereign the right of pardoning criminals.

Hegel's doctrine of punishment, then, stands and falls with the proposition that the idea is the soul of reality, which forms the corner-stone of his whole philosophical system. When despoiled of the intellectual garnish with which its author has so richly and ingeniously supplied it, and seen in its nakedness, the theory turns out to be but a tissue of logical propositions with empty abstractions for the material out of which it is woven. To attempt to develop the real content of an idea out of its bare form is to fight windmills ; and human conduct, whether individual or collective, refuses to be reduced to a mere play of logical categories.

CHAPTER V

THE AESTHETIC VIEW

“ It is undoubtedly true that we experience a certain satisfaction if the consequences of his wrong-doing recoil upon the doer. The misdeed disturbs the harmony of our being, the sight of punishment re-establishes the equilibrium of our nature ” (Jellinek). We feel that “ the two things, injustice and pain, which are both contrary to our nature, ought to go together, and in consequence we naturally desire to bring about an association of the two where it does not already exist ” (Fry). This harmony which in our consciousness exists between suffering and sin has been held to be of the nature of an aesthetical perception, and the function of punishment has been thought to consist in the gratification which it offers to an aesthetic want. Notions of this order underlie the punitive theory of the Pythagoreans. They become more explicit in the writings of the scholastics; if, for instance, St. Thomas Aquinas tells us that the saints rejoice at the sufferings of the damned souls because they discern therein the harmony of divine justice, this joy of the blessed is but a reflection of the quasi-aesthetical satisfaction which the law-abiding citizen derives from the dispensations of temporal justice. But the aesthetic view reaches its full development in the theories of Leibniz and Herbart.

According to Leibniz, there is a “ pre-established harmony ” between punishment and crime. Avenging

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justice flows from a law pervading the universe, from a divinely ordained "principle of fitness under the operation of which things are arranged in such a manner that every wrong brings about its punishment." The fitness of this relationship "pleases not only the injured party, but also the wise man who perceives it, in the same way as good music or a fine piece of architecture pleases refined souls." The connection between crime and punishment, then, exists quite independently of human intervention by virtue of a natural causal relationship, and the only appropriate attitude towards it for the human mind to assume is the contemplative one, when the perception of an immanent harmony will appeal to our artistic instinct and compel our assent and approval. The sole reason why human justice interferes at all lies in the imperfection of nature which unaided is not always able to evolve the punishment inherent in every crime. Thus punishment is the resolution of a discord which would continue to offend our aesthetic sense were crime to go scot-free.

Herbart discovers the source of punishment in the displeasure which an unrequited misdeed excites. If a person suffers an evil, not the consequence of his own conduct, a disparity results between offender and offended party, a disparity which strikes as disharmonious the impartial spectator and causes him a certain amount of mental unrest which lasts until he sees a second something supervening to restore the disturbed equilibrium. It is the idea of equity that haunts him; for equity, being equality, postulates that the wrong-doer suffers an evil equal in amount to that which he has inflicted. "The deed that disturbs the balance displeases, and the gravity of the deed determines the degree of displeasure which the deed excites. . . . Now if such displeasure were a force capable of acting upon the deed it would arrest it; like every kind of resistance, it would operate in the opposite direction and would thus tend to counteract the deed,

whilst still in process of execution. But displeasure is not a force, and the deed is actually accomplished. Yet even after it is consummated, the idea of a counteraction which ought to have prevented its execution, remains. . . . To return an equal amount of evil upon the head of the doer is that to which our judgment points. Retribution is the symbol wherein displeasure expresses itself." . . . "Two remarks at once suggest themselves. First of all it is quite immaterial what kind of evil is inflicted and suffered. For this reason it does not matter either what shape retribution assumes. In returning one evil for another, the equalization of the amounts alone would be a source of difficulties; yet it is most important to preserve a strictly accurate measure since the slightest error would leave an unrequited balance which, in its turn, would again demand adjustment by fresh retaliation. And secondly, it remains undecided who is to retaliate. The deed is to recoil upon the doer; but nobody is specially destined to take upon himself the execution of the deed that balances, as it were, the account. The victim is not, therefore, obliged to take revenge. But if the Eumenides were to come upon the offender, he would get no more than he deserves." On second thoughts the Eumenides do not seem to Herbart sufficiently reliable organs of avenging justice. What is no one's business, therefore, is made the business of the state. "Incessantly the cry of unrequited wrongs is heard, but nobody is called upon to listen. . . . But just because no single individual is bound to heed what all perceive, they all that have perceived are bound to silence the voice of displeasure."

The ideas of proportion, of harmony, of fitness, as underlying the aesthetic views of punishment, are nothing else than the idea of justice, if not of an intellectual talion, in other words, purely moral notions behind a transparent aesthetical veil. It will not be necessary to discourse upon the relation between the good and the beautiful,

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nor to remind the reader that a false analogy between these two classes of conceptions has led a long series of writers to found ethical systems upon the aesthetic sense. The fallacy upon which these systems rest, has been exposed so frequently and so thoroughly that they have now a merely historical interest. Suffice it to say that the theory which finds the justification of punishment in the satisfaction which it offers to our aesthetic taste, is in substance identical with the conception of punishment as a moral necessity, and all the objections which may be urged against the latter view are, therefore, equally valid as against the former. But those who affect a preference for the artistic variety of the theory of justice, we may well ask with Alfred Fouillée : “ Can you really improve the moral architecture of the universe by introducing sham windows ? ”

CHAPTER VI

APPRECIATION OF THE TRANSCENDENTAL THEORIES

OUR critical examination of the main varieties of the doctrine according to which punishment is its own end, has made it abundantly clear that the *Leitmotiv* in each of them is the idea of justice. However deeply disguised their true meaning may be by language which on closer scrutiny turns out to be merely metaphorical, they all come to this, that criminals are punished because justice demands it, that the rationale of punishment lies in its intrinsic justice. Indeed, the modern representatives of this school are quite content to call, nay they take a pride in calling, their doctrines theories of justice. For is it not more in accordance with that human dignity which we are bound to honour even in the criminal, to be sacrificed to the abstract idea of justice than to be punished simply because the suppression of crime is one of the fundamental conditions of existence of civilized society? Let there be no mistake about it, the justice to which all these systems appeal is that abstract justice which is said to govern the universe and to be the innate heritage of all rational beings. They are all founded upon a supposititious transcendent truth, and for this reason we have termed them Transcendental.

Of the criticisms which we have offered when examining the different groups of transcendental theories, many are valid objections to the absolutist teaching in every shape or form. Thus the reality of metaphysical justice which

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is their common basis, though asserted to be an axiomatic truth, does not by any means compel universal assent. Again, they all postulate freedom of will, liberty of choice between right and wrong, a spiritual power to control impulses, claims no more supported by a general consensus of opinion than is the opposition of good and evil as absolute principles, which they likewise imply. In the next place, upon any theory of metaphysical justice the obvious fact that the criminal code is not co-extensive with the moral law can be accounted for only on the assumption that there are two intrinsically different classes of wrong-doing. What then distinguishes wickedness of which punishment is the necessary complement, from wickedness which does not call for the intervention of the criminal tribunals? To this question the transcendentalists have not so far been able to supply a satisfactory answer. The acceptance of the doctrine of an eternal, innate justice would offer less difficulties if we did not know that the content of the moral, no less than of the criminal, law has varied within extremely wide limits and is even now constantly undergoing slow but unmistakable changes. Its supporters are of course at liberty to reply, in the spirit of Hegelian teaching: Absolute justice is not yet completely realized in the phenomenal world. History is the stage upon which it gradually actualizes itself in human experience, and the farther we read through its pages the closer do we find the approximation to become of positive justice to the absolute idea. Punishment thus conceived as flowing from an immanent principle of an ideal order of the universe which realizes itself in the world of experience not otherwise than through the operation of a blind impulse of "rationality" (?) "does not," indeed, "differ in substance from divine punishment" (Lasson); it comes upon the culprit as the dispensation of an inexorable, inscrutable destiny. In so referring us to the unknown, to the unknowable, for an explanation of

punishment, the theories of justice are really begging the question; for their very object is, we should say, to determine wherein the justice of punishment consists. But does it ring true that the state, in administering the criminal law, is but the passive instrument of providence? Certainly not. The modern state finds its mission in the regulation of social relationships, not in the satisfaction of absolute moral justice. "The legislator is not called upon to regulate the relations between man and God, or between man and his own conscience; his sole function is to regulate—and these to a limited extent only—the relations between man and man, in other words social relationships" (Roland). Social law is not an abstraction. It exists for the accomplishment of definite human objects, and for their attainment the social organ relies on means consciously adopted because, within the realm of the finite, they are found suitable for the purpose. Without, then, either asserting or disputing the existence, in a transcendental region altogether separate from the phenomenal world, of a principle of eternal justice, we claim that such principle does not form the basis of the state punishment of crime. We thus arrive at the conclusion that the theories of justice are, all of them, theories, not of actual, but of fictitious punishment, invented by their authors as part of an ideal system of laws.

In spite of all that has been said, it cannot well be denied that the ordinary consciousness clings to the conviction that it is just to make the guilty suffer. How shall we account for this sentiment which is both strong and persistent? Is it true that "in our natural instinct justice reflects itself as an impulse to retaliate" (Lasson); in other words, that the popular demand for punishment, if not punishment itself, is but an echo of the old-world cry of blood for blood? If our interpretation of historical facts is correct, vengeance is the source of rights to civil redress, not of punishments. It is, however, quite con-

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ceivable that the feelings which clustered round the presentation of the act at a period when private revenge was the normal, and the only, reaction which it excited, survived even after public sanctions had supplanted the civil remedy. But this explanation is not sound since the punishment of the culprit, instead of satisfying the victim alone, together with his friends, gratifies a desire diffused throughout the community. A partial solution of the problem may, perhaps, be found in the fact that the Christian doctrine of expiation has kept alive amongst us trains of thought which properly belong to an era when purification was really the object of punishment. Again, it may be argued that the regular administration of criminal law in civilized countries has rendered the sequence of crime and punishment so much a matter of course that it is felt to be an injustice if an individual offender is allowed to escape scot-free. If public opinion does no more than to insist upon bare legality, upon an impartial administration of the provisions of the penal code, we need not fall back, in order to account for the popular demand, upon an habitual association of ideas between crime and punishment. For these terms, taken in their strict legal sense, connote each other, and the propositions, which have become classical since Feuerbach formulated them, "*nulla poena sine delicto; nullum delictum sine poena,*" are not only juridical postulates, but flow with logical necessity from the very definitions of the words. But this is hardly a correct account of the popular attitude towards crime. The instances are not so very rare when a sentence passed in strict conformity with the spirit, as well as with the letter, of the law is decried as "unjust" by the voice of the people, which, in its turn, occasionally declares criminal, and clamours for the punishment of, conduct for which no public sanction is provided—a sufficient proof that positive law is not the standard of the popular notion of justice. Nor is the dispassionate appreciation of the

act which we associate with the dispensation of punitive justice by the organs of the state, an attribute of the high court of public opinion. To the ordinary citizen the horror of the deed and the detestation of the criminal supply his *ratio decidendi*, and our problem, then, assumes a different form, viz. : How does it come about that the moral sentiments of the community, as expressed in the demand of punishment for crime, are, on the whole, in harmony with the provisions of the penal code ? One of the reasons why "the term crime is one of the most notable meeting-points of law and morality," is certainly the fact that the criminal law has been a potent factor in moral evolution. The pages of history afford ample proof of the truth of this assertion ; but no evidence, perhaps, is more likely to convince those inclined to doubt the power of the criminal legislator to influence the moral sentiments of the citizens than the modern experience of this country where a strong public opinion condemnatory of child labour is certainly to a large extent the fruit of the Factory Acts. Whilst "great part of the general detestation of crime which happily prevails amongst the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated with the solemn and deliberate infliction of punishment whenever crime is proved" (Stephen), it is a gross exaggeration to assert that the moral condemnation of crime is in every instance due to the sanction with which it is visited. When once it is realized that both municipal law and current morality are products of the social *milieu*, that both alike have their roots in the history of the nation and in those innumerable conditions which make up its environment in the past and in the present, it ceases to cause surprise if the same acts and classes of acts are forbidden by both. Where the popular element has an important share in legislation and in the administration of criminal justice, it follows almost as a

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matter of course that in the vast majority of cases public opinion ratifies the judgment of the court. It is not, however, permissible to infer from the powerful support which the enforcement of the criminal law derives from the public indignation excited by crime that punishment is the fruit, or merely an expression, of such indignation. Nor does the concurrence of moral and legal sanctions tell in favour of the transcendental theory. For if to our moral consciousness it appears just that the guilty should be made to suffer, the morality here spoken of is not a universal eternal law, inherent in our organization and coeval with the human race, but a body of positive rules, varying with time and place and with the specific civilization of a people. Neither is it a metaphysical justice, an absolute principle ruling the whole creation, which formulates that demand. It is a postulate of the social spirit, as manifested in the conscious activity of rational beings directed to the accomplishment of social ends. Herbert Spencer, indeed, reduces the moral sense to primitive judgments, based on the experience of the usefulness of certain rules of conduct, which subsequently became instinctive, and according to J. S. Mill "justice is a name for certain classes of moral rules, which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life." Without subscribing to any particular theory of the origin of morality, and without committing ourselves to a hedonistic ethical doctrine, we may claim with Sheldon Amos that if the idea of "wickedness" as contrasted with that of "dangerousness" distinguishes the moral conception of crime from the legal conception, the most wicked acts, those done by the most vicious men, and done with the most malevolent motives, are often at the same time those most pernicious from the point of view of the state.

PART II

POLITICAL THEORIES

Fiat iustitia, ne pereat mundus.

UNLIKE the systems hitherto studied, the theories upon an examination of which we now enter discover the rationale of punishment, not in an absolute metaphysical truth, not in an immutable law of the cosmos, nor in a want of our individual organization that craves satisfaction, but in the aims and objects, realized in actual experience, of society as organized in the state. Upon this view crime is the necessary condition of, but not the reason for, punishment. Punishment, instead of being an end in itself, is but a means for the furtherance of the purposes of the state.

Subject to one exception to be presently mentioned, the political theories agree in regarding the security and welfare of society as the end to which punishment is subservient. The central idea in crime is that it constitutes a danger to society, which it is the function of punishment to ward off. The difference of opinion between the advocates of the doctrine turns entirely on the mode in which punishment is thought to accomplish this object. The main line of cleavage lies between those theories according to which it is in its **infliction** that punishment becomes operative as an instrument of social defence, and those which teach that the primary object

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of the state in providing penal sanctions is to prevent *ab initio* the commission of crimes by the **threat** of punishments. The latter view, elaborated by Feuerbach, may aptly be termed the preventive theory. The former group comprises several varieties which are not, however, in theory at least, mutually exclusive. Indeed, of the authorities who rely, for the protection of society, on the actual execution of punishment some attach equal importance to the several proximate objects by which that end is to be attained. Thus Blackstone writes (*Commentaries*, vol. iv., ch. i.): "The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any further harm; and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens." Reformation, disablement and determent are in fact the three immediate purposes for which punishments are believed to be inflicted.

The amendment of the criminal, whilst looked upon merely as a means for the protection of society by most advocates of the reformatory view, is conceived by others to be the final object of punishment. The state is credited, not indeed with the mission to realize an absolute moral order, but with the inclusion, among its positive purposes, of a self-imposed duty to provide for the moral education of the subject, in the fulfilment of which it attempts, by means of punishment, to bring about the moral regeneration of those of its citizens who have proved by their acts that they do not come up to the moral standard prevailing in the community, but stand in need of further moral training. Though radically different principles form the bases of the corrective view of punishment in the two cases, many of the criticisms which we shall have to offer, apply to both indiscriminately, and it will, therefore, be convenient to study them together.

Four classes of political theories, then, will require investigation—

1. The theory of determent.
2. The theory of reformation.
3. The theory of disablement.
4. The theory of prevention, or Feuerbach's theory.

CHAPTER I

THE THEORY OF DETERMENT

WHEN it is said that the object of punishment is to deter, the term "determent" is capable of different significations. The deterrent effect may be ascribed either to the perpetual threat with which penal rules are sanctioned and which operates upon the mind of every prospective offender, or to the infliction of punishment upon the actual transgressor. To escape from this ambiguity it is better to designate the first-named function of punishment as "preventive," a subject which will be studied in a subsequent chapter. But even if we confine the use of the expression "determent" to the result flowing from the actual execution of the criminal law, it is yet left in doubt whether we refer to the influence which punishment exercises upon the wrong-doer himself who undergoes it, or to the example which his sufferings set to others. Upon the former view, the aim of punishment is to strike terror into the malefactor in order that he may be brought to his senses and be taught in future to obey the law; in other words, determent is but an instrument of reformation. Here we are concerned with punishment as deterrent in the sense that others are deterred from committing the crime for which the criminal is seen by society to suffer.

To provide the citizens with an object-lesson has been recognized, from early times, as one, though seldom as the sole, function of punishment. Among the Greek

philosophers the sophist Protagoras seems to have been the father of this theory. In the Platonic dialogue which bears his name punishment is represented as aiming at the determent of both the offender and the public: “ἵνα μὴ αὖθις ἀδικήσῃ μήτε οὗτος, μήτε ἄλλος ὁ τοῦτον ἰδὼν κολασθέντα . . . ἀποτροπῆς γούν ἐνεκα κολάζει.” In *Gorgias* Plato combines determent with reformation: “προσῆκει δὲ παντὶ τῷ ἐν τιμωρίᾳ ὄντι ὑπὲρ ἄλλον ὁρθῶς τιμωρομένῳ ἢ βελτίονι γίνεσθαι, καὶ δύνασθαι, ἢ παράδειγμα τι τοῖς ἄλλοις γίνεσθαι, ἵνα ἄλλοι ὁρθῶτερας πάσχοντα, ἃ ἂν πάσχοι φοβούμενοι βελτίους γίνωνται.” We find the deterrent aspect of punishment illustrated in practically all the Greek orators, in Lysias and Demosthenes, in Aeschines and in Lycurgus. To quote only one passage from this source, we read in Dinarchus (in Demosth.): ἵνα ναύτης τυχὼν τῆς ζημίας παράδειγμα γίνηται τοῖς ἄλλοις. Sentences might be cited both from Cicero (*de officiis*) and from Seneca (*de ira*) in support of the deterrent view of punishment. To come to modern authorities, Cujas writes: “Poena est delictorum sive criminum coercitio inducta ad disciplinae publicae emendationem, et ut exemplo ceteri deterreantur . . .”. Fichte says: “It is to some extent true that punishment serves as an example, namely to convince all of the infallible execution of the law. The execution of the law is, therefore, a public act. Each citizen who has heard of an offence, must also learn that it has been punished. It would be an evident injustice towards all those who might, in future, be tempted to violate the same law if the actual punishments of previous violations of that law had been concealed from them; for such concealment would lead them to hope for escape from punishment.” Public punishment for the sake of its effect upon the spectators is also advocated by Bentham: “A real punishment which should not be apparent would be lost upon the public. The great art consists in augmenting

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the apparent punishment without augmenting the real punishment. This may be accomplished, either in the selection of the punishments themselves, or by accompanying their execution with striking solemnities. . . . Were it possible to keep up the illusion, all might pass in effigy. The reality of punishment is only necessary to maintain the appearance of it." As one of the objects of punishment, indeed, determent is accepted by a vast array of writers; those among moderns in whose theories it is the dominant idea, are Filangieri and Gmelin.

Nor is this view of punishment peculiar to speculative philosophy. In the past, determent was often the avowed object of the punishments with which rules of criminal law or whole collections of such rules were sanctioned. "Ut unius poenae metus possit esse multorum," "ut et conspectu deterreantur alii ab iisdem facinoribus"; these and similar phrases abound in Roman criminal jurisprudence. Numberless instances, all expressing the same idea, might be cited from medieval legislation, both English and foreign. But nowhere, perhaps, does determent appear so clearly as the foundation of the whole administration of criminal justice as in the conclusion of the old Scots indictment which craved punishment "to deter others from committing the like crimes in all time coming." The same spirit of the law is well interpreted by the English judge who, when passing sentence of death upon a convicted horse-thief, remarked in reply to the latter's complaint about the want of proportion between the crime and the punishment: "Man, thou art not to be hanged for stealing a horse, but that horses may not be stolen."

Though determent has been one of the motives for punishment in the past, it may be thought that it has ceased to be so, at least in those countries in which public executions have been abolished. As Bentham remarks, you have to appeal to the eye if you want to move the heart, and in abandoning the means, the state may be

held to have designedly repudiated the end. Now the reason usually assigned for this change of policy is that public executions were found to brutalize the spectators, to deprave the public feelings and to destroy that sympathy with suffering which it is the interest of the state to foster. Frequently, however, they produced the contrary effect and tended "to counteract in some measure their own design, by sinking men's abhorrence of the crime in their commiseration of the criminal" (Paley). Nay, more than that: a criminal displaying a certain bravado on the gallows had every chance of becoming to the masses an object, not of abhorrence, but of admiration, a hero among his kind. At the best, there was always the danger that familiarity with punishment might breed contempt for it, might blunt, instead of sharpening, the edge of criminal justice. The Vicar of Wakefield is quite right if he says: "The work of eradicating crime is not by making punishments familiar, but formidable." It is doubtful, however, whether these considerations would, in themselves, have been sufficient to induce the legislature to do away with public executions. The true cause appears to be that they have had their day and no longer served any useful purpose. At a stage of civilization when, owing to the very primitive police organization and other causes, the authors of the majority of crimes remained undetected, it was necessary to utilize such malefactors as were caught and convicted in order to show in their person that the criminal law was not a dead letter, but a living reality. In our own days the discovery and actual punishment of the more heinous offences is a rule subject to so few exceptions that we look upon the administration of criminal justice as a matter of course, and there is, therefore, no need for its *demonstratio ad oculos*. But whilst the scope of deterrent punishments has thus been narrowed down in proportion to their limited range of usefulness, we still fall back upon

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them when circumstances render their application expedient. For if in a particular district a certain crime is greatly on the increase, our judges are in the habit of passing much severer sentences than if it were but rarely committed there, and they do so with the avowed object of stamping out offences of that kind. In the words of the Duke in *Measure for Measure*: "It is too general a vice, and severity must cure it."

Determent, then, as an aim of punishment, though it has lost much of its former importance, cannot be said to be entirely eliminated from the policy of modern courts of criminal jurisdiction. It is, however, quite out of harmony with modern sentiment. Not only is there a constant risk that the judge will incline to undue severity if the punishment of the one is to serve as an example to the many; but *any* punishment will strike the modern mind as both arbitrary and excessive which is standardized, not according to the quality of the offence, but according to the probability that persons whom the offender has never seen, will commit similar acts in the future. The iniquitous character of punishment founded upon this principle was already recognized by Tacitus where he says: "Habet aliquid ex iniquo omne magnum exemplum, quod contra singulos utilitate publica rependitur." Attempts have, indeed, been made to justify the deterrent view of punishment by such arguments as the following: The criminal has, by his crime, forfeited the rights of citizenship. Society may, therefore, deal with him as it pleases; and instead of having ground for complaint, he has every reason to be grateful if he escapes with any treatment short of capital punishment. It is true instances may be quoted from the history of criminal jurisprudence where the criminal was looked upon as having outlawed himself, even before conviction, by the very act which constitutes the offence. But to found a modern theory upon such ancient examples is to be guilty

of an unpardonable anachronism. For modern law extends its protection even to the convicted criminal, and modern morality concedes rights to man as man, quite independently of all questions of citizenship. Most recent writers frankly confess that if punishment is awarded as a means of warning off others, the criminal who undergoes it is sacrificed to the ends of society, but many agree with Bentham in calling such sacrifice "indispensable." Unavoidable social necessity, but nothing short of such necessity, will reconcile modern man to a view of punishment which entirely disregards what Green aptly terms "the reversionary rights of the criminal." Circumstances do occur in modern life when a few exemplary sentences prove the most rapid means of restoring law and order; whether they are absolutely indispensable even on such occasions is a question difficult to answer. But it is certainly not permissible to base a general theory of punishment on what is exceptional, and this doctrine, upon which a class of human beings is, in Kantian phraseology, treated purely as a means, though still occasionally acted upon in forensic practice, cannot claim a high ethical value.

CHAPTER II

THE THEORY OF REFORMATION

REFORMATION of a criminal, in the widest sense of the term, means such a change in his mental *habitus* that he will not offend again. When it is said that punishment aims at bringing about such a change, reformation may either be looked upon merely as a means for the protection of society; for the reformed evil-doer no longer constitutes a danger to its peace and good order. Or it may be conceived as an end in itself, as the final object of punishment. On the former view, punishment has done all that can be expected of it if, after undergoing it, the *quondam* offender refrains from further infraction of the law of the land. It is immaterial whether his future lawful conduct be prompted by a recollection of the sufferings which his former crime has brought upon him, or whether he has been freed of the criminal promptings of his nature. External conformity is all that matters; for the interests of society are equally safeguarded whether his motive be fear or a moral sentiment of a high order. "Nec ad imperii securitatem refert, quo animo homines inducantur ad res recte administrandum, modo res recte administretur," says Spinoza. It has, indeed, been argued that a true conversion offers more solid guarantees for future good behaviour than mere terror. But even so, moral improvement is merely desirable, not absolutely necessary, for the attainment of the ultimate purpose. It is otherwise when reforma-

tion is sought for its own sake. Here punishment fails of its object unless it really cures the offender of his vicious tendencies; for the interest which it is intended to serve is that of the criminal alone.

That theory according to which punishment is to frighten the criminal from offending again, would naturally lead, if acted upon, to the conversion of our prisons into blocks of torture-chambers; for the more cruel the treatment which the convict receives, the less likely will he be ever to forget it again. It need hardly be said that the spirit of the age would never tolerate the adoption of this plan. On the contrary, it clamours incessantly for further and further mitigation of the prisoners' lot; and this tendency is certainly not compatible with a policy of intimidation. However, the experiment has all too frequently been made in the past, but never with even a semblance of success. A glance into the writings of a Beccaria, of a Howard, proves sufficiently that a savage penal system produces no effect other than to render its victims more brutal, more callous, and more reckless than they were before. The experience of the English courts with the administration of the "cat" seems, however, to point to a different conclusion; it appears to teach that punishment, judiciously selected, may well deter criminals from a repetition of their offence. Unlike other modern punishments, severe physical pain is said to leave a lasting impression upon the minds of the scoundrels who are made to suffer it. But the lesson thus learnt is incapable of extensive application. For it is only when the terror inspired by a series of crimes of violence amounts almost to a panic in a particular district that public opinion will tolerate the systematic use of that implement of torture; and in spite of its efficacy in appropriate cases, humanitarian considerations have permanently excluded it from the penal codes of all other Western European nations.

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The curative view of punishment according to which its infliction serves to dry up the spring of evil in the soul of the offender, either for the ultimate good of society or for the benefit of the criminal alone, has given rise to three groups of theories, according as to whether the defect to be remedied is looked upon as pathological, intellectual, or moral.

The notion that all crime partakes of the nature of disease, originated with Franz Joseph Gall. The analogy between moral evil and physical illness had occurred to many writers before him. But it was only in metaphorical language that both Aristotle and Plutarch described punishment as *ιατρεία τῆς ψυχῆς* or that the Church spoke of *poenae medicinales*. The founder of phrenology was undoubtedly the first seriously to advance the claim that crime is a symptom of mental alienation and that punishment is a therapeutic measure adopted to cure a disease equally dangerous in its consequences to social order and to the patient himself. Similar views gained a temporary ascendancy, owing to the genius of Lombroso and his school. We shall have to deal with them when studying the teachings of modern criminology. Here it is enough to remark that whatever the scientific merits and demerits of this doctrine may be, it has never been adopted in practice; no state has yet transformed its prisons into hospitals or lunatic asylums.

The second form which the remedial theory assumes is founded upon the experience that crime is much more rife among the ignorant masses than among the cultured classes. Statistics, moreover, seemed to prove that the percentage of those unable to read and write reaches a much higher figure in the case of prison inmates than among the general adult population. The conclusion appeared justified that the higher the educational standard attained by an individual, the less likely was he to get into conflict with the law, and that improved popular

education was the most reliable means for stamping out crime. "To open a school is to close a prison," says Victor Hugo. It was to be the function of punishment to make good the want of an early intellectual training. Now the accuracy of the statistical material which seems to support this view has been seriously doubted. But even if the tables are correct, the conclusions founded upon them are open to criticism. It does not require a long array of figures to render it probable that a man who has not mastered the rudiments of the three R's is at a serious disadvantage in the struggle for existence, and therefore more likely to commit offences against property than his well-educated neighbour. But in the environment of one whose schooling has been so hopelessly neglected, there are, as a rule, so many factors at work, social, moral and economical, which might quite as well be held responsible for his greater criminal proclivities, that it seems quite inadmissible to pick out a single one to serve as an explanation. A higher education, on the other hand, has hitherto been an almost exclusive privilege of the well-to-do, whose whole mode of life offers far fewer temptations to crime. Yet even an eminent degree of mental culture has not always proved an effective protection against criminal tendencies, and a trained intellect, if coupled with a low moral character, has been found to produce specially dangerous offenders. Nor is it easy to see how mere acquisition of knowledge should cure a criminal of his evil ways. The supporters of the theory have not found it necessary to offer explanations, with the sole exception, so far as I know, of Friedrich Groos, whose attempt, though by no means recent, is all the more interesting because isolated. Our actions, he argues, wrongful and innocent, are determined by motives. The barren mind of the uninstructed produces no ideas, or only ideas insufficient in number and vividness to counteract their impulses. The ignorant

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are, therefore, helpless victims to promptings to crime, as soon as they arise. Education by punishment cures the defect by furnishing the mind with a store of new ideas and by opening up fresh paths of associations. It would be superfluous to waste any more words upon this view of punishment. For though the schoolmaster is found in most modern prisons, the position he occupies there is quite a subordinate one. Intellectual training is not of the essence of punishment, and our prisons resemble educational institutions no more than they resemble hospitals.

The reformatory theory *par excellence* is that which regards as the object of punishment the moral regeneration of the criminal. Punishment has accordingly been defined as "a physical measure adopted to excite in the soul of the guilty true repentance, respect for justice, sympathy for their fellow-creatures and love of mankind," the notion underlying this view of punishment being either that only a good man can make a good citizen, or that the state, being a moral institution, is bound to ensure the private morality of its subjects by all means in its power. Of its advocates some expect of reformatory punishment an all-round improvement in the character of the offender, others a correction of a particular moral defect, which they look upon as the most fruitful source of crime. As an instance of the latter view we may quote Howard's well-known dictum that the object of punishment is to make the criminal industrious and thereby honest. A peculiar variety of this theory has been evolved by Karl David August Röder, whose argument proceeds on the following lines: In investing with full legal capacity those who have attained their majority, the law starts with the presumption that persons who have reached years of "discretion" know how to take care of themselves, know how to exercise their rights and how to perform their duties. This presump-

tion of the law is not, however, conclusive, but may be rebutted by proof to the contrary. The criminal supplies the necessary counter-evidence. He proves by his act that in his case the presumption does not hold good, that, though of full age, he cannot be trusted with the rights of full citizenship. He is still *in loco infantis* and requires looking after. The criminal law is, in fact, but a branch of the law of guardianship and is treated under this heading by Röder. The state takes the offender under its tutelage and gives him a belated moral training to make up for his neglected early education. Such education is state punishment. It differs in nothing from domestic or disciplinary punishment, and the only form of punishment which completely performs its proper office is imprisonment. Prison is in truth a house of correction.

It is generally in the sense of moral improvement that reformation is understood when said to be the object of punishment. This is the form in which the reformatory theory has enlisted most of its supporters, from Plato down to our own times; and it is this form which we shall submit to a detailed critical examination, though some of the remarks which we are about to make, will be found equally applicable to reformatory punishment when given one of its other meanings.

There can be no doubt that the reformatory view proves more attractive than any other to modern humanitarian sentiment. It robs punishment of its sting. The criminal is looked upon as an object of pity, not of hatred, and punishment becomes a work of charity. For whether its final aim be the good of society or that of the offender himself, it cannot fail to benefit the latter. "The state," says Höffding, "by punishment vouchsafes a good to the individual." Nor is it material that to the wrongdoer himself the instrument of correction appears an unmixed evil. Punishment is a blessing in disguise,

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and only his own short-sightedness prevents him from piercing the veil. "Non enim nocet (is qui punit), sed medetur specie nocendi; nec ulla dura videtur curatio, cuius salutaris effectus est," writes Seneca, and times out of number has the comparison been made between punitive justice and surgical operations since Plato discovered an analogy between them in that both are painful but both beneficial. Moreover, as has been said, "in reformatory punishment the state expiates, as it were, the collective guilt inherent in every crime; for in attempting to reform the offender, it seeks to counteract the baneful influence of those social factors which have contributed to the formation of his character and have been instrumental in the causation of his misdeed."

But if punishment is in reality a boon conferred upon the offender, is it still punishment? Yes, answers Krause; for punitive justice is still first and foremost justice, and the realm of justice is but a province of the empire of that one and only good, the divine good as realized in temporal conditions. Even if it were possible to counteract evil by evil, human justice, being an image of the divine, could never allow its pure fountain to be polluted by it. Punishment, conceived as an evil, is but a crime of a higher order. Crime thus begets crime, and the attempt to cure evil with evil leads into a vicious circle from which there is no escape. It is only by good that evil can be effectively overcome; only by the infusion of nobler sentiments can a corrupt heart be healed. Punishment, then, to be legitimate, must be an absolute good—good in its means as well as in its ends. The gospel of love preached by Krause may possibly have inspired the penal system of some happy island on Alpha Centauri; it has certainly nothing in common with the conditions actually prevailing among even the most advanced inhabitants of this planet. Indeed, it has been remarked of reformatory theories in general, and there is a good

deal of truth in it, that they have mostly originated in the brains of dreamers who are inclined to forget the real man in their ideal conception of man. If we wish to remain on solid ground we shall have to avow that punishment means the infliction of evil upon the offender, and that it ceases to be punishment when it ceases to be an evil.

Open to even graver objections is the reformatory theory when the moral amendment of the criminal is looked upon as the sole end of punishment, quite irrespectively of any advantages which society may derive from his transformation into a law-abiding citizen. Thus viewed, punishment is no longer founded upon a right of the state against the criminal; it becomes a claim to curative treatment which the criminal has against society. In the light of this opinion, it is difficult to see why the state should take the initiative and force its benefits upon an unwilling recipient, instead of waiting till he asserts his claim. Or, at any rate, it should be open to the offender to waive this right, like any other right vested in him. If it is attempted to justify the spontaneous intervention of the state on the tutelary principle, our answer is that the paternal form of government is so completely discredited that an appeal to its doctrines cannot appear a satisfactory explanation. If, on the other hand, it is claimed that the state has a moral mission in the exercise of which it has to provide for the ethical education of its subjects, it is obvious that such teaching, if carried to its logical conclusions, would render it incumbent upon the state to ameliorate, by forcible treatment, any man whose life or ideas are thought to be capable of improvement: the boundary line between criminality and immorality becomes, in fact, completely obliterated. In truth, the modern state does not interfere with the private morality of its members, and if it takes no active methods of promoting it, the moral regeneration

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of evil-doers cannot, in itself, form one of its political or legal aims.

Furthermore, if punishment is in substance a benefit conferred upon the offender, why should it not be a blessing in form as well? Why should it involve suffering at all? For on this theory its usefulness depends in no way upon its being painful, but exclusively upon the changes which it brings about in the subject. And if it is found that the same, if not better, results can be produced by the creation of conditions pleasant to the convict, why not adopt the ideal of remedial treatment, *suaviter in modo*? It has yet to be proved that a man must be made unhappy in order that he may be made good. An atmosphere of love may be more conducive to moral recovery. But to call such a cure punishment is playing with words. What people who denounce painful punishments really mean is that we ought to reform criminals *instead* of punishing them. To decide the relative merits of punishment and moral training as alternative methods of dealing with criminals would be outside the scope of this treatise. But to call the educative treatment which is to take the place of punishment itself punishment is obviously a misnomer.

If, then, suffering is a necessary ingredient in the conception of punishment, we must next inquire what there is in physical pain that leads to moral regeneration. Undoubtedly influences may be brought to bear on a prisoner, whilst undergoing his sentence, that open out to him the vista of a better life. The ministrations of the prison chaplain, instruction, religious or secular, a book from the prison library may excite in him a horror of vice or love of virtue which he had not before. But if this change is wrought by any of these agencies, it is not wrought by punishment as such. It is in a certain sense a mere coincidence if the time which the convict does, turns out to be the period of his reformation. We

do not thereby wish to deny that it is incumbent upon the state to provide for the moral and spiritual as well as for the physical needs of those unfortunate creatures, whilst it has them under its absolute control, and to put them in the best possible conditions for recovering from their evil propensities. Indeed, so far as it is compatible with the true objects of punishment and with the requirements of prison discipline, the state ought to endeavour to reform criminals *as well* as to punish them. But then, reformation is the complement, not the foundation, of punishment. All this, however, is not to the point. What we are really anxious to discover is how punishment *qua pain* is reformatory. With τὰ παθήματα μαθήματα and similar proverbs we have all been familiar since early youth. Here we cannot rest contented with the mere assertion of the existence of such a relationship; we want to know the "how" and the "why." Many solutions of this problem have been attempted; but of the so-called explanations some are bare circumlocutions, *e. g.* "The discipline involved in the pain of punishment toughens the moral fibre" (Stawell), "Punishment strengthens the criminal's power of resistance to such of his individual inclinations as are contrary to current morality" (Post). The first real answer to the question to suggest itself is that his sufferings may convince the offender that vice does not pay. Mere outward reformation is thus sufficiently accounted for—unless there is truth in the alleged discovery of the anthropological school that sensitiveness to painful impressions is considerably diminished in the vast majority of criminals. In any case regulation of conduct by the recollection of the painful consequences of wrong-doing in the past is something different from genuine moral improvement. Rashdall argues that the change brought about in the criminal through pressure of pain, if not true reformation, is at least the condition thereof. "Every man," he says,

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“has a better self, as well as a lower self. And if the lower self is kept down by the terror of punishment, higher motives are able to assert themselves.” The view that one side of our nature has to be compressed in order that another may have a chance to expand, cannot fail to strike us as far too mechanical a representation of our moral life. But granting that the pain of punishment prepares the soil for moral amendment, it does not follow that it does anything towards sowing the seeds thereof. Upon another version, the pain of punishment is an instrument of reformation because it impresses upon the mind of the offender, with great vividness, the fact that the act which he has done is a wrong to society. Now in the case of the more heinous crimes, the actor, provided he is in his sound senses, fully appreciates, *ab initio*, the nature and quality of his act. The explanation given can therefore hold good of none but the most venial transgressions. And even here the knowledge, if previously wanting, is acquired by the wrong-doer as soon as the verdict is brought in and sentence is passed, so that the actual suffering involved in the carrying-out of the latter can discharge but the ancillary function of bringing such knowledge home to him with greater force. Besides, though ignorance of the law is no defence to a criminal charge, before the moral tribunal absence of malice will excuse; and an offender falling within this category, cannot stand much in need of moral correction. Indeed, the education which the criminal is to derive, upon this view, from the pain of punishment, is not moral at all, but purely intellectual. The only kind of pain which can lead to true moral progress is pain of conscience, *i. e.* remorse. By the infliction of external pain one hopes to strengthen the voice of conscience in those in whom it has begun to make itself heard, and to excite it in those in whose breasts it has hitherto been silent. To supply the required stimulus was to be the function of

punishment. Now it appears doubtful whether repentance can ever be imposed from without. For its essential characteristic is its spontaneity. It originates in the depth of the soul, and "the patient has to be his own physician." The most we can hope for, is that punishment may create a psychological disposition favourable to the spontaneous growth of remorse, that "punishment, by bringing a man up, as it were, with a round turn, may awaken the reflective consciousness in him, and then that consciousness may, if it chooses, proceed to do its own work" (Stawell). But the prospects of punishment leading to pain of conscience even in this indirect way do not seem particularly bright if we believe Garofalo and others who assert that the faculty of feeling remorse and repentance is practically nil in the case of criminals—except for such regrets as are the fruit of the knowledge that wrong-doing has brought them to their present painful predicament. In any case, punishment cannot even remotely favour repentance unless it is accepted as just by the offender, unless the judgment of the court is ratified by the appellate tribunal of his own soul. Punishment enforces upon the criminal the disapproval with which his action is regarded by public opinion, as expressed through its organized mouthpiece, the judicial bench; and provided that he recognizes the latter as an authority in moral matters, the conviction of his own ethical inferiority will grow upon him, and an impetus may thus be given to his repentance and reformation. Far more frequently, however, it is to be feared, his sufferings are felt by the criminal to be imposed by an authority superior, not in moral force, but in physical power, with the result that, instead of feeling himself to blame, he rebels against his punishment and finally leaves prison permanently at enmity with society.

We thus find ourselves brought face to face with the question: *Does punishment reform offenders?* This is

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a simple question of fact to which, unfortunately, the general answer must be in the negative. "In the reformation of criminals little has ever been effected, and little, I fear, is practicable. From every species of punishment that has hitherto been devised, from imprisonment and exile, from pain and infamy, malefactors return more hardened in their crimes, and more instructed." These lines of Paley's are as true to-day as they were at the time when they were written. And if we are not prepared to subscribe to every word of Bentham's where he says: "In a moral point of view, an ordinary prison is a school in which wickedness is taught by surer means than can ever be employed for the inculcation of virtue. . . . Upon the ruins of social honour is built a new honour composed of falsehood, fearlessness under disgrace, forgetfulness of the future, and hostility to mankind," the extent to which his picture strikes us as unduly gloomy, shows the degree in which all the most strenuous efforts of modern prison reform have furthered the reformatory ideal. Every now and then an individual may leave prison a better man than he entered it; but even in these isolated instances it remains to be seen whether the change will endure after he has returned to circles where crime and punishment are regarded as an honour rather than as a disgrace.

It is true that not until quite recent times has the moral reclamation of convicted evil-doers become an avowed object of governmental activity. Nor is it even now the true aim of punishment. It cannot, therefore, strike us as very wonderful if penal measures, devised for the attainment of quite different ends, do not readily lend themselves to the furtherance of a subsidiary scheme, which, when all is said, has been a mere after-thought. At the present time we have practically only two forms of punishment at our disposal, death and imprisonment; and it must be confessed that both are eminently unsuit-

able for the accomplishment of the reformatory task. Capital punishment, one would have thought, is quite incompatible with the reformatory view. Yet even the penalty of death has been pressed into the service of this theory. It has been argued that extreme cases postulate extreme measures, and that criminals who prove refractory against the milder measures of penal reform must be executed, in the hope that the fear of impending death may yet lead to repentance. But the principle that the body must be sacrificed that the soul may be saved, is certainly foreign to the spirit of modern codes. Prison, indeed, has been credited with offering conditions highly conducive to moral improvement. Neither the allurements of pleasure nor the evil influence of bad example penetrates its walls. Regular work deprives the convict of that leisure which is Satan's opportunity. The solitude which it gives for reflection, disposes the prisoner to hold spiritual intercourse with his Creator and forces him to listen to the voice of conscience which the tumult of the world too easily stifles. Such arguments, however specious, fail to carry conviction if we remember that society is the birthplace of moral sentiments in the individual as well as in the race, and that the essential shortcoming of the criminal is a want of adjustment to his environment. The aim of true reformation, must therefore, be the artificial adaptation of the offender to the social conditions prevailing in the outside world. Now prison discipline has aptly been described as "an unnatural compound consisting of monasticism and militarism" (Morrison), which trains the inmate to accommodate himself to highly artificial conditions of existence, which have no counterpart in the life of the free population. To restrain a man's freedom is surely not the best method of teaching him how to use his freedom, nor keeping him aloof from temptation the surest means of making him proof against temptation.

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The educational success of prison training is best shown in the experience expressed in the familiar paradox that the good prisoner is a bad subject.

We arrive, then, at the conclusion that however inspiring reformation may be as an ideal, the position that it forms the practical end of punishment is untenable. Quite absurd are the results to which this theory leads in the hands of fanatics who see in moral regeneration the sole object of punishment. On this view, two classes of offenders would have to escape scot-free : those who have already repented of their evil ways, and those proved to be incorrigible ; penal visitation would be unnecessary in the former, useless in the latter. The opinion that repentance, if genuine, should be a ground of exemption, has been adopted, *inter alios*, by Schleiermacher who writes : " If a change of mind has been brought about either by voluntary repentance or by outside influences, neither the criminal himself nor anybody else has any further interest to invoke the interference of the law." But as regards the incurable, the reformatory view postulates as a necessary complement their extirpation, a truth fully appreciated both by Plato and by Aristotle.

CHAPTER III

THE THEORY OF DISABLEMENT

“IF I had a commonwealth to reform or to govern, certainly it should not be the Devil’s Regiment of the Line that I would first of all concentrate my attention on. To them one would apply the besom and try to sweep them with some rapidity into the dustbin. Away! Begone, swiftly, ye Regiments of the Line, in the Name of God and of His poor struggling servants, sore put to it to live in these bad days.”

This passage, taken from Thomas Carlyle’s *Essay on Model Prisons*, contains a literally “sweeping” statement of the doctrine that it is the function of punishment to protect society by the elimination of criminals. No other writer with whose works I am acquainted has adopted this view in so uncompromising a fashion. On the contrary, where disablement enters as an element into penal theories, it occupies, as a rule, a subordinate place and is looked upon as an object subsidiary to some other end which is regarded as paramount, generally reformation.

Historically, the intention to deprive offenders of the power of doing future mischief has been very prominent among the motives with which punishments were inflicted. The punishments first in point of time were death and expulsion from the tribe, both means of ridding society of one who had proved a source of danger to it, either directly or indirectly by calling down upon the com-

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munity the wrath of some deity whose displeasure he had incurred. Again, many of the so-called "characteristic" punishments were chosen, not for the sake of symbolizing the crime, nor, as is commonly alleged, as a sort of *talio*, namely for the purpose of visiting the sin upon the offending member, but in order to incapacitate the offender for repeating his offence. This accounts largely for the mutilations which played so prominent a part in the history of the criminal law; a handless thief is no longer light-fingered, and the sanctity of the marriage-bed is not likely to be violated by an adulterer once he is castrated. A similar motive affords a partial explanation for the practice of branding offenders. For in many cases to make a criminal recognizable as such is to disarm him. It is easier to protect your flock when the wolf comes in his own skin than when he approaches "a sheep without, a wolf within."

Among the punishments now in use in civilized countries, those of death, transportation and imprisonment for life are often cited as complete realizations of the principle of disablement. According to some authors, very long terms of imprisonment embody the same idea: they hold that the rationale of long sentences is to be found in the expectation that the convict will leave prison an old man, too broken both in spirit and in body to do further harm. That the first-named punishments have the *effect* of permanently eliminating the criminal goes without saying. Similarly, any prisoner, as long as he is behind lock and key, whether his term be short or long, is, for the time being, forcibly restrained from making onslaughts on society. It does not, however, follow that that which is the result of punishment, is also the object with which it is inflicted. The opinion that incapacitation is the end, and not merely a by-effect, of punishments which permanently remove the offender from society, is contradicted in the case of those criminal

systems in which several such kinds of punishment are found side by side, by the fact that the law exactly prescribes for what offences the one or the other is to be awarded. As they all answer the purpose equally well, one of them ought to have been chosen, on account of the collateral advantages which it offered, as applicable to all cases in which it seemed desirable to eliminate the offender : capital punishment on grounds of economy, or, where public sentiment will not tolerate the taking of human life by judicial sentence, either transportation or imprisonment for life, whichever of the two appeared preferable for other reasons.

There seems to be a complete consensus of opinion that these drastic measures ought to be resorted to only in the case of such malefactors as have shown themselves utterly unfit for life in society. Professional criminals and habitual offenders in general answer this description ; and penal codes seem to give practical recognition to this consideration when they provide that certain offences shall be punishable with a life sentence only after one or more previous convictions. But inasmuch as incarceration for life is not the sentence pre-appointed by law for such cases, but only the maximum allowed, the judge being generally clothed with a wide discretion, in the exercise of which he may award much shorter terms, it is not permissible to infer that the legislature intended to substitute, all at once when reaching the top, an entirely new principle for that which it had adopted all along the ascending line. Moreover, punishments which render the culprit permanently innocuous are not by any means restricted to old offenders ; instances occur in all modern penal codes where a single act of crime is considered a sufficient qualification. Take the case of murder in English law, which prescribes that sentence of death must, of necessity, be passed as soon as a verdict of guilty has been brought in. It might be said that a person who

has committed a murder, has proved by his act that to him human life is a thing of no value and that he would not shrink back from shedding more innocent blood when it suited his purpose. And this view was obviously adopted by the malefactor, quoted by Henricus Stephanus, who, when sentenced to death for a seventh murder, petitioned the King of France for a pardon, and when his petition was refused, complained that the six last murders lay at the door of the king, whilst he, the actual assassin, was morally guilty of the first one alone; for if the king had done his duty by having him executed for the first, it would not have been in his power to commit any more. Yet circumstances are certainly imaginable which would render it highly improbable that a murderer would ever commit another crime, even if he were to go quite unpunished. A poor nephew kills his uncle whose heir he is, in order to satisfy the pressing demands of his creditors. The victim was rich beyond the dreams of avarice, and the murderer, having come into his property, has certainly every inducement henceforth to lead the life of a respectable and law-abiding citizen. Again, a man of hitherto unblemished reputation has, in the heat of passion, fired a bullet through the heart of his best friend, from whom he had received but the slenderest provocation. The catastrophe cannot fail to make a lasting impression on his mind, and he is more likely for the future to keep his passions in check than if their strength had never been brought home to him in so dramatic a fashion. On the principle of disablement there seems to be no reason why the state should come down upon either of these offenders. But would such a defence be admitted in a court of law? Certainly not. And if not, why not? Because the malignity revealed by the act of the former, the uncontrollable temper displayed by the latter constitute, in themselves, disqualifications for life in civilized communities. Thus would answer the advocates of the

theory of elimination, to which Sir James Stephen seems to signify his adhesion, where he says : “ If a man commits a brutal murder, or if he has done his best to do so and fails only by accident ; or if he ravishes his own daughter, . . . or if several men acting together ravish any woman, using cruel violence to effect their object, I think they should be destroyed, partly in order to gratify the indignation which such crimes produce—and which it is desirable that they should produce ; and partly in order to make the world wholesomer than it would otherwise be by ridding it of people as much misplaced in civilized society as wolves or tigers would be in a populous country ” ; though the peculiar choice of offences which he has made in the compilation of his list renders it not improbable that the first-mentioned motive has, after all, proved with him the stronger of the two. Granting for the moment that the answer given sufficiently meets the two hypothetical cases adduced by way of objection, it can certainly not be relied on to explain the catalogue of crimes which legislatures have made capital or punishable with perpetual imprisonment. It cannot be seriously maintained that the man who “ maliciously and advisedly, by writing or printing, maintains that the sovereign with the authority of parliament may not make statutes to bind the crown and the descent thereof,” constitutes either a more urgent or more lasting menace to society than the shark who practises every imaginable species of fraud on a gullible public. Yet the former must, under 6 Anne, c. 7, be sentenced to death, whilst the latter cannot possibly get more than five years’ penal servitude. Lest it be said that my argument is bolstered up with an anomaly of the English law, explainable on historical grounds, another example will serve to substantiate my contention. Society has most emphatically less to fear from an accused person who has on one occasion forged the endorsement of a bill of exchange than from a professional thief, or from a brute who

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unhesitatingly knocks down the most inoffensive passer-by who happens to cross his path.

Criminal codes deal with crimes, not with criminals. Of modern penal systems Guizot's dictum still holds good that "punishment has a right but against crime"; in other words, the scale of punishments in actual legislation is determined in reference to classes of offences. Disablement, on the other hand, is a remedy appropriate to certain kinds, not of offences, but of offenders. It could, therefore, claim a rightful place only in such penal schemes as were built up on the foundation of Liszt's doctrine that "the object of punishment is not the crime but the criminal." The advocates of those theories according to which disablement is one of the ends of punishment, have felt this, though they do not all appreciate the trend of their opinions. They generally postulate elimination as the complement of reformation, as the punishment suitable for incorrigible offenders. If this position is once fully taken, the nature of the crime in respect of which the culprit has been proved refractory to all reformatory efforts, ceases to be material, and the incorrigible vagabond, the incurable thief and the incorrigible murderer will all have to be dealt with in exactly the same way. This method of disposing of malefactors, then, has no longer the character of true punishment, but is a pure measure of social defence. It is significant that long before the doctrines of the new criminological schools were dreamt of, incorrigible criminals were compared by authors who advocated their elimination from society, to every possible species of ferocious animals known to zoology; and the true significance underlying the claim for their destruction has been well recognized by Fichte, though his teaching is inextricably mixed up with that peculiar view according to which the criminal by his crime becomes an outlaw, where he writes: "The outlaw is considered simply as a wild beast, which must be shot;

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or as an overflowing river, which must be stopped; in short, as a force of nature, which the state must render harmless by an opposing force of nature. The death of the outlaw is not a means of punishment, but merely of security.”

CHAPTER IV

FEUERBACH'S THEORY

WHILST in the theories of punishment hitherto discussed the whole attention is concentrated upon its actual infliction, the doctrine on the study of which we now enter represents the threat of the law as the essential aspect. That fear of punishment is a powerful instrument for promoting obedience to the law has been early recognized. Among the Greek schools the Cyrenaics were the first to give clear expression to the idea. "The laws," says Theodorus, "have no other object than to keep in check the irrational masses." And though every pleasure is good in itself, however polluted its source, yet a wise man will refrain from acts forbidden by law and custom; his only motive for so refraining is, in the opinion of both Meleager and Cleitomachus, as reported by Diogenes Laërtius, fear of being punished and of getting a bad name. The wisdom of a view based upon the truth that prevention is better than cure, has strongly appealed to Aulus Gellius who remarks: "*Summa enim professio stultitiae est, non ire obviam sceleribus cogitatis, sed manere opperiri que, ut cum admissa et perpetua fuerint, tunc denique, ubi quae facta sunt, infecta fieri non possunt, puniantur,*" and has inspired the political maxim laid down in the Code of Justinian (*ad Legem Corneliam de Sicariis*): "*Moneat lex poenalis, priusquam feriat . . . melius est his occurrere et mederi quam iniuria accepta vindictam quaerere.*" To be guided by the knowledge that the

threat of punishment operates over a wide area, whilst its application has no influence beyond the comparatively narrow circle of individuals that actually undergo it, Ovid enumerates among the attributes of a wise prince :

“ *Multa metu poenae, poena qui pauca coercet,
Et iacit invita fulmina rara manu.*”

The same conception seems to underlie the Ciceronian dictum “ *ut poena ad paucos, metus ad omnes perveniat,*” though it is equally applicable to the view, in support of which it is frequently quoted, that the value of punishment lies in the object-lesson which it provides. Spinoza teaches that the state must, for the sake of self-preservation, enact laws and ensure their observance by threats; for “ *terret vulgus nisi metuat.*” If he adds “ *Summa potestas . . . non odio percita ad perdendum civem, sed pietate mota eundem punit,*” the obscurity of the meaning of the word “ *pietas* ” leaves in doubt what end he thought the infliction of punishment should serve. The psychological process upon which the preventive view relies, is, for the first time, clearly brought out by Samuel von Pufendorf. “ *The threat of punishment,*” he writes, “ *is to restrain people from sinning and to prompt them to obey the laws. Before embarking upon a course of action, men are wont cunningly to compare the advantages which they hope to derive with the harm which they fear may result therefrom. And it is easy to see that they will hardly be deterred from vice if they feel that the net gain to them is greater than the inconvenience of the punishments with which it is to be visited.*” Here the utilitarian character of the theory becomes at once apparent: and it is not surprising that the father of English utilitarianism took hold of it and incorporated it in his system. “ *The will cannot be influenced except by motives; but when we speak of motives, we speak of pleasures or pains. . . . The pain or pleasure which is*

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attached to a law form what is called its sanction." "To prevent an offence, it is necessary that the repressive motive should be stronger than the seductive motive. The punishment must be more an object of dread than the offence is an object of desire." Whilst the aim of the penal sanction, then, is, with Bentham, the prevention of crimes, its infliction upon the criminal serves three purposes: determent of others, reformation and disablement. After a crime has been committed "it still remains to prevent like offences, whether on the part of the same offender or of others. There are two ways of arriving at that end; one to correct the will, the other to take away the physical power. To take away the inclination to repeat the act is reformation; to take away the power is incapacitation." To Fichte "punishment is merely a means for the end of the state, to maintain public security; and the only intention in providing punishment is to prevent by threats transgressions of the law. The end of all penal laws is, that they may not be applied. The threatened punishment is intended to suppress all evil purposes and to promote a good disposition, so that the punishment may never be applied. Hence, in order to attain this end, each citizen must know that the threat of the law will invariably become reality if he should commit any offence." "The original intention of punishment," then, "is solely to deter the criminal from the crime." But once this end has failed, "he having committed a crime, his punishment has another end in view, namely to deter other citizens from committing the same offence."

These quotations show that the efficacy of the menace of the law in checking crime has been well appreciated by a long series of writers. None of them, however, looks upon the threat as the essential feature in punishment. Far less does the aim of preventing crimes by acting upon the fears of potential offenders supply to them a true and

complete rationale of punishment. In other words, whilst they fully recognize the political wisdom of enforcing obedience to the law by threats, the actual application of the sanction appears in their systems completely dissociated from the threat, and, therefore, as being in need of an independent justification, which they supply by relying on the deterrent, reformatory or disabling aspects of punishment. It was Anselm von Feuerbach who bridged over this chasm and thereby erected the preventive side of punishment into a well-rounded, self-sufficient theory. It is unnecessary to trace in his writings the modifications which the theory underwent in his hands till it assumed its final shape: the author himself has supplied us with an excellent summary of his matured views in his *Lehrbuch*, from which we shall quote:—

“By combining their wills and their forces for the purpose of guaranteeing to each other the freedom of all, individuals form a civil society. A civil society organized by subjection to a common will and by means of a constitution, is a state. The end of the state is to create legal order, *i. e.* to provide for a social life regulated by the law of righteousness.”

“Violations of the law, of whatever kind, contradict the end of the state. It is, therefore, absolutely necessary that no violations of the law whatever occur in the state. Hence the state is both entitled and bound to take such measures as will render violations of the law absolutely impossible.”

“The measures which it is incumbent upon the state to take, must, of necessity, be compulsory measures. For this purpose, the state relies, in the first instance, on physical force.”

“But physical force does not suffice to prevent violations of the law altogether.”

“If, then, violations of the law are altogether to be

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prevented, there must exist, by the side of physical restraint, another form of constraint which precedes the accomplishment of violations of the law, and which, emanating from the state, becomes operative in every single instance, whether the impending violation of the law be or be not known beforehand. Such a constraint can only be of a psychological character."

"All offences have their psychological origin in the sensual sphere, inasmuch as man's desires are moved to action by the pleasure to be derived from, or to be gained through, such action. This sensual impulse can be checked by the knowledge that the act will be followed, unavoidably, by an evil greater than the pain resulting from the suppression of the impulse to action."

"In order that the **necessary** connection of such evils with offences be established as a **universal** conviction, it is necessary (1) that a law ordain them as the necessary consequence of the act (threat of the law). And in order that the **reality** of the ideal connection created by law be impressed upon the minds of all subjects, it is further necessary, (2) that such causal relationship become manifest—in other words, that the evil threatened by the law be actually inflicted whenever an offence has been committed (execution). The harmonious co-operation of the executive and of the legislative power for the purpose of deterrent constitutes the psychological constraint."

"The evil threatened by the state by means of a law and inflicted by virtue of such law is political punishment (*poena forensis*). The general reason why such punishments are necessary and exist (both in law and in the execution of the laws) is the necessity of preserving the freedom of all by the suppression of such sensual impulses as prompt to violations of the law."

"(1) The object of the legal **threat** of punishment is to deter all, as possible offenders, from violating the law.

(2) The object with which it is actually **inflicted**, is to render the threat of the law effective, since, without such execution, it would remain an empty threat. Since the law is to deter all citizens, and since the execution is to render the law effective, the **mediate** (ultimate) end of its infliction is likewise to deter all citizens **by means of the law.**"

"From the above propositions may be deduced the following supreme principle of the criminal law : Every legal punishment in the state is the juridical consequence of a law founded upon the necessity to preserve external rights and which sanctions a violation of the law with a physical evil."

Hence "Nulla poena sine lege; nullum crimen sine poena legali."

"The general juridical ground for the existence of all legal punishments is the necessity of preventing the legal order being endangered. Hence the gravity of the danger supplies the measure of punishment; hence also the maxim : the more an act endangers the legal order, the more severe the political punishment with which it is to be visited."

The superiority of the preventive view over all others becomes at once apparent if we express in simple terms the different attitudes which the state takes towards crimes and criminals upon the various theories of punishment. Upon all other theories the state virtually says to the criminal or the prospective criminal : "Do what you like. I lie low and wait till you have committed an offence. Then I come down upon you and do what I consider to be my duty." "I cannot prevent your going wrong; you are a moral, *i. e.* a free, agent. But neither am I at liberty to alter the predetermined consequences of your choice. For my line of action is but the necessary moral complement of your own conduct." Thus reasons the theory of justice. "Your choice has shown you to

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be a danger to society, and I have to deal with you in such manner as the interests of society demand,"—so speaks the state according to the other political theories,—“ by making an example of you ” (deterrent view),—“ by making it impossible for you to offend again ” (theory of disablement),—“ by teaching you such a lesson that you will not be likely ever to forget it,” or, “ by casting the devil out of your soul ” (theories of legal and moral reformation). Far otherwise the doctrine of prevention. “ What is the good of waiting till the mischief has been wrought ? ” here asks the state. “ Every crime is a shock to the peace and good order of society. I, being the guardian of the public peace, must prevent it, must nip it in the bud. I may not always be successful ; but if I fail, it shall not be for want of trying.”

The threats with which criminal laws are sanctioned are, then, political contrivances devised by the state with the object of preventing the occurrence of those acts which, if frequent, must result in the dissolution of society. But how about the execution of the penal laws ? To the authors who wrote before Feuerbach the actual infliction of punishment appeared either as a moral necessity flowing from something in the act itself, but something quite independent of its legal character, or merely as another measure of political expediency intended to serve the ends of society. Even those writers who appreciated the important office which criminal legislation performs in the prevention of crime, completely dissociate the infliction of punishment from the threat of the law. And since, in chastising the offender, the state pursues an object different from that for which it proclaims its threat, the enactment of penal laws is not a necessary condition precedent to the punishment of criminals. Far less is it incumbent upon the state to provide definite sanctions, and Grolman consistently expresses this view if he says : “ It is not at all necessary that he who

endangers the safety of society should know beforehand what evil will befall him in case he transgresses the law. The state is in any case bound to take such measures as he, the source of danger, renders necessary." Yet the doctrine that penal law forms the necessary basis of criminal liability, was a fundamental principle of one of the most ancient systems of law. Talmudic jurisprudence goes, indeed, even beyond Feuerbach's teaching in laying down the maxim: "No punishment without a previous warning": at the time of the act the law which he was about to violate, as well as the punishment with which such law was sanctioned, had to be pointed out to the offender if he was to be held responsible for his crime. In other words, there could be no punishment without a *de facto* knowledge of the legal quality of the act at the time of its commission. Again, we read in the Digest: "Poena non irrogatur, nisi quae quaque lege vel quo alio iure specialiter huic imposita sit." Whilst, then, the proper relationship between penal sanctions and their application was perceived and acted upon by the practical genius of ancient legislators, it escaped the searchlight of speculative philosophy till Feuerbach's lucid analysis assigned the true reason for the execution of punishments. "When the legislator associates a punishment with an act, he does nothing else . . . than to make the punishment the necessary legal consequence of the crime, and proclaims that such act cannot be done without the actor suffering that punishment." The legislator, in providing penal sanctions, aims at suppressing crime altogether. But being aware of the frailty of human nature, he foresees that occasions will arise when the threat will have to be carried out. The infliction of punishment will incidentally bring home to the community at large the reality of the menace and will thereby strengthen the fear of the law and its preventive force. It is not the sight of the suffering incurred by the transgressor that produces this

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result, but the deepening of the conviction that the state is in bitter earnest when it enacts a penal law. This is Feuerbach's meaning if he says that the ultimate end of the infliction of punishment "is likewise to deter all citizens by means of the law," with the stress on the five last words of the sentence. But however desirable may be this operation of the execution of the criminal law upon the mind of the public, it is no more than a by-effect. The application of the sanction, in truth, serves no independent end whatever, but flows almost automatically from the provisions of the law itself. In civilized communities the law is carried out as a matter of course, and its execution requires no further justification. Upon this view, then, the infliction of punishment bears an absolute character. Punishment is awarded, with unavoidable necessity, *quia peccatum est*. The necessity, however, is not an extraneous one, but a necessity of the law's own creation; in other words, it is a legal necessity. In advancing this doctrine, Feuerbach has rendered obvious, what previous writers on punishment had too long forgotten, that the penal code is, first and foremost, a part of the law, and has restored to the administration of the criminal law its juridical character. A criminal court is no longer, as it would be on the transcendental theory, a tribunal where the mechanism of the moral order of the universe is given free play, nor, as it would be if it were once admitted that the infliction of punishment serves an independent end, an organ of the state destined to pursue political aims, but a tribunal where the law of the land is administered, a court of law, a court of justice.

No theory of punishment has been more admired, none has been more severely criticized than that which is associated with Feuerbach's name. Having explained wherein consists the novelty, the essential feature and, in our opinion, the merit of that great jurist's doctrine,

we must now examine the chief objections which have been raised against it.

The first of Feuerbach's positions which has been violently assailed, is his claim that "all offences have their origin in the sensual sphere, inasmuch as man's desires are moved to action by pleasure." This text, read by itself, would suggest that Feuerbach subscribed to the doctrine of psychological hedonism. But a study of his other writings, the *Revision* in particular, leaves no doubt, as we shall presently see, that, as a true disciple of Kant, he acknowledges man's freedom, *i. e.* his capacity to regulate his conduct by the light of reason in accordance with the dictates of duty. Reason can never prompt us to a violation of our duty; and it is of breaches of duty, *i. e.* of offences, and of offences alone, that Feuerbach asserts that they always have their source in the sensual sphere. The latter term he uses in the broad Kantian sense, as comprising all desires which originate within the compass, and the gratification of which serves the ends, of the empirical self. However, even after full allowance has been made for all these considerations, it may be granted that Feuerbach's views as to the etiology of crime are unduly narrow. Bauer has elaborated a list of factors, other than sensual impulses, which may be instrumental in the causation of offences, *viz.* moral inertia, absence or weakness of the moral sentiments, a dull conscience; error which causes the actor to believe that an act wrong in general is permissible or even meritorious in the special circumstances of the case; culpable inadvertence; want of correct and clear notions as to the character of an act or as to the degree to which it is wrongful. But when all is said, the assertion that crimes always originate in the sphere of the senses, is not at all material to the correctness of Feuerbach's theory. As long as it is conceded that man's conduct is determined by motives, it is reasonable for the state to create artificial

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motives that restrain man from actions which the state looks upon as dangerous to society.

This brings us to a second objection. Feuerbach's psychological constraint, it has been said, relies on the basest and most cowardly motive that can influence man's conduct, the emotion of fear. To appeal to the basest side of human nature is derogatory to the dignity of the state and of the subject alike. Assuming that it is the blandishments of pleasure that most frequently supply the impulses to crime, it does not follow that the legislator must check them by the threat of pain. If the inclinations to wrong-doing originate within the lower sphere, man has yet a better and higher self, and it is upon the latter that the legislator ought to act. "A threat," writes Hegel, "assumes that man is not free and will compel him by vividly presenting a possible evil. Right and justice, however, must have their seat in freedom and in the will, and not in the restriction implied in menace. In this view of punishment it is much the same as if one raises a cane against a dog; a man is not treated in accordance with his dignity and honour, but as a dog." And since of Feuerbach's own showing the final object of the law is to guarantee the freedom of all, surely a doctrine which seeks to promote freedom by means which imply a denial of freedom is self-contradictory and inconsistent. As against this last criticism, we wish to point out that in proclaiming, no doubt under Kantian influence, freedom as the end of the state and of state legislation, Feuerbach is on debatable ground, but that the correctness or incorrectness of this view is not at all material to the truth of the main argument by which his theory is supported. The state, for purposes of its own, decides that certain acts shall not be done, and Feuerbach's reasoning is equally cogent whatever those purposes may be. But to come to the gist of the objection, nowhere and never has Feuerbach uttered the opinion that the state

intended fear of punishment to be the mainspring of man's actions. In the *Revision* he makes it abundantly clear that penal enactments are not the only means by which the government ought to regulate the conduct of the subjects. On the contrary, he demands first and foremost that educational institutions be provided in order to promote public spirit and civic virtue among the citizens, so as to prevent criminal inclinations ever arising in their breasts. But he appreciated that the best directed efforts of the state are bound occasionally to miscarry.

"Oderunt peccare boni virtutis amore,
Oderunt peccare mali formidine poenae."

The reality of things which suggested to the medieval commentator the antistrophe with which he supplemented Horace's verse, caused Feuerbach to perceive that social order would rest on insecure foundations if it were supported by the moral instincts of the community alone. Whilst, then, the state expects the vast majority of its members to adopt, of their own free choice, the common ends of society as their own and spontaneously to obey the law, special measures have to be taken to restrain the feet of those who are disposed to wander into crooked paths. "The law is not made for a righteous man, but for the lawless and disobedient, for the ungodly and for sinners." The dictum of St. Paul, then, applies with special force to criminal law. But must the law operate upon those frailer minds by means of threats? Anton Bauer has modified Feuerbach's theory by ascribing to the law a monitory, instead of a minatory, effect. Man being a rational creature, he argues, a warning addressed to his will, his inner self, is more effective and also more in accordance with his dignity than a menace which merely influences outward conduct. This view, however, betrays a poor knowledge of the psychology of the criminal. For those prepared to lend a willing ear

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to such friendly monition do not really stand in need of it: to them the voice within speaks louder than the distant echo of a penal statute ever could. On coarser grained natures, the very ones whose criminal impulses are to be restrained, the gentle hint is lost; for they see in the law, not a friendly counsellor, but a deadly foe.

“Des Gesetzes strenge Fessel bindet
Nur den Sklavensinn, der es verschmäht.”

The compulsion of the law, then, is automatically limited in its operation to those cases in which it is required. Those who spontaneously regulate their lives in accordance with the dictates of the law, do not feel its restraining influence; and in so far as man is free, he can at any time emancipate himself from its fetters by choosing for himself the path of rectitude which is the path of freedom. The menace of the law not being addressed to any definite person, anybody is free to make it inapplicable to himself. It becomes effective only where the passions and the narrow interests of the phenomenal self, the most serious obstacles to true freedom, threaten to gain the ascendant. It is, therefore, clear that Feuerbach's teaching is quite sustainable on pure Kantian principles.

Yet the deadliest sin which has been laid at Feuerbach's door, is that his doctrine is necessitarian in character. In passing judgment on this indictment, we have to draw a distinction. So far as the problem of ultimate or metaphysical freedom is concerned—a question of speculative creed, and nothing else—the theory is equally compatible with a belief or disbelief therein. But in this sense Feuerbach is an avowed libertarian. Psychological determinism, on the other hand, which is but the application of the principle of sufficient reason to human conduct in the phenomenal world, seems indeed to be postulated by Feuerbach's theory, though the lines upon which he argues in the *Revision*, render it more than

doubtful whether the author was quite alive to this fact at the time when he first shaped his theory. At any rate, a being whose conduct we could not influence by supplying him with motives, would be completely independent of us; and Feuerbach's final position is that in the mind of the prospective criminal the desire to avoid the greater evil will of necessity prevail and that it is the business of the state to make punishment always the greater evil. But the question of free will is really altogether foreign to the problem of the state punishment of crime, and it has been owing to a confusion of legal and moral responsibility that it has been imported into the discussion of the subject. Free will is a purely ethical notion, postulated because without it moral imperatives would become meaningless. Outside the realm of ethics it loses its significance. Now positive law, concerned as it is with the regulation of external conduct alone, is not a branch of morality. A criminal court is not a court of conscience. The jurist can never concede that a man ceases to be liable to the law because we can assign the cause of his act, because we know that in the given instance the impulse to crime proved the stronger motive and that he, the man he was, could not have acted differently in the actual circumstances of the case. "Tout comprendre c'est tout pardonner" is certainly not a maxim of criminal law. It now becomes obvious that those who attack Feuerbach's theory because it rests on a deterministic basis, are really begging the question. For such criticism presupposes that legal liability is founded upon desert, a postulate which of necessity involves assent to the transcendental theory. Instead of being a ground for reproach, it is one of Feuerbach's chief merits that he has lifted the metaphysical veil in which the problem had been enveloped by Kant. And whilst agreeing with the latter in making ill-desert a condition of moral condemnation, he emancipated state punishment from the fetters

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of the free-will doctrine and restored to it its true character, that of a politico-legal institution, an institution created by the state for the furtherance of its own ends.

The same considerations dispose of the charge of inconsistency which has been preferred against Feuerbach. Upon deterministic principles, it is claimed, the blame for every crime committed would lie at the door of the state, not of the offender. For the criminal could not help yielding to the stronger motive, whilst the law was at fault in not providing a more powerful threat. This criticism loses its force once it is fully grasped that criminal liability means legal, not moral, responsibility.

Again, it has been urged against Feuerbach's theory that since the object of punishment is the prevention of crimes by means of threats, the severity of punishment of offences ought to vary in direct ratio with the likelihood of their being committed; in other words, that the most trivial transgressions, being the most common ones, ought to be visited with the harshest penalties, whereas in truth and in fact the law is most severe on those misdeeds the frequent occurrence of which society has least ground to fear, and from the perpetration of which all but a very few individuals would refrain even if they were not punishable at all. To advance this argument is to betray a complete want of understanding as to the true significance of the doctrine of psychological restraint. The latter acts, not upon the masses collectively, but singly and separately upon the mind of every person who contemplates the commission of a crime. In providing sanctions, the state must, therefore, study their effect upon the conduct of the individual, and the frequency or rarity with which they become psychologically operative, need not enter into its calculations. Other critics deduce from Feuerbach's theory the principle that the strength of the criminal impulse ought to supply the standard of punishment: the man who steals a loaf of bread when

hunger gnaws at his stomach ought to be dealt with more harshly than he who commits the same offence whilst digesting a substantial meal. Bentham indeed draws this conclusion from the preventive function of sanctions and lays down as a legislative maxim that "the greater the temptation the greater should be the punishment." Starting from similar premises, Feuerbach arrives at a different result and thereby gives proof of the superiority of his system over that of Bentham, of a deeper insight into the practical legislative problem involved than is displayed by his critics, and of the internal consistency, and of the mutual interpenetration of the different parts, of his doctrine. Whilst clearly perceiving and pointing out that every criminal impulse can be checked by the presentation of an evil of a sufficient magnitude as the consequence of the act, he neither explicitly nor impliedly lays down the principle that punishments ought to be so graduated that the impulse to commit an offence may always be so overcome. The attempt to overpower criminal motives by the menace of the law is, after all, but a means to an end, and to derive the measure of punishment from the strength of those motives, no regard being paid to the ultimate object to be accomplished, means to sacrifice the end to the means. If the true end of punishment, the preservation of social order, is to remain paramount, it must supply the scale of punishments, the gravity of the offence being determined by the degree in which it endangers the peace of society, the fundamentals of the state and the system of rights guaranteed by it. And this is the measure of punishment advocated by Feuerbach. To adopt the contrary view, to associate the extremest terror with an offence which is a source of but a trivial mischief because the temptation to commit it is strong would be as reasonable as to call out an army corps to prevent a pocket being picked in a case where a purse would not otherwise be safe.

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This insinuation of a false standard of punishment into Feuerbach's doctrine is further responsible for the assertion that the theory cannot be given effect to, because it is impossible to gauge with precision the strength of the criminal motive in each individual case and to arrange punishments so as to counterpoise the pleasure sought by the commission of each offence by the anticipation of the exact amount of physical suffering sufficient for the purpose, as well as for the claim that the theory would in practice lead to the most appalling results since sometimes the most heinous crimes are perpetrated for the sake of some trivial advantage.

Finally, it has been urged that Feuerbach's theory refutes itself, since every crime actually committed proves the futility of the threat, which forms the root idea of his teaching. And this lack of efficiency is not peculiar to this or that penal system; no punishment has yet been devised which proves adequately deterrent in all cases. "Murder and manslaughter, burglary and larceny, have continued to harass society through all the changes in the allotment of punishment: and no change is likely to put an end to them." It must be conceded that as against Feuerbach's own wording of his doctrine this objection is valid. "Violations of the law, of whatever kind," he writes, "contradict the end of the state. It is, therefore, absolutely necessary that no violations of the law whatever occur in the state." If it is true that any and every act of transgression is equivalent to the imminent dissolution of political society, then the prevention of crime becomes a necessity so absolute that the menace of the law which is to avert that danger, altogether fails of its object if it fails in one single instance. Our learned philosopher has undoubtedly been guilty here of using exaggerated language. There is a heavy bill of crime in all modern states, but they do not, therefore, tremble in their very foundations. The legal threat does not then

cease to be useful because it cannot completely abolish crime. It is enough if it keeps within the bounds of the law the vast majority of the population and reduces criminality to manageable proportions. It has, however, been denied that it does even as much as that. It has been contended that the terror of the law cannot fulfil its office because it is addressed to the mind, whilst the object for the sake of which offences are committed, is always a material advantage in the outside world,—an argument that does not require serious refutation. Again, it has been averred that the bare intellectual knowledge of the connection of punishment with crime cannot influence the conduct of a prospective offender—an objection which involves the question whether reason can serve as a motive. But the same criticism has been advanced in a form in which that moot point is evaded. Impulses and temptations to break the law, it has been said, are strongest in the lower strata of society, which, being the least educated, are prone to be governed altogether by feeling, and little, if at all, influenced by reason. Hence the threat of the law which appeals to the intellect, must be least effective where the need for a check on the emotions is greatest. As against this, it has been well pointed out by Leslie Stephen that a genuine realization of the proposition “ Offenders are liable to punishment ” is not a mere recognition of an intellectual truth, but involves an emotional process, the logical aspect of which is symbolized by the words. In any case, the point raised does not weaken Feuerbach's position, since he never asserted that the anticipation of pain which is to supply the restraining motive, is an anticipation in thought rather than in feeling. The proverbial improvidence of criminals which causes them to prefer the immediate gratification of the desire of the moment to immunity from a distant evil, and the fact that many offences are perpetrated in the heat of passion which

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excludes all calculation are further arguments adduced to show that intimidation is but rarely of service in saving a person contemplating a crime from its actual commission. The extent to which fear of punishment prevents crime is difficult to determine since the operation of the sanction upon the mind leaves no palpable traces in the material world and so fails to supply data for that mode of investigation by which alone we would be enabled to give a conclusive answer to the question, viz. the statistical method. But if we remember how successful, in every age and in every country, religion has been in enforcing conformity to its precepts by presenting to the imagination of its followers gloomy pictures of the ultimate doom of the wicked, it would be absurd to deny the practical efficacy of a system of threats the fulfilment of which lies not in the dim, distant future, but close at hand, and is a matter, not of mere faith, but of daily observation. Furthermore, a little introspection and psychological self-analysis will convince us that there have been occasions in the lives of all of us when we who flatter ourselves to be men of principles and law-abiding citizens, have not been uninfluenced by those coarser restraints by which the penal code seeks to shape and guide the course of our frailer fellow-creatures. To gainsay that the sanctions of the criminal law operate upon the mind of the would-be offender, and that they operate upon his mind even where they do not prove strong enough to overpower the impulse to crime, is to dispute that human actions are determined by motives, is to deny that man in his sound senses desires to avoid suffering. And if the negation of the two last-named propositions strikes us as absurd, the case for Feuerbach's theory is made out.

CHAPTER V

THE TRUE FUNCTION OF MODERN PUNISHMENT

HAVING completed our critical survey of the more important theories of punishment, we may now summarize the conclusions at which we have arrived as to their respective value in reference to positive criminal legislation and criminal jurisdiction. We have seen that the transcendental theories, founded as they are upon a principle entirely foreign to our subject-matter, cannot contribute to the solution of our problem. Proceeding to a study of the political theories, we found that in modern times the state has, without much success, undertaken the task of reforming criminals, whilst they are serving their terms, that in exceptional circumstances judges sometimes pass "exemplary" sentences for the sake of their deterrent effect upon the spectators, and that some forms of punishment incidentally disable criminals from doing future mischief. Whilst these factors may count for something, their practical importance is quite secondary and subordinate as compared with what we believe to be the paramount object of the legislator in providing criminal sanctions for certain classes of wrongs, viz. the prevention of offences by the menace of the law.

When examining, in the preceding chapter, Feuerbach's doctrine which is founded upon this idea, we so zealously defended his main position that it might appear superfluous to attempt to give an independent exposition of our views on the subject. But whilst fully endorsing his

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leading principles, we could not help feeling that his argument is closely interwoven with propositions to which we were not prepared to subscribe, and which, though not essential to his theory, yet lay it open to attack. Besides, he occasionally fails to explain and reconcile apparent discrepancies in his system and to express in the most lucid and forcible manner his most lucid and powerful ideas. Moreover, whilst exhausting the main object of criminal legislation, his theory overlooks another aspect which, if not the cardinal one, is of considerable significance, viz. the educative effect of the penal code and its influence upon positive morality.

Realizing that certain classes of acts are highly detrimental to the commonwealth because they tend to subvert the fundamentals of political society, endanger the public order, or violate those rights of the citizens the enjoyment of which the state regards as vital and, therefore, as worthy of special protection, the state attempts to prevent their occurrence by making them the subject of legal prohibitions of a particularly emphatic nature, the observance of which it seeks to enforce by means of contrivances believed to be eminently efficacious for that purpose. The acts so forbidden are crimes, the aggregate of laws containing such prohibitions forms the penal code, and the special measures adopted in order to ensure obedience are called penal sanctions or punishments. In devising the latter, the state relies on the following psychological facts: Before the will is finally determined, a struggle goes on in the mind of a person who contemplates embarking on a certain course of conduct between two orders of motives, those which urge him on to pursue it and those which prompt him to desist. In this struggle the stronger of the two groups is bound to prevail, and the act will be done or left undone according as to whether, to use Bentham's terms, the "seductive" or the "repressive" motives proves the more powerful. If the act

under consideration is a wrongful one, the checks are, state interference apart, in the main utilitarian, religious, and moral. But their joint force is not always sufficient to overcome the temptation to do it; and in exceptional instances, religion and morality, instead of promoting obedience to the law of the land, supply the very impulses to actions which the state looks upon as dangerous. It is, however, generally possible, by placing a sufficient extra-weight into the scale which contains the inhibitory motives, to cause the balance to incline to the side of law and order. And this result the state attempts to bring about by adding to the restraints which operate spontaneously and independently of its intervention, and which may be called natural restraints, an artificial one of its own creation, the threat of an evil of sufficient magnitude to be inflicted by the state upon the actor if he breaks the command of the law. The desire to avoid suffering it will enter into the conflict of motives, and will in many instances prove the determining factor: in many instances, but by no means always. Offences have been committed in spite of the most cruel torments which the devilish ingenuity of barbarous ages could suggest. Far less can we hope that the criminal impulse will always be suppressed by even the harshest forms of punishment which our humanitarian era will tolerate. In modern law "the highest penalty depends for its efficacy upon the love of life; and there are many circumstances under which a man may cease to care for life, and so far be beyond the power of the legislator." The greatest measure of success would be attained if it were possible for the state to contrive a mechanism by means of which every crime would automatically bring about the infliction of the punishment provided for it. A penal sanction might then be likened to a Damoklean sword hung over the head of every intending transgressor of the penal code and always ready to descend upon him as soon as by his

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own act he severs the single horse-hair by which it is suspended. But since the Watt of statecraft has not yet arisen to design the required machinery, the politician and the legislator have to be content with an approximation to the ideal by adopting the practical maxims which it suggests.

First of all, punishment must *ex vi termini* be an evil, and it must be an evil of sufficient magnitude, or it ceases to be deterrent. A sanction disproportionately light is, as Hobbes remarks, "rather the price or redemption than the punishment of a crime," and will encourage criminals to imitate the example of the Roman madman, mentioned by Montesquieu, who spent his time boxing the ears of casual passers-by, while a slave who followed him had instructions to hand to each of his victims twenty-five coppers, the statutory penalty for such offence. Besides, a sanction inadequate to prevent crime means so much gratuitous suffering; as it fails of its object, the pain which it occasions is simply wasted. And inasmuch as it has to be actually inflicted in a larger number of instances, the sum total of human agony of which it is productive, may well be a good deal larger than it would have been in the case of a harsher and therefore more effective punishment. The amount of suffering which constitutes a sufficient menace has to be determined in relation to the physical and moral susceptibilities of that section of the community in the midst of which crime is liable to be prevalent. At this point we are confronted with one of the most serious obstacles to the success of punishment as a preventive of crime. For the choice of sanctions rests in the first instance with the legislative bodies and in the last resort, at any rate in democratic states, with public opinion; and the men who compose the former and lead the latter cannot help being guided by their own feelings in judging of the effects which the threat of different punishments will produce in the minds

of those to whom it is chiefly addressed. Yet the chances are that the anticipation of an evil which would drive to despair, and possibly to self-destruction, men endowed, as the leaders of the community generally are, with a vivid imagination and a sensitive nature, might not cause a single sleepless night to people of that coarser fibre of which criminals are made. Deprivation of freedom strikes the self-respecting citizen as a calamity of the highest order; but the appalling proportion which persons previously convicted bear to the prison population as a whole, proves that the conditions of life in confinement do not compare so very unfavourably, in the opinion of those best fitted to judge, with those under which the strata of society from which the majority of criminals is recruited, generally labour when at large.

Whilst, then, sanctions are worse than useless unless they are of sufficient intensity to act as checks on crime, they ought not to be more than sufficient for the purpose. The true function of punishments assigns the limits of their severity. If the state can attain its end, the prevention of offences, by a mild penal system, there is no justification for a savage code. For punishment means pain, and humanity forbids us to inflict unnecessary pain on any sentient creature. Utilitarian considerations lend further strength to this ethical postulate. Montesquieu says: "L'atrocité des lois en empêche l'exécution. Lorsque la peine est sans mesure, on est souvent obligé de lui préférer l'impunité." The truth of this statement is most strikingly illustrated by the course of events where the penal legislation of a barbarous age survives into, and has to be administered by, a milder-mannered generation. Where such is the state of the law, the victims will suffer a great deal in silence at the hands of the criminal classes rather than come forward, as prosecutors, to set the law in motion; witnesses cannot be got to attend the trial; and miscarriages of justice will be

matters of daily occurrence since the attention of juries will be unconsciously diverted from the consideration of the evidence and will be directed to the consequences of an adverse decision. Thus, till the reign of William IV, larceny of certain goods in process of manufacture was, in English law, a capital felony. For many years it had been impossible to obtain a conviction on an indictment for this crime, however clearly the evidence might have established the guilt of the accused, till, at last, the manufacturers for whose protection the extreme penalty had been annexed to the offence, in order to obtain effective, instead of nominal, protection, petitioned parliament to substitute a milder form of punishment. The legislator, then, in the choice of sanctions, has to reckon with the opinions, the sentiments, and even with the prejudices of his times, and the attempt to conform to them may land him on the horns of a dilemma. Punishments sufficiently harsh to deter may prove ineffective, because they enlist the sentiments of the community against, instead of in favour of, the laws of the land and may lead to dangerous criminals being let loose on society by unjust verdicts of acquittal; whilst punishments which the spirit of the age will admit of, may fail to make an impression upon the criminal classes. Even those who minimize the value of punishment as a check on crime, generally make an exception in favour of capital sentences and own that the fear of death, though of nothing less than death, will cause many a prospective offender to desist from the execution of his criminal design. But a sickly sentimentality of the public has led, in more than one country, to the abolition of capital punishment, though it forms the most reliable, and in my opinion a necessary, means of safeguarding the life of the subject. Again, the progressive alleviation of the convict's lot by modern prison reforms has deprived our chief penal instrument of much of its terrors and is, probably, the factor mainly respon-

sible for the measure of truth which there is in the claim that our penal law is but an indifferent weapon in the battle against crime. To steer a safe course between the Scylla of public opinion and the Charybdis of the criminal mind is, indeed, one of the most difficult tasks which the modern statesman has to accomplish, and practical experience alone can teach how to adjust penal sanctions in so delicate a fashion that, without violating the one, they operate upon the other.

The deterrent effect of the criminal law depends, however, not solely upon its rigour, but largely upon the accuracy with which it is administered. Paley goes so far as to assert that "the certainty of punishment is of more consequence than the severity." At any rate, a person who contemplates the commission of an offence takes into account not only the actual punishment with which it is visited, but also the chances of escaping punishment altogether. Indeed, criminals are only too apt to flatter themselves that the arm of the law will not be long enough to reach them. Now "even a small uncertainty takes away from the pain which we fear, whereas even a great uncertainty does not destroy the attraction of a pleasure which we are hoping for" (Ferri). Cicero was, therefore, right if he remarked (*pro Milone*): "Maxima illecebra peccandi est impunitatis spes." In a somewhat different fashion do the prospects of discovery or concealment enter into the psychology of the professional criminal. He reckons with, and accepts, the possibility of punishment as a risk incident to his trade, and will thereby be deterred from crime no more effectively than the miner is deterred from working in the coal-pit by the knowledge that he may be killed by fire-damp. The professional criminal calculates the chances of being caught before deciding whether it is worth his while to undertake a certain job. The greater the risk the less will a career of crime pay. Change the risk into a certainty

and you create conditions under which his business cannot possibly be carried on. But whatever the type of criminal upon whose mind the sanction is to operate, its efficacy appears to be the function of two variables, its severity and the probability of its actual infliction. If we imagine the offences dealt with in the criminal code to be symbolized by one ideal or average crime, the criminal classes as represented by one typical criminal, and if we understand by marginal deterrent force the strength of the motive just, and only just, sufficient to deter the typical criminal from the ideal crime, we may express the relationship spoken of above by the following algebraic formula : $d = s \cdot c$, where d stands for the marginal deterrent force of punishment, s for its severity, and c for the chance of its infliction. We see, then, that the more certain the state can be of bringing offenders to book, the more lenient it may be in the construction of its criminal code without loss in security to its subjects. And since the risks which the criminal runs depend on the chances that he (1) will be caught, and (2) will be condemned if caught, it becomes apparent that a well-organized and vigilant police, a public opinion strongly on the side of law and order, a good and clear criminal code, a simple procedure free from technical intricacies which offer so many loopholes to the guilty, and an efficient and incorruptible judicial bench will allow of a considerable mitigation of the penal system without increase of crime. The uncertainty of punishments, on the other hand, must be compensated by their greater severity.

The efficacy of punishment as a deterrent depends, in the next place, upon the promptitude with which it follows the offence. Crimes are usually committed for the sake of a pleasure close at hand, for the immediate satisfaction of a desire both keen and urgent; and fear of an evil which lies in the remote future cannot, then, be relied upon as a check. For, by a well-known law of

perspective which applies to mental as well as to ocular vision, the more distant an object is the smaller it appears. Besides, futurity suggests contingency, and however illusive the association of these two ideas often proves to be, it influences conduct none the less powerfully for that. Hence a procedure which ensures that an offender is rapidly brought to trial and that the judgment is promptly carried into execution, greatly enhances the terror which the criminal law inspires. In this respect this country is far ahead of other states, owing mainly to the Habeas Corpus Act, which, though passed in the interests of accused persons, has rendered impossible in England those long delays of the law which detract so materially from the deterrent force of continental codes.

We have now evolved from the theory of psychological constraint the supreme penological principles which govern the choice of penal sanctions and the determination of the level of punishments *in genere*, that is to say, the harshness or leniency of the criminal code as a whole. But we have not deduced therefrom, as some authorities of repute have done, the scale of punishments applicable to particular offences. We do not subscribe to Bentham's "rule of moral arithmetic," according to which the severity of the sanction must vary with the strength of the motive which usually prompts the commission of a certain type of offence. Nor can we agree with Paley if he teaches that the facility with which any species of crimes is perpetrated and the difficulty of discovery are among the chief factors in the standardization of punishments. Graduation of punishments in accordance with these rules would result in a code running counter to public opinion and could never fulfil the purpose for which it were adopted. For criminals, not being, as a rule, trained lawyers, are not acquainted with the minute provisions of penal statutes and could not, therefore, be influenced by a scale of sanctions elaborated on highly

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technical principles. What they do expect and fear are such punishments as correspond with popular notions as to the relative gravity of different offences. If the essence of crime and its distinguishing mark from a mere civil wrong lies in the fact that it violates those interests, individual or collective, which society regards as vital, and if the true function of punishment is to protect the community from such violations, the gravity of the offence from the state's point of view, *i. e.* the degree in which it endangers public order, can alone supply the standard of penal sanctions. This was the opinion of Beccaria, who says: "Crimes are only to be measured by the hurt done to society." And it is the view adopted, as we have seen, by Feuerbach. Now it is quite possible that, in the case of minor offences, a punishment which appears appropriate if measured by the standard just laid down may prove an evil too insignificant to suppress them. Yet the state will not be justified, except within ill-defined but fairly narrow limits, to increase its severity so as to render the threat completely effective. For considering the smallness of the mischief, the price necessary to be paid for its prevention would be too dear. The legislator has here to choose between two evils, and even a comparatively frequent occurrence of trivial transgressions may well appear the lesser one. When, on the other hand, the rights to be protected are so fundamental that their enjoyment must at all costs be secured, we must not complain of the means, however painful, by which alone that object can be accomplished. The existence and the security of established government and the protection of human life are the two objects which, according to modern notions, deserve to be safeguarded at all risks, and herein lies the justification of capital punishment for treason and murder. It might be objected that the measure of punishment which we advocate, cannot be applied in practice since the degree in which acts falling

under the same category of crimes endanger public safety, varies within very wide limits. The least touching of another in anger, spitting at a man's face, throwing a bottle at him, cutting a pauper's hair against his will, giving a woman a black eye, dealing an opponent a blow which knocks him down or sends him reeling—all these misdeeds fall, in English law, under the definition of assault. Again, larceny is committed by the hungry wretch who steals a loaf of bread from a baker's shop, no less than by the professional criminal who takes a situation in order to empty his master's plate-chest. But this criticism does not hold good since modern codes make due allowance for these possible variations by not prescribing a stereotyped punishment for a given class of crimes, but only fixing the maximum and the minimum; and English law shows even superior wisdom in having done away, long since, with minimum punishments altogether, with the result that it has become possible to award a merely nominal punishment where the offence is of a purely technical character. But what is it that makes the same offence a merely technical breach in the one instance, a heinous crime in another? It is the character of the offender, as expressed in the act. And this is the principle upon which judicial sentences are measured out within the latitude allowed by the code. "Si duo faciunt idem, non est idem"; the difference lies in their desires and passions, in their dispositions and habits, and it is a consideration of these which guides the judge in the exercise of his discretion if, in the case of two offenders charged with the same crime, he passes a severer sentence upon him whom he judges to be the more serious menace to society. We see, then, that the dangerousness of the act, from the social point of view, "the objective danger", as it may be called, supplies the measure of the legal punishment, whilst the dangerousness of the actor, "the subjective danger", determines the judicial sentence.

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This distinction seems to underlie the maxim of English criminal jurisprudence that the criminal motive is irrelevant on the issue "guilty?" or "not guilty?"—but an important factor which has to be taken into account in awarding punishment. For the motive cannot alter the character of the act, but it supplies the key to the character of the actor. It is because sanctions are fixed and punishments dispensed according to the rule just explained that criminal legislation and criminal jurisdiction generally conform to and satisfy public opinion. In the popular mind the gravity of an offence is determined by the alarm which it spreads, *i. e.* by the degree in which it is felt by society to endanger its peace and security; and where the moral and intellectual levels of the rulers and of the ruled do not materially differ, the popular and the official index to the measure of punishment cannot but practically coincide.

Crimes, we have found, are in their essence acts which menace, or are believed to menace, the existence of the state, the peace of society or the fundamental rights of the individual, and the function of punishment is to prevent their commission. Penal sanctions have been found by experience to be powerful instruments for shaping men's conduct; but there is nothing in them to limit their application to acts falling within the above definition of crime. Indeed, rulers have discovered at an early date how easily they can be utilized for the purpose of enforcing obedience to rules which they were anxious, for one reason or another, to impose upon their subjects. Modern democracies, likewise, have only too well learnt this lesson, and more than one instance has occurred where the public has clamoured for the annexation of penal sanctions to legislative measures intended to carry into effect some popular scheme of social or economic reform. In one way and another, a certain amount of heterogeneous matter has thus been introduced

into the penal law of every state. And so it has come about that analytical jurists were at a loss to find any generic character whereby to recognize a crime, until at last in despair they advanced the doctrine that the difference between crime and civil wrong is merely a difference in procedure, though in formulating this view they run counter to popular feeling which obstinately clings to the association of crime and public alarm. When once this artificial conception of crime had been adopted, the true object of punishment could not fail to be obscured. The truth is that the extension of penal sanctions beyond their legitimate sphere forces us to distinguish between a material and a formal criminal law. The domain of the latter has, it is true, to be defined by reference to the remedies alone by which it is enforced; for it comprises all the rules the transgression of which is visited with punishment. Material criminal law, on the other hand, deals only with those acts criminally sanctioned which fall under the definition of crime which we have given. It is only by concentrating our attention upon criminal law in the latter sense and by adhering to the conception of crime as implying a disturbance of public order, that a clear insight into the true rationale of punishment can be gained.

The function of punishment does not, however, exhaust itself in muzzling wild beasts, to use Schopenhauer's metaphor. It exercises in no mean degree a moralizing influence upon the community at large. Let the legislator penalize a line of conduct to which current morality is but slightly averse, wholly indifferent, or even somewhat favourably inclined, and the immediate result will be that the vast majority of the citizens will refrain from the prohibited act, partly because they desire to avoid the sanction, but partly because in a well-ordered community obedience to the commands of a lawfully constituted authority is recognized as a binding duty. Conduct

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conforming to the dictate of the law thus becomes habitual, and, habitual conduct reacting on opinion, a moral aversion to the opposite conduct may gradually grow up; in other words, what was originally only a legal duty, gradually acquires the obligatory force of custom too. Besides, the forbidden act being constantly visited with punishment by the state, the feelings of repugnance which the mental picture of the gallows or of the broad arrows inspires, are communicated, by a ready association, to the deed which brings those horrors in its trail; and that which is in the first instance a source of evil rapidly comes to be looked upon as an evil, and finally as evil. In both these ways a *malum quia prohibitum* is converted into a *malum per se*, into a moral wrong. The legislator, then, has it in his power, by branding certain acts as crimes, to modify, in the course of a few generations, the moral sentiments of the community, and it may safely be asserted that in the past the penal code has been one of the most valuable instruments in the moral education of the human race. We have here a partial explanation of the reason why, though crime is a creature of the law, and nothing else, public opinion generally endorses the dispensations of the criminal courts. The fixed associations gradually formed, as we have seen, in the minds of the whole population are one of the roots of that sense of justice which imperatively demands the punishment of crime. Upon the lower strata of society into the dark recesses of which the ethical spirit of the age penetrates with difficulty, the operation of the criminal law, as an engine of moral discipline, is even more direct; there are probably thousands, as Mr. Rashdall remarks, who have scarcely any moral notions except those rudimentary ideas of right and wrong which are inculcated at assizes and petty sessions.

The conclusion at which we arrive, then, is that though punishment cannot be regarded as a panacea for crime,

it is a valuable means of social hygiene in the struggle against that disease of the body politic. Such efficacy as it possesses, flows, in the main, from its character as an agent of prevention; and it discharges the functions of this office in two different ways: by appealing to the fears of persons likely to commit crimes and by operating upon the habitual sentiments of the citizens in general.

PART III

THE DOCTRINES OF MODERN CRIMINOLOGY

FOR thousands of years the sword of punitive justice has never departed from the throne of earthly rulers; yet the criminal, like the poor, we have always with us. Crime remains a problem, a problem of a particularly pressing character, and punishment offers but a partial solution, according to some extremists, like De Girardin, Minzloff, Kropotkin, no solution at all. This ill-success has been ascribed to the standpoint from which the problem has hitherto been approached; for crime is a social phenomenon, and classical jurisprudence which relies in the study thereof on the descriptive and analytical methods alone, could produce nothing, it has been said, but barren generalizations and abstractions. When once it is granted that crimes are not the outbursts of an incalculable, quasi-demoniacal power, termed free-will, they become events in an orderly, intelligible world, subject to the law of sufficient reason and capable of truly scientific study. Crime has its causes, and these we must discover if we wish to deal with it effectively. Considerations such as these have led to the birth of a new science, the science of criminology.

Whilst preventive punishment merely seeks to avert the actualization of crime when its germ is already developed and active, the aim of the "positive school" is to eradicate it completely by the discovery and elimination of its etiological factors. Now the causes of crime

may lie either in the criminal man or in the social environment; and according as to whether biological or social conditions are believed to constitute the dominant influence the advocates of the young science are divided into two camps: that of criminal anthropology or biology on the one hand, that of criminal sociology on the other. The main tenets of the rival schools may be summed up in the following two aphorisms: "Crime is a character which attaches to an individual," and "Crime is a product of society."

Criminal anthropology starts with the proposition that the crime which the criminal perpetrates, is but the manifestation of natural forces operative within him and which produce their effects with the same unavoidable necessity as other physical forces. If the commission of offences is as natural to him as barking is to the dog or man-eating to the tiger, it is useless to study crimes, to dissect the *corpus delicti* and to classify offences. True scientific inquiry must be directed to those peculiarities in the constitution and organization of the criminal man which cause him to act in that peculiar manner, in a mode different from his fellow-creatures, in short, to act abnormally. "All progress in penal jurisprudence lies in giving consideration to the man," says Salillas; and Lacassagne, though essentially a sociologist, has allowed himself to be carried away by this idea to such lengths as to pen the paradox: "There are no crimes; there are only criminals." Criminal anthropology regards the criminal as a natural deviation from the type, a variety of the species *homo sapiens*, and studies him in the same way in which one studies the different human races; or it looks upon his distinctive features as morbid in character, in which case the science which has him for its subject-matter would more aptly be spoken of as criminal pathology. In any case, the abnormalities are either bodily or mental, and criminal biology accordingly

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consists of two branches, criminal somatology and criminal psychology. Again, since the physical characteristics are partly structural, partly functional, criminal somatology may be sub-divided into criminal anatomy or morphology and criminal physiology. As is well known, this field of research was cultivated chiefly by the Italian school, the majority of the members of which follow the master in concentrating their attention principally upon the corporal features, whilst others, Colajanni for instance, lay the main stress upon the psychic elements. It would be impossible within the compass of this chapter to summarize the vast material accumulated by the ingenuity and industry of Lombroso and his disciples. But a few examples chosen from each of the three departments may illustrate the lines on which the inquiry is pursued, and the data upon which criminal anthropology relies when formulating its practical postulates. Morphologically, much importance has been attached to anomalies in the size and shape of the skull, such as microcephalism, macrocephalism, oxycephalism, a receding forehead, cranial asymmetry, prognathism; whilst confluent cerebral fissures, a fourth frontal convolution, presence of the Darwinian tubercle in the ear, a scanty beard strikingly contrasting with an abundant crop of hair on the head, have been noted as occurring with special frequency among criminals. Among physiological peculiarities extraordinary agility, left-handedness, deranged reflex action, abnormalities in the vasomotor sphere, insensibility to pain, "disvulnerability" (or rapid recovery from wounds); auditory, olfactory and gustatory obtuseness, but exceedingly keen eyesight may be mentioned. Stupidity coupled with cunning, lack of forethought, laziness, inaptitude for prolonged and sustained exertion, inordinate vanity, suspicion, hypocrisy, superstition, moral insensibility, cruelty; incapacity to experience remorse, yet with it all a certain sentimentality; craving for excitement

which finds vent in gambling, in excesses *in Baccho et in Venere*, and its culminating satisfaction in the orgy; emotional instability—these are the properties found in the mental and moral armoury of the criminal classes. Garofalo describes as the essential characteristic of the criminal the absence or weakness of one or both of the fundamental altruistic sentiments, sympathy and honesty, Dr. Wey (of Elmira) finds the basis of all criminality in the ineradicable tendency to lie, Dr. A. Krauss in the love of pleasure combined with aversion to work. But in whatever else they differ, the students of criminal anthropology are all agreed that the criminal is a poor creature both in mind and in body.

If next we inquire into the origin of those anthropological features by which the criminal is distinguished from other members of society, we find that the biologists arrange themselves in two schools, according to the manner in which they attempt to solve that problem, viz. the evolutionists and the pathologists. The latter look upon the criminal as suffering from a morbid condition or a morbid defect which stamps him as abnormal with whatever healthy human being he may be compared. Of the two eminent advocates of this doctrine, Maudsley regards the criminal as congenitally wanting in one of the mental faculties, the moral sense, in other words, as a moral idiot or imbecile, *i. e.* as a kind of lunatic, whilst Benedikt describes criminality as a neurosis, akin to hysteria and epilepsy. Maurice de Fleury, adopting the modern terminology of neuro-pathology, speaks of a paralysis of the neurons. To the evolutionist, on the other hand, the criminal appears abnormal only when contrasted with civilized man; for criminality is to him an atavistic phenomenon, a reversion to the type of savagery. "Among savages," says Lombroso, "crime is by no means the exception; it is there the general rule. Hence it is not there regarded as such by anybody, but it blends

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in its origin with other acts not in the least wrongful." In a similar strain writes Poletti : " Crime is unknown at a certain stage of social life. The acts which nowadays constitute crimes were indeed done in former times. But they were in keeping with savage life, of which, among us, they are, as it were, a continuation." Even a pre-human, nay a pre-animal, atavism has been invoked by the Italian school in explanation of criminality. The criminal has been credited with reproducing in all their primordial violence the indomitable instincts and impulses of the brute creation. According to Garofalo, " the typical criminal is a monstrosity in the moral world, having features in common with the savage, and others which place him even below the plane of human beings." And no less an authority than Lombroso himself writes : " If we cast a glance at the phenomena of Nature, we see that the acts which are considered by us to be the most criminal, are really the most natural ; so generally and so frequently do they occur in the animal and even in the vegetable kingdom. As has been well said by Rénan, Nature gives us the example of the most implacable insensibility and of the greatest immorality." Lombroso then proceeds to mention in the same breath insectivorous plants and homicidal criminals, as if it were possible, without absurdity, to regard them as representing phenomena of the same order. All this is mere intellectual jugglery, the less deserving of serious criticism, as the main position, viz. the atavistic explanation of criminality, is quite untenable. The point of contact between the " typical " or " born " criminal and the savage is, according to Lombroso, the prevalence of antisocial instincts, according to Garofalo, the want of altruistic sentiments. This teaching is based upon a view of savage life which modern sociological research has hopelessly discredited. The blind obedience to custom which all observers agree in describing as one of the most striking characteristics

of primitive peoples, shows that the savage is essentially a social being. The strength of clan and tribal feeling, coupled with a callous indifference, if not unmitigated hostility, towards the stranger, which is the universal attitude of primitive races, merely proves that if the circle within which altruistic sentiments are excited, is much more restricted in the savage than in modern man, their intensity within that charmed circle is all the greater for being confined within narrower limits. And if it is true, as Lombroso remarks, that Australian aborigines feel no more compunction in killing a human being—a stranger to wit—than in killing a toad, this fact cannot be regarded as evidence of antisocial impulses or of incapacity for altruistic sentiment by us who, with all our much-vaunted civilization and imbued, as we have been for nearly two thousand years, with the humanitarian spirit of Christianity, still look upon slaying an “enemy” in warfare as something morally excusable, if not actually praiseworthy.

According to the abnormalities or “stigmata” which they exhibit, criminals may be arranged in different anthropological groups. Each author, however, appears to have a system of classification of his own. Lombroso distinguishes five types, viz. born criminals, epileptic criminals (a Lombrosian speciality!), criminals by impulse or passion, criminal lunatics and occasional criminals. Benedikt makes short work of all these niceties by boldly advancing the thesis: “All criminals are born criminals.” Garofalo recognizes three categories of criminals, according as to whether there is complete absence of both fundamental altruistic sentiments, or merely deficiency in the development of the one or other of them: the typical criminal or assassin knows neither sympathy nor honesty, in the violent or energetic criminal the feeling of sympathy is but rudimentary, whilst the thief or neurasthenic criminal is not as honest as he might be. According to

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Ferri, there exist five classes, namely criminals by passion, occasional criminals, criminal madmen, instinctive criminals and criminals by acquired habit, the latter type testifying to the recognition, by Ferri, of the sociological factor in the genesis of crime.

The results of anthropological research into the causation of crime necessarily subvert the groundwork upon which the whole structure of criminal jurisprudence is built up. If it is true that the criminal is born with the mark of Cain indelibly impressed upon his forehead and haunted by a destiny from which he cannot escape, then the fundamental notions of the penal law become meaningless; or, at any rate, they have to be revised in the light of the new scientific discoveries. A crime ceases to be a "wrong" "imputable" to the criminal and becomes a mere natural phenomenon, "like water, fire, lightning or subterraneous vapours"—dangerous but unavoidable. There can no longer be a question of guilt, or of punishment *proprio sensu*; for you cannot make a man responsible for the manifestations of his physical or psychical abnormalities when they happen to be crimes, any more than you can impute to him a limp resulting from a crippled leg, or a deformed nose, the visitation upon him of his father's sin. What, then, is to be done with him? Is he to be given a free hand to continue his onslaughts on his fellow-citizens? Certainly not. By the act which has brought him into conflict with the law, he has proved that he is a menace—and since the deed has to be regarded, not as an isolated phenomenon, but as an indication of a permanent, deeply rooted, constitutional defect, a standing menace—to society. And if the crime flowed from his organization with unavoidable necessity, the social, like any other, organism reacts, of the same unavoidable necessity, against what disturbs the conditions of its existence. Society must protect itself and deal with him in such a manner as its own

interests demand. "The welfare of the community is the end and is the ultimate standard. Its right and duty is, in brief, to be a Providence to itself" (Bradley). As against the claims of society the criminal's own claims are nil: he is not a responsible, *i. e.* not a moral, being, and for that very reason no question of justice can arise as between him and society. According to Garofalo, society thus speaks to him: "Men have ceased to see in you their equal; between you and the others every tie is broken. Therefore you have no longer a place in society." He has shown himself a noxious creature "and may be destroyed as a lion or tiger, one of those wild savage beasts with whom man can have no society nor security." The words between inverted commas show that John Locke has anticipated the conclusions of the Italian school. But even he was not the first to advocate the wild-beast principle in the treatment of criminals. Seneca justifies the elimination of incorrigible offenders both by a similar argument and by that now more fashionable doctrine of social surgery: "At corrigi nequeunt, nihilque in illis lene aut spei bonae capax est? Tollantur e coetu mortalium facturi peiora quae contingunt et quo uno modo possunt desinant esse mali; sed hoc sine odio. Nam quis membra sua tunc odit cum abscidit? Non est illa ira, sed misera curatio. Rabidos effligimus canes, et trucem atque immansuetum bovem occidimus, et morbidis pecoribus, ne gregem polluant, ferrum immittimus. Nec ira sed ratio est, a sanis inutilia secernere." We read in Spinoza's *Cogitata metaphysica*: "Si tantum illi, quos non nisi ex libertate fingimus peccare, essent puniendi, cur homines serpentes venenosos exterminare conantur; ex natura enim propria tantum peccant, nec aliud possunt." Again, Fichte says: "The outlaw is considered simply as a wild beast which must be shot; or as an overflowing river which must be stopped; in short, as a force of Nature which the state must render

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harmless by an opposing force of Nature. The death of the outlaw is not a means of punishment, but merely of security." The passage would be accepted, I suppose, by any modern criminal anthropologist as an excellent presentation of his case. At any rate, it is on all fours with Lombroso's argument which is, in substance, as follows: "One might entertain doubts as to whether wild beasts lacerate men out of viciousness or by virtue of their natural organization. But nobody will be prevented by such scruples from killing the brute, and quietly allow himself to be torn to pieces. Again, but very small will be the number of those who, out of regard for the rights of those others of God's creatures, the domestic animals, out of respect for their life and liberty, will hesitate before putting them to the yoke or before killing them to eat their flesh. And what other right have we to confine lunatics or to isolate those suffering from contagious diseases?" In short, measures of social protection will have to take the place of punishments proper. Now the chief means of social defence is the elimination of the criminal. "The evil-doer is one whom we must destroy, not punish," remarks Diderot. It is not, however, necessary to do him to death; segregation from the social environment will answer the purpose equally well. If Lombroso describes the current theories of punishment as mere mystifications, the popular attitude towards the criminal is, according to Garofalo, in complete harmony with the new doctrine. "What the public demands is that the criminal be eliminated, not that he be made to suffer. When a crime has been committed, the first question always is: Has the criminal been arrested? It is only because punishment satisfies the desire for segregation that his punishment is demanded, and only because punishments happen to be painful does the public wish him to suffer. Suffering is not, however, the true end of the reaction demanded by popular senti-

ment, but in the natural order of things it always goes with the true end, the elimination of the criminal." Some criminal anthropologists look upon elimination as the sole weapon in the warfare of society against the criminal; and the hereditarians among them, in the utter hopelessness inspired by their theory if consistently adhered to, will not rest satisfied with anything less than permanent elimination. Others, who regard crime as partaking rather of the nature of disease, recognize the alternative "kill or cure" and demand the permanent elimination of the incurable criminal, temporary segregation and the application of remedial measures, till a cure be effected, in the case of those whose condition justifies a more favourable prognosis. But inasmuch as it is impossible to determine beforehand how long it will take till the criminal recovers, indeterminate sentences form an integral part of their programme. Whilst, as we have seen, the wild fauna serves as the stereotyped simile when the principle of elimination is to be justified, the experience of the arboriculturist is drawn upon in explanation of the alternative measures of social defence: "The evil-doer has to be treated like a faulty tree which one improves and in certain circumstances even fells. The fact that the fault lies in the nature of the tree and of the man, so far from barring such treatment, is the very reason which compels us to adopt it."

It must not, however, be assumed that "the new horizons in criminal jurisprudence" open a vista of unmitigated harshness. On the contrary, our prison population includes many an individual that bears not a single mark of the beast upon him, and such persons are not, according to anthropological doctrine, appropriate subjects for the application of the criminal law. No act ought to fall within the province of the latter which does not brand its perpetrator as an anti-social being. This is the meaning of the dictum, so often quoted after Major

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Griffith, that there are only two classes of people in jail, first, the majority, those who should never have been let in, and, second, the remainder, those who should never have been let out. Short sentences for trifling transgressions are an abomination to the criminal biologist. Fines ought to be substituted for them in all cases, or better still, those peccadilloes, since, as a general rule, they prejudice individuals rather than endanger the safety of society, ought to be transferred from the penal to the civil code and ought to impose upon the wrongdoer an obligation, to be enforced with the utmost rigour by the state, to make full compensation to the injured party—an excellent postulate the practical application of which is, unfortunately, confined within very narrow limits, owing to the absolute impecuniosity of the overwhelming majority of offenders.

Under the system of social defence, criminal responsibility acquires an entirely new meaning. It must now be understood to signify the liability of the criminal to be dealt with by society in such a manner as his own constitutional abnormalities and the interests of the common weal demand. In the words of Alfred Fouillée, the offender is responsible to society in no other sense than a torrent which is always ready to leave its bed is responsible to the engineer who will take the measures required to avert the danger. Hence it is no longer a question of guilt and punishment, but a question of biological diagnosis and appropriate treatment that engages the attention of the tribunals. It is not now the business of judge and jury to ascertain whether the facts established answer the definition of this or that crime and justify the application of a certain section of a criminal statute. «The object of the judicial investigation is, first of all, to prove that the person on his trial has committed a crime. This part of the inquiry is merely preliminary in character and necessary only to give the court juris-

diction; for the nature of the illegal act in no way determines the fate of the criminal. The latter depends exclusively upon the main trial which resolves itself into a biological examination and appreciation of the accused person. His act may, indeed, be one symptom among others of his infirmity; but he, the criminal himself, "will be the true and living subject of the trial." His heart and his reins are searched, and anthropometric and physiognomic data, records of sensibility, of reflex activity, of vasomotor reactions, tattoo marks, psychic peculiarities and the details of his family history are now relied upon as evidence in order to discover to what type of criminal he belongs. It is obvious that in such a procedure there is hardly room for the discharge of judicial functions. The work of the jurist proper is practically at an end as soon as it is established that the prisoner is the author of the crime. Henceforth the scientist and the administrator divide the field between themselves; but the former is the true master of the situation. For his findings guide the administrator in the choice of the appropriate measure of social protection and in the disposal of the criminal's destiny. But if the claims of the Italian school are true, if a study of the anthropological features enables the scientist *a priori* and independently of the actual commission of a crime to spot criminals and so to supply the guardians of the law with reliable information, why postpone proceedings till they have wrought mischief, possibly irreparable mischief? Why not take steps for the protection of society before they have had a chance to perpetrate offences? Surely we do not wait till the tiger has had his tribute of human flesh before slaying him. The more extreme of the disciples of Lombroso, who, it must be conceded, are also the most consistent, do draw this conclusion from their doctrines and demand that potential criminals be dealt with by the state according to the defects of their organization.

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Others, without going to that length, suggest that where the authorship of the crime cannot with certainty be brought home to an accused person, the presumption *in dubio pro reo*, upon which the courts now act, ought to be reversed, so that the prisoner, if the anthropological scrutiny goes against him, would be treated in exactly the same way as if his connection with the offence had been fully established.

Such are the practical lessons to be learnt from the biological study of the criminal. The doctrine of social defence has been attacked on the ground that collective, like individual, self-defence is resistance to unrighteous attack, and *ex vi termini* legitimate only so long as the danger is imminent. At the time of the judicial investigation the attack has long ceased, and the aggressor is disarmed and no longer a source of danger. In answer to this objection it might be urged that the right of personal defence does not endure beyond the attack, because, when once the danger is over, the injured party has only to invoke the assistance of the state to be safeguarded from further molestation. This argument in favour of limiting the right of defence does not apply to the case of collective defence; for there is no superior power to which society can appeal in order to obtain protection for the future. But this answer does not go to the root of the matter, nor does it touch the most vulnerable spot of the criticism. The real weakness of the objection lies in this—that it rests on an entire misconception of the position of the anthropological school. According to the doctrine of the latter, the danger against which society has to defend itself is not the crime but the criminal, not the anti-social act as an isolated phenomenon but the individual with his anti-social instincts; and this source of danger persists as long as those organic abnormalities endure which form the physical and psychic substrate of his inaptitude for life in a civilized com-

munity. The doctrine of social defence is certainly open to the charge that the conception of the relation of society to the individual which it involves, runs counter to modern ideas. According to that theory, society alone has a claim to consideration, the individual counts for nothing. If out of harmony with the social whole, he may be crushed out pitilessly by the manifestation of superior force. Current morality still respects, even in the criminal, the divine image and will not tolerate a leviathan that ruthlessly devours human beings. If the new system is of doubtful ethical value, logically it is unassailable—provided that the premises from which it starts are sound. The discoveries of criminal anthropology, when first published, were received with that enthusiasm with which everything new and startling is greeted when clothed in a scientific garment. But a reaction promptly set in when the new thesis began to be subjected to more careful examination and sober analysis. The doctrine that crime has a biological basis would sound less paradoxical if the penal law were eternal and immutable. But since a perfunctory glance at history is enough to convince us that crime is entirely a question of time and of place, that even popular notions of right and wrong may undergo radical changes in the course of a very few generations, the course of organic evolution would have to be a million times more rapid than we know it to be were it to keep pace with the developments of the criminal law. Moreover, since crime is not a natural product, but a course of conduct which derives its whole significance from the relation between man and man, in other words a social phenomenon, the theory of its organic origin in the individual implies that Nature in the choice of the monstrosities which it brings forth is determined by tendencies antagonistic to society; and the absurdity of the assumption that some people are predestined to become murderers, others burglars, others again forgers, is in

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no sense mitigated by the adoption of terms borrowed from pathology to designate these different classes of criminals and by providing, after the example of Garofalo, the born thief, for instance, with the alternative label "neurasthenic." The zeal of anthropological investigators has indeed rendered it probable that certain peculiarities, morphological, physiological and psychical, are found more frequently in habitual criminals than in law-abiding citizens. But as to the true significance of these "stigmata" we are still completely in the dark; and interesting though those observations may be, they cannot help us in the practical solution of the problem of crime, nor guide our steps when dealing with an accused person *in concreto*. Shall we really allow our judgment on the prisoner in the dock who happens to have, or not to have, an ear *ad ansa*, to be influenced by the knowledge that Ottolenghi found the handle-shaped ear in thirty-nine per cent. of the criminals he examined as against twenty per cent. of normal persons; what help would we derive from such knowledge even if we were ignorant of the fact that Lombroso found that peculiarity in only twenty-eight per cent. of his criminals, Knecht in twenty-two, and Marro not more frequently than among normal persons? Henri Thierry tells us how, on a certain day, he attended the Paris assizes, and discovered that of seven prisoners who in succession left the dock with a conviction recorded against them only one answered Lombroso's description, whilst of the three judges who presided at the trials, no less than two displayed unmistakable stigmata. This homely observation, devoid of all scientific pretensions, shows, in its irony, the value which criminal anthropology as yet possesses in the administration of justice. The new science, with the impatience of youth, clamours for the practical application of its scientific data. "The modern world," however, "will never tolerate a court which pretends to sit in judgment on men's mere thoughts as opposed

to their actions. But is it possible that we could tolerate a court which, even in a qualified way, sat in judgment, not upon men's thoughts, but upon their mere dispositions and tendencies ? " (Watt). Certainly not as long as these tendencies and dispositions have to be determined by rules which are premature generalizations from an insufficient number of imperfectly digested observations.

Criminal sociology, like criminal anthropology, looks upon crime as symptomatic of a morbid condition; but the patient is the social body, not its individual member. The latter supplies but the raw material to be fashioned in the workshop of society, and if the finished article is faulty, the workman who has bungled, is alone to blame. One author, Carl Heath, indeed, goes so far as to understand by social responsibility, not the responsibility of the criminal to society, but the responsibility of society for the production of crime. It is the temptation which makes the criminal, and society provides the temptations which are the true causes of crimes. The criminal cannot, then, be regarded as standing to the social whole simply in the relation of aggressor and victim. " He is a member of its body; bone of its bone, flesh of its flesh. If he has sinned, it has also sinned through him." The doctrines of criminal sociology were first systematically elaborated, with the aid of a vast statistical material, by Quételet, who in his *Physique sociale* thus sums them up: " Society holds in its bosom the seeds of all crimes that are going to be committed. It is society that prepares them, and the actual offender is but the instrument to carry them into execution. Hence every social state brings with it a certain number and a certain order of crimes which result, as a necessary consequence, from its organization." We see, then, that sociologists, too, look upon crime as the inevitable outcome of causes which are irresistible in their operation. The antecedent conditions which are thought to reside in the social environment, have in modern times

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been studied with special care by the Lyons school, with Lacassagne at its head, who writes : " The social environment is the culture-medium of criminality ; the microbe is the criminal, an element of no importance until it finds the broth on which it thrives." The influence of a very large number of sociological factors in the genesis of crime has been fully established, and the results of sociological inquiry generally have a ring of common sense about them by which they contrast favourably with many of the tenets of the anthropological school. That political oppression leads to political offences, that the social ostracism of the girl-mother favours infanticide, that a boy trained to pick pockets will, when grown up, in all probability become a professional criminal, that during periods of unemployment offences against property are especially prevalent, that the wave of criminality rises and falls with the price of corn ; all these propositions appear quite acceptable to us in the light of our ordinary experience and would compel our assent even if they were not proved by statistical tables. Sociologists differ somewhat in the relative importance which they attach to the different factors. Thus according to Tarde the influence of example is paramount in the production of crime, as in the shaping of man's conduct in society generally ; Coutagne insists upon the relation between occupation and criminality, whilst Raux lays special stress on the influence of education. That an unwholesome domestic atmosphere during the years of childhood, that poverty and ignorance are potent factors in the etiology of crime, is conceded by most authors.

In the practical conclusions which they draw from their theories, sociologists are far less aggressive than we have found the advocates of the biological doctrines. It is not here a question of completely revolutionizing our penal methods. An isolated voice is, indeed, heard now and then demanding that punishment should be done

away with altogether. But most writers agree that we should retain punishment for what it is worth, though the value which they themselves put upon it is an extremely low one. They claim that it is absurd for society to expect that the threat of the law should prove a very effective deterrent so long as practically nothing is done to minimize the operation of those causes which powerfully impel to the commission of crimes; that all attempts to reform prisoners must prove abortive if they are again exposed to the same old morbidic miasmata as soon as they leave jail; that to eliminate offenders is to begin at the wrong end and to waste a good deal of valuable material. (At any rate, punishment must cease to be the only, or even the main, weapon in the fight of society against crime. Only by suppressing the causes can we hope to suppress the effects, and since the cause of the evil lies in the social *milieu*, all our efforts must be directed towards the reform of society. The social structure has not been cunningly enough devised to allow elbow-room to men of every stamp. The straight roads are too few and too narrow to permit all members to take them; many are forced into crooked paths. These defects must be cured. The measures of social amelioration taken with this end in view Ferri calls penal substitutes, whilst others describe them as prophylactics of crime. There is hardly a measure of social improvement which has not been included in the sociological propaganda against crime; objects so widely different as universal adult suffrage, free-trade and the establishment of state-orphanages, the introduction of the political referendum, cheapening of the means of communication and an efficient popular education, restrictions on the production of intoxicating beverages, simplification of the law and the provision of public works during hard winters, have all been advocated as indispensable reforms if we wish to reduce the volume of crime. It is conceded that each of these measures by itself can do

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but very little towards palliating an evil the germ of which lies in the intricate interaction of practically all the social forces; but their combined effect, it is hoped, will be appreciably to reduce and finally to suppress crime.

We have now reached a point where we can clearly perceive what the teachings of criminal sociology come to. On the theoretical side they amount to this—that at the millennium criminality will vanish, together with all other kinds of evil now prevalent upon earth; and the practical policy which they suggest is that we should endeavour, by all means in our power, to hasten its advent. In other words, the sociological theory, which at first sight appeared full of promise, is now shown to give us but very little assistance in the solution of the problem of crime. Still it must be granted that the ideal which it holds before our eyes, is an inspiring one, and it is satisfactory to know that every step we take towards the alleviation of human suffering, towards the liberation of the oppressed, towards the elevation of the submerged, towards the enlightenment of those walking in darkness, will concurrently diminish the bill of crimes.

“The social environment is the culture-medium of criminality; the microbe is the criminal, an element of no importance until it finds the broth on which it thrives.” A better acquaintance with the elements of bacteriology would have saved Lacassagne from the use of a false simile and, at the same time, from a one-sided criminological theory. The vital phenomena of a microbe are by no means determined by the culture-medium alone, but depend to a large extent upon its own specific nature. The composition of the soil may, within certain limits, modify the biological characters, including the virulence, of the comma bacillus; but no broth which we may concoct, is capable of transforming the *bacillus prodigiosus* into a *vibrio cholerae*. Lacassagne's error is typical of the whole sociological school. It overlooks the resistance

which the organism opposes to external forces and regards man's nature as entirely plastic, as passively reproducing the impressions, and submitting to the impulses, which it receives from its social environment. The best of modern criminologists have overcome the opposition of the anthropological and the sociological schools. They recognize with von Liszt that the two hostile camps represent but two different points from which the same problem may be attacked; that they differ in their methods of research, the one relying on the systematic study of the phenomenon in the individual, the other on the statistical investigation of the same phenomenon, when observed in large bodies of persons; that the tenets of either school are, in their isolation, untenable; and that a careful appreciation of the combined results of both modes of investigation can alone advance our knowledge of the subject. This is the position taken up by the two most eminent English criminologists, the Rev. William Douglas Morrison and Mr. Havelock Ellis. The synthetic view may be expressed in the following short formula: "Since crime results from an imperfect adaptation of the individual to its social environment, two groups of causes are responsible for its production, personal defects and social shortcomings. Etiological therapeutics, to be successful, must take into account both series of factors." But since criminological eclecticism has found its most eloquent mouthpiece in Enrico Ferri, we may be permitted to borrow the following summary from the writings of this author: "Every crime is the result of the simultaneous and indivisible concurrence of the biological conditions of the criminal and of the social conditions of the environment in which he has been born, in which he lives and acts." Hence "the most reliable and the most fruitful measure of defence against crime which society can adopt, is of a twofold character, and both parts must be employed and developed simultaneously. On the one hand, the improvement of

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the social conditions, as the natural preventive of crime, on the other hand permanent or temporary means of elimination, according as to whether the influence of the biological conditions in the causation of the crime is almost absolute, or greater or smaller and more or less curable." But where the occurrence of an event depends upon the interaction of two forces, surely it is impossible to apportion the shares which they have in the production of the phenomenon. The concluding sentence of the passage quoted from Ferri is about as scientific as would be the assertion that hydrogen is the more important element in the composition of water because two atoms of it, as against one only of oxygen, enter into the formation of a molecule. And if the same author states that "the biological factor of crime is something specific, which, so far, we are unable to determine, but without which all the other conditions, physical and social, are insufficient to account for all forms of crime and for crime itself," we discover that one arm of the bifurcate criminological theory ends in a very big note of interrogation, whilst the other, as we have already found, points to a distant Utopia.

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