

MORAL ASPECTS OF THE CRIMINAL LAW

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IN passing moral judgments, as we all sooner or later inevitably do, in regard to legal and other human arrangements, we generally oscillate between the appeal to self-evident principles and the appeal to the obvious demands of the specific situation before us. This seems a highly unsatisfactory procedure to those who feel that certainty must be found in one or other terminus, else all our moral judgments fail for lack of an assured support. This Article is based on the view that such oscillation is under certain logical precautions and scientific systematization the only proper procedure, that to trust rigid principles regardless of specific consequences makes for inhuman absolutism, while to rely on nothing but the feeling of the moment leads to brutal anarchy. Consider the ethical atomists who think that life breaks itself up into a number of separate autonomous situations, each immediately revealing its own good or proper solution to our conscience, intuition, or intuitive reason, intelligence or common sense. When these moralists are confronted by a challenge to any of their particular judgments, they generally adduce some reason or at least cite an analogous case, thus involving explicitly or implicitly an appeal to some determining principle more abstract and wider than the specific case before them. On the other hand, those who rely on principles to decide specific cases do, and have to, defend these principles by showing that they lead to the proper consequences. By a consideration of some of the ethical problems of the criminal law, I wish to illustrate the truth that the procedure from principles to facts and from facts to principles, without assuming either to be absolute or unquestionable, does not at all lead to complete moral nihilism, but rather clarifies the process of building a systematic view of what the law should do, even though it tolerates a certain amount of probabilism and pluralism in taking into account the wide variations of social conditions and sentiments.

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In the law school's curriculum and in the textbooks, the criminal law appears as a distinct and strictly delimited province; and practitioners generally leave it to a separate branch of their profession, by no means the highest in income and prestige. But if you ask the man in the street what he understands by *law* he will generally mention the prohibition against theft, murder or some other punishable offense. As in other cases the layman, while devoid of well-defined and properly elaborated ideas, still touches the root of the matter. The criminal law may properly be viewed not only as a branch but also as a basic phase of the whole legal system.

Jurists often distinguish the criminal from the civil law on the ground that the former is concerned with punishments for violation of those rules of public order to which normal people naturally conform, while the civil law is concerned only with determining the rights of the parties in private transactions. In fact, however, not only does the criminal law today regulate all sorts of private business, but *all* legal provisions (at least in a modern state) have at their back an enforcing machinery that operates through some system of penalties. Consider for instance such requirements as that certain agreements must be in writing or involve a "consideration," that a will must have two or three witnesses, that a valid protest of a note must be within a certain time, or that one may legally charge an interest rate of six per cent. Anyone who ignores these provisions exposes himself to the penalty of losing certain advantages — a loss which may be far more severe than many of the fines for public disorder or for various misdemeanors. A law permitting a man to transfer his property by a will is significant only when the beneficiary legatee or devisee can invoke the penal machinery of the state against those who would deprive him of possession. All laws as to property, contract or personal rights may thus be viewed as specifications within the criminal law, specifications as to when the public force will be brought into play to punish non-obedience to its prescriptions.

There are doubtless obvious differences between the extreme penalty of death or life imprisonment for certain felonies, and the penalties which support the civil law. But it is well to remember that imprisonment for debt has not yet been completely abolished; that the triple damages of the Sherman Anti-Trust Act may deprive you of your home; and when you happen to be put into jail for not obeying an injunction which deprives you of most elementary civil rights, the actual effects on you and your dependents are not much different than if you were punished for committing a crime.

It is sometimes asserted that the civil law protects the private interests of individuals while the criminal law protects the interests of the state or community. But this contrast is of little value. I do not wish to dispute the fact that the interest in preventing sacrilege or other grave

public danger was one of the origins of criminal procedure, and that offences against the king or government have been and still are generally the most severely punished. But it is hardly necessary to call attention to the vital interests of the state not only in protecting but in promoting private industry and commerce from which it derives its support. Surely no interest of the state is so dear to it as the collection of taxes. Yet the non-payment of a real-estate tax is not always a crime. An absolute differentiation between the substance of the criminal and of the civil law is indeed clearly impossible so long as the same act may be the basis of either a civil suit or a criminal prosecution. The difference here clearly resolves itself into one of procedure.

In the United States today, it seems very easy to distinguish between criminal and civil procedure on the ground that in the former some state official is in duty bound to prosecute, whereas a civil action is brought by a private individual acting at his pleasure. We must add however that state officials are also bound to bring certain civil suits, and in England the attorney general may intervene in tort cases between private parties. This is not to deny that there are today some differences between civil and criminal procedure, *e.g.*, the one in regard to the burden of proof. But it is well to remember that these differences are far from prevailing in all legal systems and are apt to appear more important in theory than in the actual practice of our jury trials. In any case, up to the second decade of the nineteenth century the common law allowed a private action or "appeal" for murder and other injuries.

These considerations are not intended to deny that legislatures and courts can, do, and should call certain acts criminal and provide some distinctive procedures for dealing with them. The general feeling of security demands that everyone know, with a fair degree of certainty, what is and what is not criminal. The fear that some innocent act may be branded as criminal is as horrible as the older paralyzing fear of unconscious unintentional sin. What I wish to insist on is that the criminal law is an integral part of the legal system and is subject to the same considerations which do and should influence the whole. More specifically, the criminal law cannot be distinguished from the rest by any difference of moral principle. Some crimes, to be sure, are shocking; but there are many crimes that are felt to be much less reprehensible than many outrageous forms of injustice, cruelty or fraud, which the law does not punish at all, or else makes their perpetrator liable to money damages in a civil suit. It is well to remember that Moses murdered an Egyptian and fled the country, that Socrates was, by a majority of his fellow citizens that voted, found guilty of a crime, and that George Washington and others would have been treated as criminals if the American Revolution had been as unsuccessful as was the Scotch rebellion under Sir William Wallace. Those who, like Kant, regard obedience to

the law as an absolute duty, must logically deny the moral right of any revolution. But this cannot be carried out consistently, since most, if not all, established governments, even the Constitution of the United States, have arisen out of revolutions and military conquest. Some dim, uncomfortable perception of this may be responsible for Kant's remarkable prohibition of any inquiry as to how the existing government acquired its authority.

An adequate discussion of justice in the criminal law must therefore deal with all the ethical issues of the law generally, such as the principle of equality, the adjustment of conflicting interests, or the relation between respect for personality and the demands of social responsibility and solidarity. But this Article will be limited to a few questions that are in the forefront of current discussion as to the criminal law.

WHAT IS A CRIME?

With this question, we are at once plunged into an ancient and persistent controversy. On one hand, we have the legalists who urge that any act or omission is a crime when, and only when, it is declared to be such by the legislative power or by those who speak with the authority of the law; an act may be sinful, immoral or contrary to the public good, but it is not a crime unless it is legally so declared. On the other hand, we have those who claim this view to be superficial, and who insist that no legislature can or should treat anything as a crime unless it is so in fact or in the nature of things. This issue dates back to the old Greek controversy of the fifth century B.C. between those who saw everything determined by nature and those who pressed the claims of convention or human legislation. To Aristotle may be traced the classical compromise of distinguishing between those acts which are crimes by nature (*mala per se*) and are prohibited among all peoples, and those others (*mala prohibita*) which are prohibited only in certain places by special legislation. This view has been largely influential in molding the classical doctrine of natural rights in the criminal as well as in other branches of the law. In point of fact, however, no one has ever made a critical catalogue of the acts which have actually been prohibited by all peoples at all times. Almost all those who insist that there are *mala per se* put into that class those acts which in an undefined way seem to them to be shocking. But they do not give any clear criterion by which to judge what acts should thus be included and what acts should be excluded from the category of crime.

THE TRADITIONAL MORALISTIC VIEWS OF CRIME

The oldest traditions view crime as a violation of some eternal law set by the gods, nature or reason. These find expression in two forms, the theologic and the rationalist (more properly intuitive). Both have the

advantage over the positivist that they do not have to use empirical evidence to establish absolute distinctions between what is and what is not properly a crime.

1. *The theologic point of view.* This is the older and still the most widespread. It regards the criminal law, and indeed all law, as divinely ordained for all time by Manu or by Zeus, given by Jahweh to Moses or to Mohammed by Allah. Without entering into any theologic controversy, it may be granted as an historic fact that communities as a rule do not allow any one who pleases to decide what acts the divine will has ordained as criminal. That is a function left in fact to some recognized authorities, *e.g.*, priests, religiously trained judges, scribes who interpret certain texts, or the like. When the judgment of these authorities can in any way be questioned, there is some attempt to justify it on the basis of reason and human history. Thus great moralists of the Catholic church, such as St. Thomas, are not willing to rest the distinction between what are and what are not crimes on mere authority. The divine Will is not despotically arbitrary, but is viewed as essentially rational and just. Hence in practice, theologic moralists appeal also to a rationalist view of human nature and experience.

Of course, there are theologians who insist that the essence of crime is the violation of the divine will, and that our frail human reason cannot determine what is just or unjust for the Perfect Whole. Mankind is quite accustomed to double standards of morality, different for men and women, for the state and individual, and for divine and human persons. Thus it is not wrong for Jahweh to harden Pharaoh's heart or to send a lying spirit to Ahab in order to punish him. It is not even wrong to put an evil design into David's heart in order to punish innocent children of Israel by either killing them by the plague or else depriving them of their parents. But the persistent efforts to explain such incidents and to justify the ways of God show a general disinclination to view God's law or will as entirely devoid of what seems to us rational or just.

Moreover, not all sins or violations of God's law are treated by theologians as crimes. Many evil acts are left to the direct punishment of the divine power here or hereafter, *e.g.*, covetousness, sex relations that are prohibited by the divine but not by human law, uncharitable attitudes to others, or failure to honor our parents. The Catholic church, claiming divine authority, does not today urge that the state make it a penal offense to disbelieve the dogma of trans-substantiation or of the immaculate conception of the Virgin Mary, or to hold those views as to the relation of the Holy Ghost to the Father and Son which make heretics of all the Greek orthodox. If blasphemy is still a crime in some of our states, it is defended on the alleged ground of protecting the public peace. Suicide is very often viewed as a direct violation of divine law. But few care to see criminal punishment meted out to one who has been unsuccessful

in his attempt at it; and we may suspect that when suicide was treated as a felony, the fact that this deprived the heirs of the felon of his property and gave it to the king or church was an important motive or factor in the case.

2. *The point of view of moral intuition.* Of those who have attempted to give us an absolute moral basis for a penal code, Kant is the foremost. He rejects the claims of all authority, secular or sacred, as inconsistent with the autonomy of the free will in ethical relations. The universal principle of all moral conduct, the categorical imperative to live so that the maxim of our action can become a principle of universal legislation, is not the source but rather a formula for what conscience, moral faith or "practical reason" immediately dictates as our duty in any specific case. In the end Kant falls back on the assumption that just as our moral conscience tells us that "Thou shalt not kill" is an absolute duty for the individual, so is "You shall kill the murderer" an equally absolute duty for the community. If a society is to be dissolved, the last murderer must be executed, else the blood of the victim will be on the heads of those who fail to do so.

While the Kantian theory is fairly close to the popular conscience, which often regards the prevailing *mores* as eternal laws of nature and reason, it fails as a guide in the determination of what specific acts are or ought to be treated as criminal.

Not all violations of moral laws are crimes (*e.g.*, lying). But why is not truth-telling as important for the preservation of the moral order as the protection of property? We all agree that murder should be a crime. But such agreement is purely verbal unless we are agreed as to what is murder. Surely, not all instances of killing can be regarded as criminal, even on Kantian grounds. What distinction does he offer between excusable or even commendable homicide, and murder? No one today regards it as criminal to kill a man in self-defense. But the line between justifiable and unjustifiable fear of attack varies and is somewhat arbitrarily fixed by law. In international relations, it is hopeless to fix a sharp line between an offensive and defensive war, even though in extreme cases the distinction is clear even to those not involved in the combat.

None of us think of the official executioner as a murderer. Though he is obviously not of the highest dignity, and we may not agree with De Maistre that the whole state rests on him, he is still a public servant. Nihilists who condemned and executed some of the brutal underlings of the czar were branded as murderers by his advisors who ordered, one Sunday morning, the shooting of a number of people that came to present a petition. Shall we say that the moral conscience of mankind is clear as to who in these instances was guilty of murder? The soldiers who kill in war are brave heroes, and on both sides they are said to be

defending their country. But may not their obedience to their officers make wars of unjust aggression possible?

I am not arguing that there is no such thing as morally revolting criminal murder, simply because in the nature of things there is not any sharp line to define it. That would be like arguing that there is no difference between day and night because there is no sharp line but rather a twilight zone between them. But I am calling attention to the inadequacy of the intuitionists' account which supposes that the common conscience has a clear and universally acknowledged answer as to when an act is or is not criminal.

Similar considerations hold in regard to theft. Apart from existing law, it is hard to say what does and what does not morally belong to another. Especially is this true in modern society when no man can point to anything and say, "This is exclusively the product of my own work in which I received no help from others." For, in fact, the author of a book, or the farmer who raises crops, has been supported by others during his work, and the relative value of his services is largely determined by the conditions created by the legal system. The notion of theft is relatively clear if it denotes taking something in a way that the law prohibits. But on purely moral grounds, apart from the law, it is by no means clear. Is it immoral for a manufacturer to copy the brilliant ideas that his rival has developed? If the design of a dress should be made property by law on the analogy of copyright, then imitating it will become theft. Among many primitive people there is no sense of private property in food. But it is a grave theft for one man to sing the personal song of another. Before the copyright laws, there was no conception of property in the literary composition itself. But when the legal rules in regard to property change, our moral duties in respect to it change.

Even if there were an absolute duty to obey the law always (which is dubious), legislation in a modern state would still have to go beyond traditional morality precisely because the latter does not offer sufficiently definite rules to regulate the life of people that in fact have conflicting notions of right and wrong. We see this in the conflicting claims of different classes of society, *e.g.*, employer and employee. The truth is that our specific moral rules are not, as is often assumed, fixed for all time, but vary with changing conditions; and to maintain the order necessary for the good life, we must have the power to terminate controversies definitively. This involves rules that generally are not free from all elements of arbitrariness. Moral duties thus become more definite and clear after the law is enacted. A consideration of the law of marriage and divorce will make this clear. Bigamy is repugnant to the general conscience of today. But was it adulterous for the Old Testament patriarchs to marry more than one wife, even two sisters? Is it adulterous today to marry two sisters successively, if death or divorce comes between the two mar-

riages? Many who regard free love as horrible, see no objection to free divorce. Arbitrary legislation does in fact change our judgments as to what is moral or immoral in given situations, and the law makes crimes of acts that were not so before the legislation took place.

THE POSITIVISTIC VIEW

The positivists who wish to develop a science of criminology, and who believe that a science can deal only with facts of existence, find it difficult to admit that what is a crime is determined by legislation. They are thus forced to maintain that certain acts are criminal by nature, whether committed by men, beasts or even plants. Unfortunately, however, they do not tell us what traits distinguish a criminal from any other act. What for instance makes it criminal for the sensitive plant to feed on insects? Are not birds similarly guilty, and do not fish live by devouring other fish? It seems that the positivists are here following the old doctrine of the Stoic moralists that nature decrees certain acts as impermissible even to animals, so that those who violate this decree are guilty of crimes against nature. But unless we believe in supernatural ordinances or in a devil who interferes with our nature, we must apply the term natural to everything that actually takes place, in the field of legislation as well as in the field of "unnatural" or "abnormal" animal behavior.

The most thoroughgoing attempt to define natural crime is that of Garofalo who identifies it with those harmful actions which shock the moral sense of pity and probity of all civilized people. This moral sense, he holds, is not only unaffected by legislation which makes acts criminal that were not so before, but it is independent also of the circumstances and exigencies of any given epoch.¹ But how can positivists who identify science with determinism hold that social changes can occur without having any effect on what is deemed criminal? Garofalo admits the obvious and well authenticated fact that laws as to what constitutes crime do vary, but he thinks that the sentiments of pity and probity are the same among all civilized peoples. But who are civilized people? The naive answer is: those whose views are like our own,² from which it follows that our ancestors were not, and that other people with different conceptions of the requisites of pity and probity are not, civilized. This use of the term *civilized* seems amazingly naive but it is supported by the fashionable assumption that there is a cosmic law according to which all people must, regardless of diverse circumstances in their environment, evolve along the same uniform line of which we today represent the highest point. There is, however, no scientific evidence, logical or em-

1. GAROFALO, *CRIMINOLOGY* (Tr. Millar 1914) 4.

2. *Id.* at 215.

pirical, for any such law. As a matter of historic fact, not only do different "civilized" peoples vary in their moral sense or sentiment as to what pity and probity require, but within any community there is a large variation in this respect. And which view, or way of feeling, will prevail depends on temporal changes that do not follow any one line, but are dependent on so many circumstances or factors that the future is unpredictable.

It is hardly necessary to show that hatred, pugnacity and brutality have not only been human traits at all times, but have been glorified in religion and literature. Consider the command in Deuteronomy to exterminate all the inhabitants of a conquered city, or the ferocious ending of the touching psalm "By the Rivers of Babylon," not to mention the obvious delight in wholesale slaughter in the book of Esther, or the record of pious, God-fearing Puritans in their treatment of Indians, or their participation in the Negro slave traffic.³ Moreover, when we reflect on the tortures imposed by the Inquisition, the brutalities of civil war (and even of the economic struggle) or how certain contemporary rulers have risen to power not only by the practice but by the very glorification of brutality, it does not seem that the latter trait is found only among those in prison.

Civilized Italians and Germans at the time that Garofalo wrote might have been shocked at the suggestion that their people would ever be capable of perpetrating the cruelties which Fascists and Nazis have exercised on their opponents or even on innocent children who happened to live in Ethiopian villages or to be of Jewish ancestry. Yet today those responsible for these acts are national heroes and their cruelty has become the virtue of fortitude and patriotic devotion to the national state.

Within American society today, there is a violent difference of feeling or sentiment in regard to birth control. There are those who consider it an abominable crime against nature, so that spreading information about it or abetting it should remain a penal offense. On the other hand, there are those who feel strongly that the best interests of society demand that such information be more widely diffused. The question as to which party will prevail cannot be answered by any law of evolution such as Spencer's. It depends upon such factors as legislation for improved and more ample housing.

In the end, Garofalo admits that besides natural crime there are many offenses which even civilized peoples do and should punish. The latter category will be found to include most of the offenses of our criminal law. Garofalo himself mentions not only political crimes, such as meetings to conspire against the government, seditious utterances, prohibited

3. The Boers won a great deal of sympathy when they defended their country against British imperialism but they had their own record for burning towns, murdering men and women, and stealing cattle and children. *Letters of David Livingstone* (Aug. 1922) 130 ATLANTIC MONTHLY 212, 213.

political demonstrations, refusal to perform required military or other services to the state, irregularities in the conduct of elections, etc., but also clandestine prostitution, smuggling, helping prisoners to escape, and the like. Now if all these are not natural crimes, our prisons contain very many who have not committed any natural crime, while many who practice gross cruelty and improbity in business or elsewhere are not in prison at all. There is therefore no ground for the basic assumption of the "anthropologic" school of criminology, that the physical or mental traits common to prisoners are distinctive of natural criminals.

Positivistic sociologists and jurists as well as moralists often identify crime with acts which are contrary to the social interests or endanger social existence.⁴ But the most obvious reflection shows that this begs the question. Acts are criminal not because they *are* harmful, but because they are *deemed* harmful by those who make or interpret the law. The most serious crimes are sometimes those acts that in the judgment of enlightened and heroically unselfish people will best promote the common good, for example, criticism of the errors of established governments or churches. The history of the martyrs of religion and science amply indicates that acts deemed criminal at a given time in a given community often turn out to be of the greatest value for human life.

In the past the most heinous crimes (judging by the severity of the punishment) have been sacrilege or ceremonial defilement, witchcraft and heresy. Doubtless these were regarded with terror because they were supposed to endanger society by bringing down the wrath of gods that are not careful to discriminate between the guilty and innocent when they send down their lightning or plagues. But what any community regards as most dangerous is not eternally fixed in the nature of things, but varies from time to time and from locality to locality in ways which we cannot always explain. Moreover, it is not always the feeling of danger that makes us regard certain acts as punishable. The causes of social irritation and active resentment are wider. Children in New York have stoned men for wearing straw hats after September 15th and Mexican peasants have burnt new orange groves planted by foreigners for no other reason than the dislike of any novelty in their vicinity.

THE LEGAL AND THE MORAL

The foregoing discussion has indicated not only the impossibility of identifying the contents of the penal code with eternal morality or with any invariant nature of things, but also the difficulty of regarding legislation as purely arbitrary. Laws must often be changed if our rules of conduct are to facilitate the good life under changing conditions. How

4. See MERCIER, *CRIME AND CRIMINALS* (1918).

this is to be brought about in any given determinate social situation is not something known in advance, but must be determined in the processes of adjustment of our economic and political life. To be effective, the law must have back of it the organized force of the state against those who refuse to conform to it. This force, to be sure, can not be exercised for any long time unless the law itself is felt by a large part of the community to be in harmony with their prevailing customs and moral views. But we cannot escape legal penalties by trying to show in court that the law is unjust — for example, that the Fugitive Slave Law is inconsistent with the natural rights of man, with the Declaration of Independence, or with judicial dicta to the effect that our constitutional government rests on the principles of freedom and equality. Nor can we escape the penalties of the law of divorce or of military conscription in a Christian country by quoting the words of Christ against divorce or against taking up the sword to kill one's fellow man. Those who are convinced of the existence of injustices in the established law and who struggle for their abolition are more often defeated by general inertia and unreasoning fear of change than by any rational counter argument. Even a convinced and determined majority may for a considerable time be unable to effect the legal change it desires. Hence while the criminal law, like other branches, is largely influenced by various moral views and sentiments, it cannot be identified with the latter — certainly not so long as we admit the possibility of unjust laws, so often used for purposes of oppression.

We hear a good deal of complaint about too many statutory crimes. These complaints are rather superficial, if not entirely thoughtless. We need new penal laws in cases where new conditions cannot be adequately dealt with by reliance on customary ways. This is obviously the case where, having introduced, *e.g.*, the secret ballot, we need to protect its secrecy, or having introduced telephony, we need to protect the privacy of communications. Thus also, when modern methods of canning goods are introduced, the community of consumers needs better protection than the old laws or ways of doing business afford. Of course, legislative enactments as to crime may soon become obsolescent. But that is not an inherent evil if legislatures are as quick to repeal old laws as to enact new ones.

It is of the utmost importance that the law be just. But it is also important that our conception of justice and the nature of things be not so rigid as to prevent experiments in legislation to attain optimum conditions. For since we lack omniscience as to all the possible forms of social adjustment, experimentation, or the process of learning from experience, is indispensable. Law and morality can coincide only in the fundamental assumptions as to the proper procedure to enable us to correct our mistakes. Their common ideal is thus like that of science,

to wit, a system that corrects itself by the process of testing principles by their consequences, and conversely, judging actual consequences in the light of principles.

Judges and jurists are tempted to take the position that they have to deal only with the existing law and need not be concerned with what the law should be. And this is, because of the principle of strict interpretation, easier to maintain in the criminal than in any other branch of the law. Nevertheless, in the end it is impossible for any thoughtful and sensitive person dealing with the criminal law consistently to refrain from passing moral judgment. And such judgment exerts a powerful influence on the actual administration of the civil law. Yet, the legislative question of what acts should be made criminal and which should no longer be so treated cannot be settled by ethical principles alone. To apply the latter we need to have factual knowledge as to what are going to be the various consequences of the enactment or repeal to the different individuals that will be effected thereby. As the complexity and uncertainty of future social events generally make it next to impossible to obtain complete knowledge on this point, and as even the acquisition of some approximate knowledge open to our various social sciences involves enormous difficulties, moralists have tended to ignore this factual side altogether and have asserted that right is right regardless of all consequences. This has found expression in the maxim *fiat justitia pereat mundus*, or *fiat justitia ruat coelum*.

It is easy enough to dismiss this as a lazy evasion or even as inherently absurd. It is more difficult to determine the amount of truth back of it which has made this act appeal to so many noble spirits. We can begin the latter task if we realize the inadequacy of the maxim that the good or ill of any act is to be judged by its consequences only. For this does not determine which consequences are to be deemed good and which are to be regarded as bad. And any discriminating test which applies to consequences should be applicable as well to the original act. If nothing has any inherent or intrinsic goodness in itself, neither can the consequences have it. The insistence on taking the consequences of an act into consideration is valid only if we realize that the problem is one of balancing immediate or present goods or ills against future ones. This is not a solution of the problem of ethical evaluation, but it calls our attention to our fundamental difficulty, which is that of determining the relative weights of the different interests that are often in conflict. The principle of the greatest good to the greatest number not only fails to give us a common denominator or common unit for the different kinds of value, but it is not possible to take all men and women equally into account. The obligation to those of our own family or community, state or nation generally seems to outweigh the interests of any equal number of others, and it does not seem that our obligation to remotely future generations is as great as to our more immediate ones. In the absence

of any accurate determination of the relative weights of different obligations, all sorts of variations of opinion in this respect are possible.

When we consider any course of harmful conduct, our first impulse is to urge the enactment of a law to prohibit it; but on reflection we become aware of the enormous cost of bringing the criminal law into play. This includes not only the direct cost of policing and detection of crime, of judicial procedure and penal institutions, but also the indirect costs of social fear, spying, and the often unsavory effects of criminal proceedings, as for example, in the case of adultery.

JUSTICE IN PUNISHMENT

When we raise the question of punishment, we are met at the outset with the challenge, what right has the state to punish at all? This challenge sometimes comes from determinists who hold that the criminal could not help doing what he did, and sometimes it comes from those who maintain that society itself, through the conditions and institutions which it tolerates, is ultimately the cause and therefore responsible for the offensive acts.

Though it is customary for writers on ethics or penology to discuss in this connection the question of determinism versus free will, that is really not necessary for our purpose. When we are considering whether we should or should not punish certain individuals, it is irrelevant to argue that no one can help doing what he does. For against such an argument it is fair to reply as the irate father did to the wayward son who used it: "If no one can help doing what he does, then I can't help punishing you." The truth is that the ethical question is not the metaphysical one, whether the human will as such is or is not absolutely uncaused, but rather how to discriminate properly between those who should and those who should not be held accountable for legally prohibited acts. And here the prevailing ethical conscience today seems to recognize a common sense distinction between voluntary and involuntary acts and generally holds that no one should be punished for any act in which his will did not enter.

I shall try to show later that this principle is subject to some important qualifications. But if we accept it, as in the main we must, we have to answer those who claim that criminals are a special class whose acts are not normally voluntary because they are determined by special physical, biologic or mental conditions.

IS THERE A SPECIAL PHYSICAL CAUSE OF CRIME?

Crime and punishment were, up to the middle of the nineteenth century, objects for the considerations of moralists, philanthropic reformers and prison officials. It is to the credit of Lombroso and his associates that they conceived that the matter should interest scientists, that since

the criminal is a human being, reliable knowledge of the nature of crime should be the aim of the science of anthropology.

As the most advanced science of their day was physics, they naively assumed that the science of criminality could be established firmly by viewing crime as a purely physical phenomenon having physical causes. On this assumption they proceeded to measure the physical traits of criminals in prison and found all sorts of stigmata, such as epilepsy, anaesthesia and the like which they attributed to degeneracy or atavism. This movement acquired great prestige, not only because it brought in the fashionable ideas of popular science but also because it appealed to certain humane feelings. By insisting that the criminal is not a normal human being who freely chooses to break the law, but is one who suffers from certain defects, inherited or inherent in his physical constitution, they sought to show the futile cruelty of the usual forms of punishment and the necessity of treating the criminal with the same absence of resentment that enlightened communities now treat the sick and the insane.

The great weakness of this school is its altogether inadequate conception of what constitutes scientific procedure or scientific proof.

In their haste to be scientific, the members of this school did not at the outset stop to ask precisely what was the phenomenon which they wanted to study and explain. For obviously if crime is a violation of the law, few of us go through life without committing some crime or other, such as some traffic rule, or rule as to income tax returns, declaration of goods bought abroad, etc. It would be a most illuminating study to determine why so many of us do fail to obey laws that we thoroughly approve. We should not expect a simple answer when there are so many different factors which make people divert from the path which they recognize as honest or reasonable. The problems of health are relatively simple since they depend on more verifiable physical factors. Yet who would expect a simple answer to the question, why are not people perfectly healthy, or what causes disease? There are many different kinds of diseases and of only a few do we have an adequate idea as to their causes. How naive is it then to ask for the cause of the much more complex phenomena of crime which are influenced not only by physical and biologic factors but also by training, association and personal elements which are seldom if ever available for examination. In point of fact, the positivists do not study the causes of crime in this wider sense. What they really study are the traits of prisoners, among whom are some who have been wrongfully convicted and have not actually violated any law. Nor are all who have committed crimes to be found in prison, not even all who have been apprehended and found guilty. For some have been fined or have had sentence suspended.

Do these prisoners form a physically homogeneous group? Some are there for purely political offenses, some for non-payment of certain

debts, others because of embezzlement or fraudulent stock transactions, and some for crimes of passion. Even a single category such as theft represents most diverse types of people and motives.

Now if the analogies of biologic science are to guide us, we should not expect the measurement of the outer physical features of all these men and women to give us the cause of crime. At best it may reveal some fact or element of the situation, certainly not anything like a sufficient cause.

Now not only have the actual measurements been hasty and inaccurate, but these lovers of scientific procedure fail to observe the most elementary caution of statistical inquiry, namely, to check their generalizations by inquiring first whether the same stigmata which they find in prison do not exist outside of prison among people of the same situation in life. Then, too, even if it were true that certain stigmata are more prevalent in prison than among the same class of people outside, it does not necessarily follow that these stigmata are or indicate the cause of crime. Not all correlations have direct causal significance. The stigmata may be the effects of the kind of life that the prisoners have lived and perhaps even the effect of the prison itself. There are people who claim to be able to recognize with a fair degree of accuracy criminals of a certain kind. There is little experimental evidence for this claim, but even if it were demonstrated, it would not follow that there are hereditary causes for crime. All groups seem to develop noticeable characteristics so that some can recognize sailors, clergymen, actors and other occupational groups that are not at all hereditary and hardly attributable to any definite physical cause.

These methodologic observations do not deny that there may be physical factors in crime, but they do warn us against accepting at its face value the mass of "evidence" gathered by the positivistic school. On the whole, when we consider how artificial is the distinction between the criminal and the non-criminal, we need not be surprised to find criminologists who assert that there is little physical difference between the two.⁵

There are doubtless sick and insane men and women among those condemned for crime; and it may be that these unfortunates are more easily seduced or led into crime than those who can take better care of themselves. They should receive treatment in hospitals or insane asylums. But there is no reason for ignoring distinction between crime on the one hand and disease or insanity on the other. If the criminal be viewed as one who has failed to adjust himself to a social environment, which of us is properly adjusted? Certainly not the persecuted saints or prophets.

5. LOMBROSO, *L'HOMME CRIMINEL* (1895) 324 claims that prisoners lack sensitiveness. This is flatly denied by Joly in *LE CRIME* 113. See SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (1934) c. 5.

If statistical studies show that certain crimes are more frequent in the summer than in the winter months, it does not follow that this indicates a direct relation between heat and criminality. There are seasonal variations of employment which may play a more direct role here. There is also the social factor of the opportunity for certain crimes when more people are out in the streets or in certain thoroughfares, gatherings, etc. This may be a much closer explanation of the variations of criminality in our northern and southern states.

ARE CRIMINALS FEEBLE-MINDED?

In view of the difficulty of measuring the intelligence of criminals who are not caught and put in prison, it is not easy to establish their relative intelligence. Every knave may be a fool but there is no reason to believe that foolishness is restricted to those who break the criminal law. It is well to insist that those sent to prison have failed in their plans. If then we take those who have failed in any business, might we not find them of a lower mental average than the rest of the population? Of course, those who fail in the business of crime are very often those who have been exploited. Feeble-minded women especially are no match for those captains of crime who sit behind the lines and do not suffer from the casualties of the social war. No one can deny that the rich with a staff of able lawyers can find their way through or around the law; and there is no reason to suppose that the "fences" who buy up jewelry from thieves have a lower I.Q. than the average of the communities where they live.

IS CRIME AN INSTANCE OF ATAVISM?

The theory of evolution has brought into vogue the attempt to explain all puzzling social phenomena as survivals of the past or as instances of reversion to the state of our remote ancestors. In line with this we have the theory of crime as an atavistic relapse into the primitive or savage state. But what basis is there for identifying crime with the state of savages? Most of the savages known to us obey their customary rules with perhaps greater regularity than we do, and there is no reason to suppose that our remote ancestors exceeded us in the number of perjuries, forgeries, embezzlements, fraudulent bankruptcies, counterfeiting, smuggling, safe-cracking and the like. Even the art of pick-pocketing can hardly be regarded as a reversion to an earlier state of mankind.

To this Lombroso replies that the tendency to these crimes existed in germ in our savage ancestors. But if, according to the theory of evolution, all civilization is a maturation of the germs latent in savage society, atavism can hardly be distinctive of crime. More important, however, is it to note that while we use the word savagery as synonymous with cruelty, it is not true that savages (*e.g.*, those in the South Sea Islands)

are always more cruel than civilized peoples. The popular impression to that effect is due to the fact that we are less likely to notice those forms of cruelty to which we have become accustomed. It is not necessary to overlook or minimize the vices of primitive people. But it is well to note that they became demoralized when first brought into contact with more powerful, civilized people. This is due not only to the exploitation by these civilized invaders, but also to the fact that demoralization naturally follows whenever any people's habits and customs are rapidly changing.

Similar to the foregoing is the theory that crime represents that feral strain in mankind that cannot adjust itself to the processes of civilization. History shows that many peaceful people become criminals under specific social conditions, *e.g.*, the sturdy beggars in Tudor England when people were deprived of the support they used to receive from the monasteries, or when their farms were turned by their lords into pasture land. How many descendants of law-abiding families became brigands (*Klephtai*) when Greece was subjugated by Turkey or when the conditions of border life in America put a premium either on the life of the ruffian or the land swindler?

CRIME AND NATURAL SELECTION

The uncritical haste to apply the theory of natural selection to the phenomena of crime leads, as in other cases, to a confusion between moral and biological categories. It is fortunately not necessary for our present purpose to point out the limitations of the category of natural selection in biology itself. That is at best a name for a large number of factors, many of which are unknown. It is sufficient to insist that biologic fitness to survive means a greater birth-rate than a death-rate and that there is no reason to assume that saints multiply more rapidly than sinners, or that moral heroes and martyrs are those who preserve their lives longest. The distinction between the moral and the biologic is also confused by regarding gregariousness or sociability as an unmitigated virtue.⁶

The late Professor Giddings and his disciple Hall maintained that on the whole the process of converting immoralities into positive crimes is one of the most powerful means by which society in the long run

6. Some years ago the benevolent anarchist Prince Kropotkin published a book, *MUTUAL AID AS A FACTOR IN EVOLUTION* (1902), which appealed to certain moralists, though not at all to biologists. Although many instances of mutual aid among animals were there adduced, there is no evidence that it is a factor in evolution, and no organic developments are traced to it. Certainly, non-gregarious animals, like the tiger or the snake, manage to survive. Indeed, the extremely individualistic uni-cellular organisms seem to have survived for longer periods than any others. Nor is mutual helpfulness really an absolute moral good. The mutual aid of brigands or gangs of political corruptionists makes them all the more dangerous to society; and the unquestioning subordination of all the individuals to the state threatens today to destroy all the values of civilization.

eliminates the socially unfit and gives an advantage in the struggle for existence to the thoughtful, the considerate, the far-seeing and the compassionate, so lifting its members to higher planes of instinct and character. While such a consummation would be highly desirable, neither Giddings nor Hall have given us any adequate evidence that that is actually the case, certainly not enough to shake the contrary conviction that the criminal law has often been an instrument of oppression by which the ruling powers have managed to keep people in subjection. It is true that in all countries at all times the most serious crime is that which endangers not the community as a whole but the particular rulers. Thus, in Russia, both under the czar and under the present government, ordinary murder is punishable by a limited term in prison, but any attempt to change the form of government is a capital offense. This does not come under the exception which Giddings admits, namely the mistaken zeal which sometimes brands harmless acts as crimes. It is rather a felt necessity, on the part of all governing classes. And when it prevents, as it often does, any agitation for any change in government, religious views, or moral code, it becomes a hindrance to real progress.

Theories which regard crime as a social maladjustment can recognize that since social conditions change, an individual who is not adapted to one set of social conditions might well be adapted to another set, so that the cure for crime might be effected by eliminating certain social arrangements rather than human beings. And those who argue that the progress of civilization consists in raising our standards of conduct, even though that means increasing the number of criminals, are blandly begging the question. What is the good of such progress purchased at the cost of preventable misery and degradation?

In general, the contention that those who manage to adjust themselves to the existing legal system are the abler ones rests upon an ambiguity between a tautology and an absurdity. It is a tautology, of course, that those who are able to adjust themselves are thus able. It is an absurdity that those who are able to adjust themselves to the existing law are necessarily superior morally. Under different (and perhaps better) conditions, the others might shine much more. Unless, therefore, we assume that the existing law is identical with the absolute and unchanging moral order, we cannot maintain that those who are not adjusted are necessarily morally inferior to those who succeed. For among the former have been political and religious martyrs, men like John Huss, Jerome of Prague (who blessed those who burnt him), Thomas Moore and the like, while among those who have succeeded within the law have been all sorts of tyrants and ruthless exploiters. There are doubtless many who drift into crime and then into prison because of moral weakness or defect. But this does not deny that in the effort to keep out of prison, poverty is a serious handicap. So long as the law of property makes its distribution

unequal, it cannot be said that everyone at birth has an equal chance, and that those who succeed in being economically comfortable are therefore thereby proved to be morally superior.

We come now to the argument that the cause of crime, or at least the main cause is a result of economic conditions; and since society is responsible for these economic conditions, society itself is responsible for the crime. On this view it is as profoundly foolish to devote our attention to the punishment of the criminal as to concentrate on the swatting of mosquitoes while we allow the breeding ground to continue.

This argument raises two questions. First, are economic conditions the sole cause of crime; and second, if so, can we dispense with punishment?

THE ECONOMIC CAUSES OF CRIME

That crime has its sole cause in a given economic system is a proposition which has been fanatically maintained and fanatically denied. But if we abandon the monistic prejudice of trying to explain everything as due to one cause, the question is not a difficult one. Crime is certainly not unrelated to economic conditions but there is no simple ratio between crime and poverty. There are many crimes of passion which affect the prosperous as well as the needy. But it must be admitted that men of wealth have a greater opportunity of escaping imprisonment. They have more means for securing witnesses and documents, hiring more skillful lawyers, etc.⁷ It has been argued that a relatively small number of prisoners have committed crimes because of actual lack of food. But who supposes that economic need ends where the line of actual starvation is passed? Moreover, it is a fact that men and women are demoralized by extreme poverty to the extent that they cannot bring up their children properly. Morrison mentions in this connection that the number of female beggars is less than the number of male ones though the former are more often in need. But the obvious answer to this is that successful mendicancy requires a certain energy, and that women not only cling more to ideas of respectability but that when they go in for mendicancy, many of them soon drift into prostitution. Many writers have urged that mendicancy cannot be due to extreme poverty because there have been instances of able bodied beggars who are offered opportunities to work at fair remuneration.⁸ This argument seems to me to show a singular lack of social imagination. In the first place, it ignores the fact that none of us find it easy to change our occupation, even though originally we may have made great efforts to avoid it. How many of those engaged in the kind of soliciting that is regarded as respectable,

7. ETTINGER, *THE PROBLEM OF CRIME* (1932) 149.

8. MORRISON, *CRIME AND ITS CAUSES* (1891) 105; LEROY-BEAULIEU, *L'ÉTAT MODERNE* (1900) 30.

e.g., for subscriptions to periodicals or to new stock companies, would change their occupation if offered the kind of work and pay which Monot and the others offered? We must also remember that the granting of alms was regarded as a virtue long before begging for it (when not done by organized groups) became a crime.

But while there is no simple proportionality between economic distress and criminality, the causal relation between the two cannot be ignored. The inmates of our jails and prisons are, in overwhelming proportions, poor people. Of course, we must take into account that the poor are also in the great majority outside of prison. But even allowing for this, the wealthy certainly have the advantage of attaining their ends by legal ways which are not open to the poor. In the business world, it is common for certain powerful financial interests to demand that they be allowed a liberal share in certain profitable undertakings, for their ill will is very dangerous. This was notoriously the case a few years ago in the tobacco trade. Railroads also have been compelled to engage in certain deals in order to give controlling bankers an opportunity to make commissions on the flotation of certain loans. In the same way, politically powerful individuals extort money from business men by compelling them to contribute to party funds which they control. But the man without wealth or political power has no such lever. He has to use the threat of physical force or blackmail. This does not deny the great evil of the latter. But though the poor are more numerous and more needy, they are not inherently more criminal or even more ruthless in attaining their ends.

We may conclude then that economic conditions are a very important cause of crime. But it is obvious that not every one in a given economic situation will be equally tempted or will as readily yield to temptation. Psychic dispositions and previous habits and associations enter into the situation. On the whole it can safely be asserted that the greatest resistance to criminal temptation is steady employment. If, then, a crime curve be plotted along the line of income, we shall not find the former straight. We shall, I think, find the maximum in the classes that have the lowest income, with a lower rate for peasants who continue to live on their family lands even if on a rather low income level. There seems to be an increase in criminality when boys and girls try to improve their lot by going to the cities where the opportunity for crime is greater and settled custom exerts less force. The influence, however, of past tradition may last for a considerable time. Thus, the smaller criminality among the foreign born is to be explained not only by their age distribution but by the persistence of their old home training, while the increased criminality of their more Americanized children is due to the fact that those accustomed to the old world discipline have difficulty in transmitting it to their children who are living under new conditions.

Does the existence of economic causes remove the necessity of punishment? The fact that some conditions leading to crime are removable does not prove that all are so. But what is even more important is to be on guard against the assumption that the elimination of social conditions can be effected at once. If, as human experience indicates, this is not so easy, we may well ask of our reformers: what do you propose to do with those guilty of rape, incendiary murder or the like? Abolish the cause? Admirable, when feasible. But so long as these offenses do occur, do you propose to do nothing to the offender? Even if you propose to reform him, must you not detain him against his will? And is not such detention a punishment?

While these counter questions are legitimate, they do not go sufficiently to the root of the matter. For back of all the arguments against the right or duty of punishment is the natural and just, if inadequately formulated, resentment against the stupid and ineffective cruelty of our whole penal system. It was the conservative President Taft, later Chief Justice of the Supreme Court, who characterized our criminal law as a disgrace to civilization.

THE PRINCIPLE OF INDIVIDUAL RESPONSIBILITY FOR VOLUNTARY ACTS

The main principle of just criminal punishment, one that is generally regarded as self-evident, is that one shall never be answerable for the crime of anyone else, and for his own only to the extent that it is voluntary. Before the advent of the present regime in Germany, it would have been easier to argue that these principles have been established as the result of the long process of human evolution. But recent experience, if not critical reflection, should make us hesitate to ignore the past experience of the human race which has by no means always accepted the principle of no punishment except for individual voluntary action. The whole of human history testifies to the fact that individuals are punished for the acts of those related to them. Few readers of the Bible, I imagine, have felt outraged at the fact that when Achan sins, his innocent children are also killed. And today, when the head of a family is put in prison, fined or killed, the members of his family are in fact punished, though in not quite the same way. Furthermore, as a result of the last war, Germany was made to pay reparations, and the burden fell upon the innocent children who had no part and could in no way prevent the invasion of Belgium and the destruction which it involved. Was this unjust? By no means, if we recognize collective responsibility. It is obvious that in many relations the family or the nation rather than the individual is regarded as the moral unit. This does not deny the individual's responsibility for his own acts. But what acts are his own alone? It is not always possible to reduce social action to that of a number of

independent atomic units each responsible for his own deeds, since in fact we are parts of each other's fate; and punishment or reward of any one individual naturally affects others. Thus the members of a family or of a nation who acquire a certain estate must necessarily participate in the liabilities of that estate. Bills of attainder seemed quite just when estates were given to the head of a family and were forfeited when he proved disloyal. It is only in recent times when the economic unity of the family is no longer so strong that such acts have been looked upon as unjust. So long as we profit from the virtues of other members of our family (or nation) we must be prepared to pay the penalty of their faults.

Just as the history of religious literature impresses one with the fact that the most dangerous sins have been involuntary ones, so does the history of the criminal law reveal the fact that unintentional acts have been and to some extent still are punished. Even in Biblical law the man who unintentionally caused the death of another was subject to the same penalties as if he had done it intentionally. The Deuteronomic reform consisted in providing a city of refuge for the one who was the innocent cause of death; but he could be killed with impunity if caught outside of its gate. In general the conditions of modern life and the emphasis on the subjective elements in our thought, have stressed the voluntary phase of conduct in the criminal law as elsewhere. We no longer punish animals or inanimate objects for injuries that result from them. The law no longer holds me responsible when I am deprived of the usual freedom of action by purely external physical forces, *e.g.*, when I am pushed or thrown. Similarly, I am not a free agent in the legal sense if purely physiologic factors prevent normally conscious action, *e.g.*, if I faint and fall or if my arm gets paralyzed and I cannot do the things that the law requires me to do. In more recent times the law is beginning to give more recognition to psychic hindrances to normally voluntary action. It is now considered useless cruelty to punish those who are so insane that they do not know what they are doing, or cannot distinguish between right and wrong. The deterrent value of such punishment would be almost nil. I say *almost*, for it may be argued that the deterrent effect of punishment depends upon the certainty of its being applied and that this is somewhat diminished when there is the ability to hire experts to convince a jury that the one who committed a criminal act was not sane at the time he did it.

Whether because psychiatry is not yet an exact science, or whether because there are so many intermediate cases between the completely (if only momentarily) insane and those who are perfectly in control of their thoughts and acts (if indeed there be any such), any sharp line of division between the legally responsible and those not so responsible is necessarily somewhat arbitrary. The whole criminal law would certainly break

down if any one could escape the legal penalty because of ignorance or confusion as to what is right and what is wrong. If yielding to the desire to take attractive articles without pay should cease to be theft when called kleptomania, then the law against stealing might as well be abolished. Alienists and others who have not been trained to rigorous critical standards of scientific evidence or proof are apt to be misled by highly developed technical terminologies into overestimating the amount of determinate and verifiable knowledge at their disposal. This shows itself in the readiness with which different experts testify on opposite sides of a case. Under the circumstances it is natural for judges, who see too many criminals escape the just penalties of the law, to look with distrust at any extension of this opportunity under the guise of science. Possibly some judges are unduly conservative. But it is not for our purpose necessary to decide the exact extent to which psychiatry can at present tell us whether a man has acted under such an abnormal compulsion as not to know what he was doing or not to be able to distinguish between right and wrong. It is sufficient for us to realize that relatively few of us are so free from all inner compulsions as to realize perfectly what we are doing, or to know adequately the difference between right and wrong. The prevalence of human error, regret and disappointment seem to indicate that most of us are in the intermediate zone, and if there is to be any legal responsibility at all, it must include many doubtful cases.

There are also various reasons why certain people may by rule be exempted from the normal workings of the criminal law. It is not feasible to give ordinary officials the right to arrest or prosecute the ambassador of a foreign country, or the king or other head of our own state. If these do commit forbidden acts, our remedy must be sought elsewhere than in the ordinary criminal law. Children below a certain age cannot be tried at all because of the presumption that they do not know what they are doing. But like all conclusive presumptions, this one contains an element of fiction. The act of a child between six and seven, for instance, may actually be more intelligently and consciously planned than the acts of many a low-witted adult. But on the whole, the amount of injury done by children under seven that could possibly be minimized by prosecuting them (and going through the difficult task of determining whether they knew what they were doing) does not warrant doing violence to the general sense of the sacredness of childhood. And so we draw an arbitrary line at the age of seven or so.

THE RETRIBUTIVE, EXPIATORY OR RETALIATORY THEORY

Against the doubt as to whether the state has any right to punish at all, this theory maintains it to be a positive moral duty. It regards crime as a violation or disturbance of the divine or moral order. When Cain

kills Abel, the very earth cries for vengeance. The moral order can be restored, or the violation atoned for only by inflicting evil (generally pain) upon the one guilty.

It is easy, far too easy, to dismiss this theory with the remark that it is a remnant of the barbaric conception of vengeance as an absolute duty. The sentiment of just vengeance or retribution is too deeply grounded in human nature, and embodied in too many moral and religious codes, to be thus lightly dismissed. It is profoundly foolish to suppose that anyone can by the free use of ugly epithets eradicate the desire to return a blow or to give active expression to the resentment against injury. It is not only barbaric people who regard punishment as a duty. As I pointed out before, the highly idealistic or spiritual book of Deuteronomy deemed that one had a right to avenge the killing of a kinsman even when the killing was accidental. And the stern Greek moralist, Aeschylus, would not deny altogether the duty of a son to avenge the murder of his father even against his mother. The traditional code of honor still prevailing in Europe is that a gentleman must, at the risk of his life, resent an insult to the extent of seeking to remove it with the blood of the offender. In the clubs of European gentlemen, the English and Americans used to be looked down upon, because they would not fight duels. But even with us, popular sentiment was expressed by Theodore Roosevelt who regarded a man as a poltroon who, when his wife was insulted, called on a policeman instead of exercising a gentleman's duty to knock the offender down. And this view seems to prevail among those nations that are generally regarded as most enlightened. To defend the national honor one must fight or make reprisals for insults. In religion, this sentiment expresses itself in the orthodox theory that heaven would be less fair or that God's justice would be tarnished if there were no hell for the sinners, even when the sins are not the result of free will. Kant, who went to extremes in putting duty for duty's sake foremost, expressed an undoubtedly wide sentiment when he urged that we could not regard a world as moral if in it virtue went unrewarded or sin unpunished.

But does this retributive theory offer us a criterion whereby to discriminate between just and unjust punishment? Kant offers us the *jus talionis*, the principle of equality between the crime and the penalty. This sounds simple in the case of murder, a life for a life. But it is obviously not capable of being extended. Crime and punishment are different things. Can they really be equated? What penalty equals the crime of forgery, perjury or kidnapping? For the state to exercise the same amount of fraud or brutality on the criminal that the criminal exercised on his victim would be demoralizing to any community. In point of fact, not even the rigoristic Kant has the courage of his hard convictions; and he refuses to prescribe the death penalty in such cases as dueling and

infanticide or to all those engaged in a rebellion. Indeed, he hesitates at prescribing a death penalty in cases where such penalty will not act as a deterrent. Moreover, if we accept the *jus talionis* as absolute, we make it immoral to pardon a criminal. Yet, the moral and religious conscience of mankind has always regarded charity or mercy as of supreme value and forgiveness has been preached as a divine virtue.

But if the old form of the *lex talionis*, an eye for an eye or a tooth for a tooth, sounds too barbaric today, may we not reformulate the retributive theory and put it thus: everyone is to be punished alike in proportion to the gravity of his offense or to the extent to which he has made others suffer? As Mittermeier, the leading criminalist of the early nineteenth century once put it, "The penalty which transgresses by even one atom the seriousness of the crime is unjust." But by what yardstick or measure can we determine the precise degree of offensiveness, or the exact amount of suffering that the criminal has imposed on the victim or on all those who depend on the latter? And how can we measure the severity of the punishment? Historically the plea for equality has meant a reaction or revulsion against the ignoring of it in previous criminal laws: let us have no more favorites, no more tariff of offenses with different rates according to the social standing of the offenders as in Anglo-Saxon England or in the France of the ancient regime. But what is the same punishment? Is the same fine, for example, productive of the same effect on rich and poor? Or does the same number of years in prison have the same effect on different individuals regardless of their diverse temperaments or physique? If we took the principle of equality literally as absolute, we should not have any right to make any distinction in the punishment of a first offender and a hardened criminal, between a man acting under natural passion, for example an outraged father or husband, and a shrewdly calculating villain.

Despite the foregoing and other limitations of the retributive theory, it contains an element of truth which only sentimental foolishness can ignore. The sentiment that injuries should be avenged still prevails in the relations between nations and cannot be ignored within the life of any community. The problem of enlightened social morality is not to suppress the natural desires of human beings. Such suppression may itself be vain or cruel. Morality should aim to eliminate or minimize the brutality of natural vengeance or such results as would breed more general evil than the suffering of any particular injury.

If the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law we shall revert to the more bloody private vengeance of the feud and of the vendetta. We must remember that lynch law is not a recent American invention but rather the primitive form of public justice, and that the formal procedure of the criminal law is only a more rational expression of this primitive demand. The criminal

law deals not with a kingdom of heaven but with actual men and women of flesh and blood living on earth.

While the principle of equality cannot be literally carried out it does suggest that no system of punishments will be considered just if it shows evidence of what is generally considered favoritism.

THE REFORM THEORY

The most popular theory today is that the proper aim of criminal procedure is to reform the criminal so that he may become adjusted to the social order. A mixture of sentimental and utilitarian motives gives this view its great vogue. With the spread of humane feeling and the waning of faith in the old conception of the necessity for inflicting pain in the treatment of children and those suffering from mental disease, there has come a revulsion at the hard-heartedness of the old retributive theory. The growing belief in education and in the healing powers of medicine encourages people to suppose that the delinquent may be re-educated to become a useful member of society. Even from the strictest economic point of view, individual men and women are the most valuable assets of any society. Is it not better to save them for a life of usefulness rather than punish them by imprisonment which generally makes them worse after they leave than before they entered?

There are, however, a number of highly questionable assumptions back of this theory which need to be critically examined.

We have already had occasion to question the assumption that crime is a physical or mental disease. We may now raise the question whether it is curable and if so at what cost to society? Benevolent social reformers are apt to ignore the amount of cold calculating business shrewdness among criminals. Some hot-blooded ones may respond to emotional appeal; but they are also likely to backslide when opportunity or temptation comes along. Human beings are not putty that can be remolded at will by benevolent intentions. The overwhelming majority of our criminals have been exposed to the influence of our school system which we have at great cost tried to make as efficient as possible. Most criminals are also religious, as prison chaplains can testify. Yet with all our efforts school education and religion do not eliminate crime. It has not even been demonstrated that they are progressively minimizing it. Nor does the record of our special reformatories for young offenders prove that it is always possible to reform even young people so that they will stay reformed for any length of time. The analogy of the criminal law to medicine breaks down. The surgeon can determine with a fair degree of accuracy when there is an inflamed appendix or cancerous growth, so that by cutting it out he can remove a definite cause of distress. Is there in the complex of our social system any one cause of crime which any

social physician can as readily remove on the basis of similarly verifiable knowledge?

Let us abandon the light-hearted pretention that any of us know how all cases of criminality can be readily cured, and ask the more modest and serious question: to what extent *can* criminals be re-educated or re-conditioned so that they can live useful lives? It would indeed be illiberal dogmatism to deny all possibility and desirability of effort along this line. Yet we must keep in mind our human limitations.

If the causes of crime are determined by the life of certain groups, it is foolish to deal with the individual as if he were a self-sufficient and self-determining system. We must deal with the whole group to which he naturally belongs or gravitates and which determines his morale. Otherwise we have to adapt him completely to some other group or social condition, which is indeed a very difficult problem in social engineering.

And here we must not neglect the question of cost. When we refer to any measure as impracticable, we generally mean that the cost is too great. There is doubtless a tremendous expense in maintaining our present system of punishment. But this expense is not unlimited. Suppose that fiendish perpetrators of horrible crimes on children could be reformed by being sent first for several years to a special hospital. Will people vote large funds for such purposes when honest law-abiding citizens so often cannot get adequate hospital facilities? Suppose that we find that a certain social environment or that an elaborate college course will reform a burglar or gunman, would our community stand for the expense when so many worthy young people cannot afford to go to college because they have to go to work? We certainly should not give even the appearance of reward for criminality. Let us not forget that there is always a natural resentment in any society against those who have attacked it. Will people be satisfied to see one who is guilty of horrible crimes simply reformed, and not give vent to the social horror and resentment against the miscreant? It is difficult to believe that any such course would not result in a return to personal vengeance on the part of the relatives or friends of the victim.

A crucial instance of the inadequacy of the reform theory is the case of a man who we are fairly certain will not commit the given offense again. A burglar, for instance, in trying to enter a house breaks his leg so that he can never again engage in that enterprise. A man in desperation kills one who has ruined his family life and it becomes obvious that he will never again have a chance to be in a similar situation. Or take the case of one who can for any reason convince us that the criminal act itself has sobered him so that never again will he commit such an act. What more can reform achieve in these cases? Shall we then close the account and let the guilty one off? That would arouse not only general resentment but would open the gates to all sorts of abuses and

would certainly so encourage crime that the suffering of innocent people would increase.

It has been argued that on the theory of protection to society there should be no punishment for one who is no longer capable of doing harm. But this ignores the fact that the law contemplates not only the individual at the bar but all others who might be tempted to commit similar offenses even under conditions not quite the same.

PUNISHMENT AS A MEANS OF PREVENTING CRIME

If we look at the criminal as one who assails or endangers the proper life of the community, it is not only our right but our duty to defend, if not ourselves, at least our dependents. Primitive communities effect this by getting rid of the unruly member through death or outlawry. In the course of time, this is largely replaced by fine or imprisonment. Societies, however, never abandon the effort to minimize crime by punishing the offenders. We do this by incapacitating the criminal either through death or detention, and by deterring him and others through the example of the painful consequences of crime to the criminal.

Few have ever argued against the right of society to protect itself and prevent crime by detaining the criminal at least so long as there is some reason to suppose that it would be dangerous to set him free. But the right to punish anyone to deter him or others from future acts, has been widely challenged on grounds of (1) justice and (2) utility.

1. Kant and others have urged that it cannot be just to punish anyone except for a wrong actually committed; and much less can it be just to punish Peter in order to prevent Paul from attempting any crime. This is an appeal to a principle so seemingly self-evident that most writers on the criminal law have preferred to ignore the objection rather than to meet it. But modern science has made enormous progress by learning to distrust self-evident principles. We need not, therefore, hesitate to challenge Kant's assumption in this case. Why should we not inflict pain on *A* if that is the only way of securing the safety of the society of which he is a part, or preserving the general conditions of desirable life on which he depends for all his goods? We tax an old bachelor for the support of the education of other men's children and we conscript our youth and put them in positions where they will be killed in order that others shall be able to live. Consider the case of the typhoid carrier Mary who spreads the germs of that dreadful disease wherever she goes. Do we not by detaining her and limiting her freedom in effect punish her for her misfortune rather than for her fault? We are at all times inflicting pains on innocent people in order to promote the common good, in time of peace, as well as in war. When we need a road or bridge, do we not order a family to abandon the house which has been its home

from time immemorial, and for which there can be no equivalent restitution or compensation? The fact is, that the lives of individuals are not independent atoms which can be treated in isolation. We are all members of a common body and the health of the entire body may demand inflicting pain or even the cutting off of some member.

This does not mean the complete abandonment of the principle that one should be responsible only for his own voluntary act. That would be opening the floodgates to the most extreme and outrageous injustice. But our principle may be viewed not as an isolated independent absolute, but as the statement of a general condition of the social order necessary for the good life. Certainly nothing would be so detrimental to the effective enforcement of the law than the feeling in any community that some may commit crimes and others will be punished.

This approach comes closer to the actual conscience of humanity and cuts the ground from the Kantian objection. A state has as much right to reform a criminal, even against his will, as to educate a child or to compel one with a contagious disease to be quarantined or to undergo curative treatment. And while it would destroy the basis of all that we hold dear in civilized life to make one man suffer merely that another be advantaged thereby, no society under present conditions can achieve the good of the whole without causing more suffering to some than to others. One need only add that we cannot be too critical in determining whether the good of the whole *is* promoted when the innocent suffer. For if we realize that our means are always part of the total end, we can see reason to doubt the goodness of an end which involves evil means. Unfortunately, however, the actual choice that life presents to any society is seldom a clear issue between absolute good and absolute evil but generally a choice between alternatives, all of which are imperfect embodiments of justice or of the highest good. Wisdom consists in such a balancing of rival considerations, that the total amount of evil is minimized.

2. We come now to the much more common objection that punishment does not in fact deter either the one punished, or others. Criminals who are tempted will not, we are told, desist from taking a risk just as wolves who attack a wild horse on the Russian steppes will not abandon their effort after one or two of them are killed or crushed by the horse's hoof. There are more dangerous occupations than crime; yet people are not deterred from taking the risk.

Those who urge this objection illustrate the abuse of absolutism in the discussion of practical issues. To prove the utility of medicine it is not necessary to prove that it always prevents death and cures all instances of disease. It is enough if life is often prolonged and suffering sometimes diminished by its wise use. And to justify punishment it is not necessary to prove that it *always* prevents crime by its deterrent

quality. It is enough to indicate that there would be more crime if all punishment were abolished. Now we may ignore the positivistic dogma that punishment cannot possibly have any deterrent effect, that criminals are bound to commit crimes. That kind of fatalism is not only opposed by human experience but it is not even consistent with scientific determinism which it professes to follow. All experiments on animals as well as the historic observations of human experience indicate that fear of painful consequences is as effective a force in life as is the prospect of pleasant rewards. We are living at a time when terror on a large scale has succeeded in removing the effective temptation to rebellion. When in 1920 the police of Boston struck and left their posts, a lot of young men broke store windows and possessed themselves of goods which they tried to sell at prices which no trained or professional criminal would demand. Sir James F. Stephen has suggested the following query. Suppose a burglar feels that he might catch a cold that would incapacitate him for as long a period as the usual prison term for burglary. Would that not deter him? Of course that largely depends on the exercise of the imagination. And the law, if wisely administered, should dramatize its punishment. It is the fact that all men live more or less in their imagination and any imaginative realization that one will be hissed off the social stage or suffer pain is bound to act as a strong deterrent. In this connection, it is well to repeat the frequently-made, but still just observation that not only the severity but the certainty of punishment is a factor in the case. Men will risk their lives if they think that there is some chance of winning something. And while many will take very "long" chances, as in lotteries, it is a fact that professional crime, like any other business, ceases to grow in extent when the chances of failure rise. That is why bandits do not try to rob the United States Treasury, or the Mint.

In general we know that just as certain factors will tend to increase crime, so certain factors will tend to diminish the amount of it; and that the penalties of the law, if enforced, constitute one of these minimizing causes. There is no doubt that the abolition of the police force, or the lessening of their vigilance or competence to detect the crime and to apprehend the criminal will tend to increase the amount of crime. Thus not only the specific penalty but the question of the procedure or mechanism of its enforcement, the ease of its proof, and the likelihood of finding proper witnesses are all determinants.

It is true that men follow the *mores* apart from any fear of punishment, because normally that seems the only way in which one can act. But in a heterogeneous society, where diverse moral standards prevail and where conditions are rapidly changing, the temptation to depart from the hitherto accepted ways rises rapidly; and the fear of social disap-

proval decreases even more rapidly when we associate only with those who have the same inclinations that we have.

PUNISHMENT AS REPROBATION

We may look upon punishment as a form of communal expression. An organized group, like an individual, needs to give vent to its feeling of horror, revulsion or disapproval. We turn away in disgust at certain uncleanly or unaesthetic traits of an individual and exclude him from our company without inquiring as to whether it is within his power to prevent being repulsive. It is only personal love like that of a mother that can train itself to overlook repellent features or devote time and energy to eliminate them. It is *one* of the functions of the criminal law to give expression to the collective feeling of revulsion toward certain acts, even when they are not very dangerous — for example, buggery. There are, of course, various forms and degrees of social disapproval and it is not always necessary to bring the legal machinery into operation. But at some point or other the collective feeling must be embodied in some objective communal act. By and large such expression of disapproval is a deterrent. But deterrence here is secondary. Expression is primary. Such disapproval need not be cruel or take extreme forms. An enlightened society will recognize the futility of severely punishing unavoidable retrogression in human dignity. But it is vain to preach to any society that it must suppress its feelings. In all our various social relations, in business, in public life, in our academic institutions and even in a church, people are rewarded for being attractive and therefore penalized for not being so.

The reprobative theory will explain why it is difficult to repeal penal statutes where no one believes that the punishment will have any reformatory effect on the offender or any deterrent effect on others and consequent diminution of the number of offenses. An example of this is the law against suicide. There are also statutes such as those making adultery a crime which the community does not want to see enforced. For the publicity in the matter would do more harm than good. Yet people will not vote to repeal it; for such repeal would look like removing the social disapproval.

THE CRUELTY OF PUNISHMENT

The foregoing discussion of punishment may have impressed the reader as too hard-hearted. It seems to lack indignation at the demoralizing effect of cruelty. If punishment means inflicting pain, how can we avoid cruelty? It is no answer to say that the physician also inflicts pain, and is justified by the fact that he removes a greater amount of pain. For who can say that prison life saves the convict from more

pain than it inflicts on him? Few prisoners will answer in the affirmative, for very few want to remain longer than they possibly can help. But people do go voluntarily to the doctor. No, the justification of punishment is not saving pain to the criminal but to the great mass of people who have to be protected from criminal acts.

And here it is well to note that it is impossible to live at all without inflicting pain on others as well as on one's self and on those we love. On the biological level, it is impossible to live at all without killing other creatures (plants or animals), either for purposes of food or for protection (wild beasts, vermin, etc.). In the human field we may wish to minimize the struggle for existence. But so long as different peoples want the same land (and only those who are especially prosperous are satisfied with their own possessions), and are not ready to give up what others more urgently need, there is bound to be war. And so long as two different parties want to control the government (which is likely to be the case so long as two men want the same office), there is bound to be political conflict and human suffering. It is a mistake to assume that human history shows a gradual but constant elimination of such suffering. It shows only a shift or change in the forms of it. It may perhaps be said that progress consists in the refinement of suffering. But such refinement is largely aesthetic and by no means eliminates cruelty. Under the circumstances, it is folly to preach love of all mankind, for mankind includes all the horrible villains whose atrocious villainies grow out of their human nature. Indeed, there is nothing vile in human affairs that can genuinely be said to be foreign to human nature. All the sweetness and grace which makes life in its happy moments so delectable has its seamy side which cannot be hidden to an all-seeing eye. The effort to make life more decent therefore always involves a struggle against opposing forces. And in this struggle men find hatred as well as love, tonic emotions. Indeed, we must hate evil if we really love the good. (Undiscriminating love extended to everyone is nonsense.) We must hate evil intensely if we are to fight it successfully, and we cannot hate theft, violence and fraud except when we see it embodied. It is thus impossible not to be indignant against certain criminals, or not to wish to punish them.

If civilization, however, means rationality in the elimination of needless cruelty, then our methods of punishment must certainly undergo profound changes even though they cannot cease to be punishments. Thus it is progress if we stop branding criminals, even though we keep their records; and it would be retrogression if we went back to the whipping post, the stocks, the practice of breaking men's bones on the wheel and the other old forms of torture. While the sterilization of certain kinds of criminals may be indicated, it may also open the gates for unlimited cruelty, as seems to be the case in Germany today.

The punishment provided by the criminal law is a sad necessity. But even if it is bitter medicine, there is no wisdom in unlimited doses of it. It is well to realize that the mere conviction of a crime brings social dishonor, and that may in some, though not in all cases, be sufficient. Thus, impeachment and removal from office does not necessarily demand subsequent imprisonment. But above all it is needlessly cruel to add to human temptation, or to make it more difficult for unfortunates to overcome the temptation, and then to punish them for it. Of course, every progress in civilization may add to the difficulties of adapting ourselves to the new social standards; and it may be argued that it is of the very essence of civilization that we should increase the temptation and with it the power of self-control. That might be claimed as the superiority of the West over the East in regard to sex relations. But after all civilization may be purchased at too great a price. Of what value is a civilization if it leads to physical and moral misery? May not one reverse the argument and say that only those social arrangements represent true progress which make life more serene and less tortured? So judged, many of the improvements of civilization might well be condemned. And the criminal law would offer a great deal of evidence along this line.

THE INDIVIDUALIZATION OF PUNISHMENT

Dominated by the reaction against the abstractness of the classical emphasis on equality and influenced by the prevailing tendency to think of crime as a disease, the idea has recently spread that in punishment we should pay more attention to the individual criminal rather than to the abstract crime. Just as medicine is turning from specific remedies, the same for everybody, to greater emphasis on individual diagnosis and treatment, so penologists are urging that since no given punishment has the same effect on different individuals, it would be more humane as well as realistic to make the punishment fit the criminal rather than the crime.

While this theory has elements of novelty in its formulation⁹ and application, it is not altogether new in principle. Theoretically, it is but a re-assertion of the old idea of equity (*epieikia*) as the correction of the undue rigor of the law, a corrective to the injustice which results from the fact that the abstract rule cannot take into account all the specific circumstances that are relevant to the case. It assumes its simplest and oldest form in the pardoning power. Strictly speaking, the pardoning power is inconsistent with the view that punishment is an absolute duty prescribed by the moral law for all those found guilty by the proper tribunal. And the humane feeling or good sense of mankind has never in fact yielded to the Stoics, Kantians and others who had the courage

9. It is sometimes formulated in an extremely nominalistic form, as if the individual could be treated apart from his universal determinants.

of their one-sided dogmas. Some religions, indeed, make God's forgiveness His most glorious attribute.

Let us look at the matter a little more closely. Let us distinguish the pardoning power from the corrective justice exercised by a court when it frees a man because of a flaw in the evidence or procedure by which he has been condemned. When the technicalities of legal administration prevent courts from correcting such legal errors, the Chief Executive exercises the same judicial power when, after a hearing, he pardons the person convicted.

There are cases of undoubted technical guilt, where the results of the strict application of abstract law are felt to be shocking to our moral sense. The abstract law cannot take difficulties and temptations into account, but a humane administration of it must if it is to keep the respect of the people. Theft is always a crime but few of us would be shocked at the pardoning of a mother who stole food to prevent her children from starving. Nor would we feel that justice suffered if an escaped convict, like Jean Valjean, were pardoned after he had for so long shown the qualities of a good citizen as mayor of his town. On the contrary, we think the administration of justice inept if he is returned to the galleys. The pardoning power is also generally regarded as necessary or desirable in mass phenomena, as in the case of a general pardon for rebels, rioters, or whole classes of prisoners. It is generally issued in the form of a favor but it is actuated by a desire to promote good will to the government by placating discontented elements or diminishing the current amount of resentment. In the main, amnesty is like making peace with an army with which one has fought. If we have to live with people, it is well to have their good will. But if we allow such acts of wholesale pardon, we have abandoned absolute theories of punishment.

This is not the place for a thorough exposé of the unsatisfactory character of "rigoristic" theories of morality which leave no room for the pardoning power. The superficial character of the sharp line between legal morality and social utility which these theories draw, is seen in their attitude to statutes of limitation. According to the theory that rights and wrongs remain eternally what they are, the mere lapse of years can make no relevant difference to anyone's claims. But if we look carefully at the practical conditions of human conduct we cannot thus ignore the element of time. It would upset all human calculations and expectations and thus make our transaction most uncertain if claims no matter how ancient and long-forgotten could suddenly be revived. Why may not then a man be freed from punishment, if the accusation or indictment has not been brought or pressed against him for a sufficiently long period? While statutes of limitations are not technically exercises of the pardoning power, they do illustrate the fact that people generally feel that a lapse

of time justifies the abandonment of a punishment, just as a father is disinclined to punish a child for last year's fault.

When all this is said, it remains true that the pardoning power can be, and has been, a prolific source of injustice. We need not refer to the Texas governor who pardoned hundreds of criminals for his political advantage. There are other and subtler forms of injustice in the exercise of the pardoning power. A young man of good family is convicted. Then all sorts of good people intervene with testimonials which a less advantageously situated individual cannot get. When the rich or those who have political influence can thus "get away with murder," the general expectation of justice through law tends to disintegrate.

The power to pardon, which naturally includes the power to commute or reduce the terms of the court's sentence, is generally entrusted to the head of the state, who sometimes delegates it to an official such as the British Home Secretary. But if the mitigation of the rigor of the law is to be done intelligently and justly on the basis of thorough knowledge, should it not also be given to the judge who has heard all the evidence in the case and has had the guilty one before him? The recognition of this has led in recent years to increase the discretionary power of the judge in imposing sentence. Instead of fixing the penalties for diverse crimes, legislatures now tend to fix upper and lower limits between which the judge can determine by himself the proper sentence. He may even suspend sentence altogether in some cases, or put the guilty one on probation.

Any sentence, however, that the judge imposes, involves more or less a guess as to its effect on the character of the convict. But a board of prison officials who have had an opportunity to study the actual conduct of the prisoner ought to be in a better position as to when he is ready to leave prison fit to reenter the "free" world and engage in its lawful activities. On this theory are based the various forms of our parole system.

Any plausible attempt to reform something that has worked as horribly as our prison system should have its frailties viewed with benevolent patience. Given time and experience, the new movement may overcome many of the evils which it has already manifested, such as the abuse of discretion by judges and parole boards, and the number of paroled prisoners who commit new crimes. But it is always helpful to clarify the issue by critically examining fundamental ideas.

1. The advocates of individualization of punishment should beware of overworking the analogy between crime and disease. Crime is not the direct result of physiologic factors but depends directly on social institutions. It is foolish to talk glibly of treating the criminal according to his individual nature when in fact we have no means of adequately knowing it. The physician does not need to know all about a man's individual character. In his diagnosis he looks for very definite facts of

a recurrent character and once that is determined, the treatment moves along a limited number of alternatives. But can any judge be honestly said to know the character of a person convicted sufficiently to determine what precise treatment is needed? Similarly with parole boards. A man's conduct in prison is not always the best indication of what he will do when released. And in point of fact prison officials can be and have been influenced by political and social pressure.

2. The ideology of individualization tends to an extremely nominalistic position. That is, it tends to forget the logical fact that we are apt to have more reliable knowledge about classes than about individuals and that for certain purposes classes rather than individuals are relevant. If our country is invaded, we try to take measures against the invading army or armies. The treatment of individual soldiers is determined by these general policies. Of course, we may avoid the false ideology criticized here by admitting all this and saying that the law needs more individualization of treatment than exists at present. But it is of the utmost importance not to forget that the abuse of discretion was one of the principle causes which led to the revolt expressed in the classical views on penology — a revolt that has undoubtedly done much for the humanization of the criminal law and its administration. And it would be a great calamity if this gain were frittered away by hastily conceived novelties.

THE KINDS OF PUNISHMENT

When we think of the great diversity of crimes, the paucity of our means of punishment is amazing. Death, imprisonment and money fine pretty nearly exhaust the field, just as the calomel pill and the lancet (for blood letting) exhausted the remedies of the old fashioned medical practice. Of course, any conviction brings social disgrace, which is a very severe punishment in some cases. Removal and disqualification for further public office is also an unusual and rather rare phenomenon. Recently we have introduced sterilization (in some of our states and in Germany) and it seems the only appropriate remedy for certain kinds of dreadful crimes. But the brutalizing effect on a community of thus disfiguring a human being is not to be lightly ignored. All proposals for whipping posts, and similar arrangements, should recall to us the struggle to get rid of the cruelty of the old forms of torture in the criminal law. It may be, as Dean Inge has suggested, that we have become too sensitive to pain, and that the decline of true aesthetic sensibility is associated with this hyperaesthesia. But if so, so much the worse for aesthetics.

The Death Penalty. Up to modern times the law seems to have had a remarkable preference for the death penalty. If a man gathers wood on the Sabbath, he should be stoned to death. If he says something insulting to his father or mother, he should be put to death. English law

well into the nineteenth century made theft of anything over three shillings, six pence, a capital offense, and there was a long list of many other acts, now minor offenses, that were punishable with death. To be sure, on many occasions these penalties were not enforced in later times, but the idea that such penalties are necessary was certainly widely accepted.

According to the Kantian philosophy, the death penalty for a murderer is not simply permissible but is an absolute duty, and Kant wrote after Beccaria had maintained that the death penalty was absolutely wrong, incompatible with the basic social contract. The controversy as to the right of the state to kill a citizen for any cause whatsoever has continued ever since with considerable sentimental heat but not much illumination. Nor does it seem that the different parties can arrive at any agreement if they start with different attitudes to the value of physical life. No one doubts that there is something horrible about killing a man or woman, and that the state should maintain the supreme value and sanctity of human life. Yet no one has consistently carried out the view that under no circumstance may a life be destroyed. Few deny the right of killing a bandit who attacks us or those dependent on us, and most people not only approve but glorify the killing on a wholesale scale of those with whom we are at war. We allow automobiles to kill over 36,000 people every year which we well could prevent by foregoing the convenience it offers. (The argument that the automobiles saves as many lives as it destroys or maims cannot be supported by reliable evidence). We also allow people to be killed by mine or factory accidents or through undernourishment, when we could prevent it by definite though expensive social measures. These examples suggest that our revulsion against murder is rather against direct and messy forms of it. Balzac has expressed that through the query: if you could inherit a great fortune by killing a Mandarin in China by just blinking your eye when no one could see you do it, would you do it? In any case, we do shorten human lives by economic conditions which compel men to undertake such work as housewrecking where the mortality is often as high as twenty per cent per annum.

While these considerations throw doubt on the claim that the taking of life is absolutely prohibited by the moral code of all mankind, they do not support the present or any other legal system. It may be that in some cases the death penalty should be eliminated but perhaps extended in other cases. Certainly we should minimize the public brutality involved in hanging or even in the burning which we call electrocution.

Fines. Fines, like money damages in the civil law, are frequent penalties in the criminal law and used to be even more common. Indeed, in former times the monetary value of human life was fixed by a definite tariff. This does not necessarily mean that human life was held cheap (though that

may have been a factor), but that money was so dear that men sold themselves into practical slavery to acquire it. If a family lost a member through murder, it had a right to vengeance. But the loss might be made good by the tribe of the murderer giving up one individual who would either be killed to satisfy the desire for vengeance or made a slave to repair the loss. An additional laborer is under certain conditions as valuable as an additional ox, horse or the money that will buy other means of subsistence. Hence the seeming paradox of adopting a member of the murderer's family in settlement of the vengeance claim.

Today money penalties or fines in the criminal law violate our sense of justice, because they do not represent equal burdens on rich and poor. There is an old story of a nobleman who brutally assaulted a poor man and when convicted had to pay what was to the nobleman a relatively small fine. When he smiled derisively and expressed great satisfaction at the outcome, the poor man was moved to make some uncomplimentary remark as to the justice of the legal system which encouraged such an outrage, whereupon he was adjudged in contempt of court and sent to jail, to the great detriment of his wife and children.

In brief, money damages mean imprisonment for the poor and release for the rich.

Another ethical question which may be raised in regard to fines is: to whom shall the fine go? To the state or to the victim of the crime? Under the old English procedure, any private person could bring a criminal action and recover the part of the fine that did not go to the crown. But this partnership between the state and a private person for the collection of a fine seems to many not conducive to a dignified administration of justice.

Imprisonment. Imprisonment, originally a mere matter of detention until a debt be paid or a trial determined, has now become the most usual punishment for all crimes, except the lighter misdemeanors for which fines are generally collected. Its horrors so cry to heaven that no one ventures to say anything in defense of the system. Still it maintains itself because despite the various associations of benevolent men and women interested in prison reform, and the writings of psychologists and other students of penology, no practicable alternative has been worked out.

A few things stand out unmistakably: some may perhaps discount the accounts of the horrible sexual and other perverse conditions which prevail when we segregate a number of male or female criminals and deprive them of most of the humanizing influence that normally operate on us. After all, they may say, it is unfortunately true that most of these conditions exist also outside of prison walls. But no one denies that our prisons are the great schools of crime, that many who are committed for minor offenses learn from their associates more cunning and brutal ways.

No one can dispute the depressing figures which show the large number of criminal offenders that have already served some prison term. The efforts of noble men to preach that imprisonment should be a preparation for the later free life come to naught, for they do not tell us how that consummation can be brought about. It is difficult to work out any plan which will actually succeed in reforming even young offenders who are sent to our reformatories. And even if we do succeed in educating prisoners and preparing them for some useful work, how can we guarantee them opportunity for employment, especially when millions of men without such blemishes on their records are out of work? While we may minimize, we cannot deny the fact that a prison record is a handicap in applying for a responsible position.

But when all this and much more is admitted, what feasible alternative have we to our prison system? Shall we shut up our prisons and let robbers, gunmen, and various fiends freely prey on innocent men, women and children? Imprisonment does prevent people from committing such outrages, at least so long as they are incarcerated. And while the deterrent effect of imprisonment may be small, it cannot, in the light of human experience, be denied or regarded as nil.

The foregoing reflections in no way militate against the effort to improve prison conditions and to help to save the human beings who get caught in the meshes of the criminal law. But it is well to realize difficulties that cannot be removed merely by good intentions. Many proposals for reform are altogether unobjectionable except for the external conditions that interfere with their effectiveness. There is obvious justice, for instance, in the proposal that the criminal be compelled to work to pay the victim of his crime for at least a part of the loss he has imposed on him. But to allow prison labor to compete with free labor would be horribly detrimental to the latter.

There is more merit in the proposal that the state should compensate the innocent victim of a wrongful conviction and imprisonment, just as wrongful fines and tax collections are refunded. But though this has been more or less successfully tried in several countries, the practical difficulties of assessing the money equivalent of all that is involved prevents the justice of this proposal from finding greater appeal.

On the whole, the problem of imprisonment and in general of punishing those who violate the law is one of the most disheartening ones that face modern civilization. It represents the breakdown of human intelligence as well as good will. It shows perhaps the ugliest phase of our human nature, even if we should attribute it all to our economic system or to any other *deus ex machina*.

The criminal law represents the pathology of civilization. But just as the study of animal pathology has illumined normal physiology, and has been helpful in physical hygiene, or just as the study of insanity has

thrown light on mental processes and has been at times somewhat helpful in mental hygiene, so the study of criminality may illumine normal human motives and be helpful in bringing about just humane social relations. The necessary conditions for this study, however, is the most rigorous, intellectual integrity, the concentration on seeing the facts as they are, regardless of natural sentimental predilections. We must learn to live in an imperfect world, though we dare not relax the effort to make it better.