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CRIMINAL PUNISHMENT— LEGAL AND MORAL CONSIDERATIONS

S. OLEY CUTLER, S.J.*

ANY DISCUSSION OF CRIMINAL PUNISHMENT is inexorably linked to a consideration of moral and legal responsibility. To study the philosophical basis for punishment is itself to investigate also the very foundations of our criminal law. For many years now the focus of attention of students and observers of the interrelationship between psychiatry and the law has been fixed on criminal responsibility, "insanity" rules, and the like. The present preoccupation of such scholars seems to be to accelerate the movement of fundamental changes in our handling of the convicted criminal and to involve both an elimination of punishment from the administration of justice and a denial of the state's right to punish the criminal at all. This discussion has now entered a public phase outside the learned journals.[1] Much of this discussion concerns itself with practical considerations of what best to do with the convicted criminal, and not with the basic legal and moral points which are really involved. So it is that in this article we prepare to deal with these fundamental considerations, leaving the technical aspects of criminal punishment to those more qualified to discuss them.

The Death Penalty

In the forefront of any discussion, legal or moral, on the entire, broad topic of punishment, must come a consideration of capital punishment. We have come a long way from the day when the proposition: "Capital Punishment Should Be Abolished" was a standard topic in every college and prep school debate manual. Everywhere the issue is now seriously debated, in state legislatures, legal associations, and in popular journals of opinion. The Caryl Chessman case has undoubtedly brought the issue to dramatic public attention.

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[1] See MARTIN, BREAK DOWN THE WALLS (1954).

A key as to why the death penalty is presently and has been so deeply embedded in our legal systems is to be found in history itself. We know, for example, from the research of anthropologists and students of primitive peoples the blood-feud loomed large as the vengeful response of a clan for a homicide visited upon one of its members. As primitive social organization progressed along tribal governmental lines, the evidence indicates that the new tribal chief or authority imposed most harsh expedients to wipe out the corrosive effects of the blood-feud practice upon tribal survival.

As one great authority on primitive law states[2]:

> What emerges from the data is this: within loosely organized tribes in which the local group is autonomous, trouble involving members of different local groups frequently brews physical violence which then leads to feuding; feud marks an absence of law, for the killing is not actually acknowledged as a privilege-right; yet it appears that every society has some set procedure for avoiding feud and bringing it to a halt; among the more organized tribes on the higher levels of economic and cultural growth feud is frequently prohibited by the action of a central authority representing the total social interest; this never happens on the lower levels of culture.[3]

Sanctions in society develop in legal systems, it appears, just as the culture and degree of civilization of the social group itself progresses. As Hoebel further states:

> As the scope of commonality expands, as community of interest reaches out beyond the clan and self-conscious kindred, men find the means to create and implement judicial and executive power in such a way that internecine strife within the bounds of the larger society is checked and ultimately suppressed.[4]

So, it seems, capital punishment was born as a harsh and stringent weapon of social development. The context within which this occurs is very important to keep in mind when discussing the use of the death penalty in modern times. Looting amid a great general catastrophe, treason, etc., during times of war, outbreaks of large-scale crime in an underdeveloped regime — all these represent situations when society, least able to protect its own citizens, is most like a primitive society. The trend in law within a progressing civilization ever seems to have been to soften the harshness of penal sanctions and to achieve the same effects by gentler and more humane means. Or, as one scholar sums up this general historical development of which we have been speaking:

> Among the most primitive societies, with whose birth law came into existence, it was penal law, and not compensatory (tort) law which originated with punishment for certain primeval crimes; but it was *criminal justice* that originated with the reaction to other wrongs, in the form of blood vengeance, in form controlled by instinctive feelings for "justness" and "fairness."
> The law of compensation for harm done came much later, in lieu of some of the permissible vengeance reactions, and it existed side by side with both genuine punishment and with remaining vengeance reactions, until it finally replaced all vengeance reactions at a certain point of cultural development.[5]

Haven't we, then, at our present-day level of social progress and civilization arrived at the point where to retain capital punishment any longer as a part of our system of

[2] HOEBEL, THE LAW OF PRIMITIVE MAN (1954).
[3] *Id.* at 330.
[4] *Ibid.*
[5] Mueller, *Tort, Crime and the Primitive,* 46 J. CRIM. L., C. & P. S. 303, 323 (1955).

justice would seem to be as obsolete as using galleys, torture or branding? This seems to be the inescapable conclusion if we can be sure that a number of facts on contemporary crime are true. Firstly, capital punishment was initiated and retained through the years on the theory that it was an essential means of protecting the security of society. And, I think, history could prove that it did serve just such a purpose. The sight of the executed or the gallows at the edge of old cities and towns was a stern reminder to the stranger that law was here, at least, enforced. Is society today so protected by the retention any longer of the death penalty? To put our question in another way, are potential wrongdoers thereby deterred from serious capital offenses? This is a difficult question, and well-nigh impossible to answer accurately. Certain statistics must first be reviewed. Five of our states have abolished capital punishment.[6] The range of crimes punishable by death in the various states run from thirteen offenses in Alabama (including dynamiting and train robbery) to only one in five states (usually, murder).

The protection argument in favor of capital punishment assumes that abolition would encourage criminal elements to increase the practice of carrying lethal weapons and even to use them if in danger of being caught by the police. This is a very important consideration, for the lives and safety of society's protectors, the police, are involved. Several studies have been recently made on the precise point of police safety. Last year Mr. Thorsten Sellin published a study on the death penalty for the American Law Institute.[7] He acknowledges the difficulty involved in attempting to measure police safety from available data. Nevertheless, upon studying reports for rates of police killed while on duty in both capital punishment and abolition states, Professor Sellin concluded:

> In the group of cities with populations between 30,000 and 60,000, the abolition cities had a total rate (i.e. police homicides per cent of population) of 1.0 and the capital punishment cities 1.1, but there were considerable variations among the states ranging from a high of 4.1 in Indiana to a low of .4 for Massachusetts. . . . It is obvious from an inspection of the data that it is impossible to conclude that the states which had no death penalty made the policeman's lot more hazardous. It is also obvious that the same differences observable in the general homicide rates of the various states were reflected in the rate of police killings.[8]

Akin to the protective aspect of the death penalty is a consideration of its deterrent side. "Deterrence" has been defined as "the preventive effect which actual or threatened punishment of offenders has upon potential offenders."[9] From a thoughtful consideration of this definition alone, I believe it is immediately evident how difficult it would be to attempt to measure the degree to which the deterrent aspect of the death penalty is effective.

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[6] Alaska, Delaware, Maine, Minnesota, Wisconsin. In Michigan it is retained as a penalty only for treason; in Rhode Island, only for murder committed in prison by an inmate serving life for murder. Similarly, North Dakota retains it for treason and for the Rhode Island type of situation; Puerto Rico and the Virgin Islands also have abolished the death penalty. See Sellin, *The Death Penalty,* MODEL PENAL CODE (Tent. Draft No. 9, 1959).

[7] MODEL PENAL CODE (Tent. Draft No. 9, 1959).

[8] *Id.* at 57. For a similar study of state police safety, see *Proceedings of Joint Committee of Commons and Senate on Capital and Corporal Punishment,* 22D PARL., App. F (1955) (Can.) (report of Donald Campion, S.J.).

[9] Ball, *The Deterrence Concept in Criminology and Law,* 46 J. CRIM. L., C. & P. S. 347 (1955).

A recent writer on this subject declares that an endeavor to measure the deterrence factor of a particular type of punishment involves at least six empirical variables. These are:

> (1) the social structure and value system under consideration, (2) the particular population in question, (3) the type of law being upheld, (4) the form and magnitude of the prescribed penalty, (5) the certainty of apprehension and punishment, and (6) the individual's knowledge of the law as well as the prescribed punishment, and his definition of his situation relative to these factors.[10]

The social scientist just quoted is so wary about reaching a definitive conclusion as regards the deterrent effect of the death penalty that he feels forced to say:

> . . . that capital punishment has been effective as a deterrent measure in numerous historical periods under various political circumstances is an established fact. (See TARDE . . . [PENAL PHILOSOPHY] Chapter IX "The Death Penalty.") That it has been ineffective under certain conditions is also established.[11]

He continues:

> To recapitulate, it may be said that current empirical data is inconclusive with regard to the deterrent effect of capital punishment. It has been shown, however, that the death penalty can be an effective deterrent under certain conditions. It has been noted that the categorical acceptance or rejection of the death penalty as a deterrent is a meaningless position. Relevant variables must be identified, measured, and related to an analytical schema. Only then will data be secured which can meet the criteria of scientific knowledge.[12]

Since the evidence of the deterrence aspect of the death penalty is so unreliable, more compelling reasons for its abolition must be present to justify the state's assuming the risk of a dangerous socio-legal experiment. It is unfortunate that more decisive evidence is not available as to the deterrent effect of life imprisonment, which is usually advanced as the acceptable alternative for the death penalty, in terms of society's protection.[13]

Such compelling reasons as just alluded to, do, I believe, really exist. The value of one human life is so great that the state should not be allowed to make the unredeemable error of injustice, executing the wrong individual. Likewise, the agonizing jury function, deciding a capital verdict, will be considerably lessened with the abolition of the death penalty, and fewer sentimental verdicts will result. In fine, true justice will more surely ensue.

Movements today, especially among judicial conferences, to amend at least mandatory death sentence statutes; the consideration of more mitigating factors during the sentencing procedure, as suggested by the American Law Institute's Model Penal Code; the reduction in the number of capital crimes – all these could do much to alleviate the awesome burden of our present capital punishment situation. It is along lines of practical considerations such as these that I believe the death penalty controversy should be decided. Frequently, the advocates of reform in this area of our criminal law are in fact opposed to the death penalty mainly because they are in opposition to any crime-punishment relationship whatsoever. To clarify this debate on the fundamental philosophy of criminal punishment, I now turn to a consideration

[10] *Id.* at 348.

[11] *Id.* at 353 n. 24.

[12] *Id.* at 354.

[13] See Sellin, *Is Imprisonment for Life an Inadequate Substitute?*, MODEL PENAL CODE 69 (Tent. Draft No. 9, 1959).

of the basic philosophy that underlies any form of punishment at all.

Reasons for Criminal Punishment

It was Mr. Justice Oliver Wendell Holmes, Jr., who in his *Common Law* gave wide circulation to the view that revenge rests at the wellsprings of our entire system of criminal jurisprudence.[14] This opinion has been accepted uncritically by many. So it was that the late Dr. Gregory Zilboorg could say:

> The impulse to take revenge, the talion principle regardless of what its manifestation in the law may be, is still the preponderant principle of our penal system.[15]

While the long history of mankind reveals countless examples of society's cruel inhumanity to wrongdoers (everything from hideous tortures and barbarous executions, even to wild, lawless mob lynchings in our own day), still I believe it to be a gratuitous assumption to say our entire system of criminal sanctions reveals a cry for blood, a basic urge to punish for its own sake. Such an urge has been described in this fashion:

> [O]n the one hand we identify ourselves with the criminal's own impulses, and consequently we are tempted to give vent to these impulses within us which are usually inhibited. This state of temptation produces anxiety unless it is lived out in some innocent way such as the reading of detective stories and murder mysteries. Our anxiety can be quieted down only in one of two ways: in our sudden unconscious denial of any similarity with the criminal, we can hurl ourselves upon him with all the power of our aggressive, punitive, destructive hostility; or we can assume the criminal to be a mentally sick man and can then assume a more tolerant, more charitable attitude toward the doer, if not the deed.[16]

It is true, of course, that at the outbreak of an especially brutal crime there is a reaction of convulsive horror in the community where the crime occurred, particularly if it be a small, closed-type community. Dr. Zilboorg's analysis of punishment just quoted finds its echo in most classical commentaries on crime and punishment as well. Thus, Salmond remarks in speaking of retributive punishment:

> It gratifies the instinct of revenge or retaliation, which exists not merely in the individual wronged, but also by way of sympathetic extension in the society at large. Although the system of private revenge has been suppressed, the emotions and instincts that lay at the root of it are still extant in human nature, and it is a distinct though subordinate function of criminal justice to afford them their legitimate satisfaction. . . . The emotion of retributive indignation, both in its self-regarding and its sympathetic forms, is even yet the mainspring of the criminal law.[17]

These ordinary instincts, of course, are experienced by individual and community alike. It is the achievement of social order through law that bespeaks the triumph of civilized intelligence over such emotions. There is no reason to conclude, as does Holmes, for example, that because of the substitution of law with its sanctions in place of mob violence, our law itself is nothing but an emotive outburst, a pompous, stilted legal fiction for what is still but a cry for blood.[18]

Because of views such as these, shared by many, it becomes most important, I

[14] HOLMES, THE COMMON LAW, Lectures I, II (1951).

[15] ZILBOORG, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT 85 (1954).

[16] *Id.* at 79-80.

[17] SALMOND, JURISPRUDENCE 146-47 (9th ed. 1936).

[18] "If I do live with others they tell me that I must do and abstain from doing various things or they

think, to attempt to answer several questions at this point in our article: does the state really possess a moral right to punish at all, and if so, why, and to what extent?

Classical Theories On The State's Right To Punish The Criminal

a. *The Strict Retributionist Theory*

There are in general four main theories on the basis of state punishment of criminals. They are roughly classified as the extreme retributionist, the deterrent and medicinal views, and finally, the juridical retribution theory. The deficiencies of the first three have long since been pointed out by the better texts on scholastic ethics. Yet, it is still necessary to view each of these opinions in turn, because kindred forms of these theories have risen and still persist in contemporary discussions on the question.

The extreme retributionist view is certainly not in great vogue today, but since it possesses superficial resemblances to our own solution of juridical retribution, it will be well to analyze the theory briefly.

According to the extreme retributionist theory, the purpose of punishment that has been inflicted is to exact retribution in whole or in part for the theological guilt implied in the commission of a crime. The originator and chief exponent of this view was Emmanuel Kant, who can speak best for himself:

> Juridical punishment can never be inflicted simply and solely as a means of forwarding a good other than itself, whether that good be the benefit of the criminal or of civil society; but it must at all times be inflicted on him, for no other reason than that he has committed a crime. A man can never be treated simply as a means for realizing the views of another man, and so be confused with the objects of the law of property. Against that his inborn personality defends him. . . . The penal law is a categorical imperative, and woe to him who creeps through the serpentine ways of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure thereof . . . . That is the maxim of the Pharisees, "it is expedient that one man should die for the people, and that the whole nation perish not." But if justice perish, then it is no more worthwhile that man should live on the earth. . . . It is only the right of requital (*jus talionis*) that can fix the amount and the quality of punishment. . . . Even if a civil society were to dissolve itself by vote, nevertheless, before it goes, the last murderer in prison must be executed. And this that every man may receive the just due of his deeds, and the guilt of blood not rest upon a people which has failed to exact the penalty.[19]

This is the famous Kantian passage on retributive punishment. Underlying it is the author's philosophy both of the purpose of the state and the ethical purposes of man. The right to punish, we notice, is stated as a categorical imperative, product of the practical reason, which in his metaphysic neither demands nor is capable of proof.

As to the extent and the quality of punishment to be meted out to the criminal, Kant lays down a more ferocious norm; "it is only the right of requital (*jus talionis*) that can fix the quantity and quality of punishment."

It is this theory of retributionism that is intended when writers on criminological

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will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights." Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

[19] KANT, PHILOSOPHY OF LAW 194-96 (Hastie transl. 1887).

problems speak of "revenge theories", etc. Its own philosophical vacuity is enough to damn it.

There is an Hegelian theory on the problem of state punishment also. As might be anticipated, Hegel equates crime with negation, and punishment with the negation of the prior negation, to effect an harmonious synthesis. Against his theory, equally valid are the arguments summoned against his dialectical materialism.

We mention Hegel only to draw attention to a kindred view of a professional criminologist, the famous Pessina, who holds that the basis of state punishment is judicial necessity. For all purposes, he merely states an opinion, while offering no proof whatsoever. Pessina, in Hegelian fashion, speaks of the necessity through punishment of the reaffirmation of a violated legal norm.

b. *The Deterrent Theory*

So much then, for the strict retributionist school of criminal punishment. The second and perhaps most widely held popular theory is the deterrent one. Holmes speaks of this preventive or deterrent view as that most commonly held in the English speaking world of his day.[20] This is still true among laymen to the law and citizens in general. In his book on this problem, already referred to, Dr. Zilboorg devotes an entire chapter to a refutation of this theory. Even the late Holy Father, in his allocution to the International Penal Law Congress in Rome, has his own reservations on this view, when he says:

> This more profound understanding of punishment gives no less importance to the function of protection, stressed today, but it goes more to the heart of the matter.[21]

Actually of course it seems slightly inaccurate to identify the preventive theory with the deterrent one. We do here, because in fact both theories do stress the same finality. The deterrent view seeks to hold up the punished criminal as an example to others in order to make them less inclined to pursue a career of crime. It is embodied in the adage, "Crime doesn't pay." The preventive theory also seeks to prevent future crime by means of punishment, but from the more proximate purpose of protecting society from attacks made on its peace and security by the criminal.

In a comprehensive survey and study of all these theories of punishment, Fr. Michael J. Mooney defines the deterrent theory so as to show how it and the preventive theory tend to coalesce:

> [T]he deterrent theory [is] that which justifies punishment as a useful or necessary instrument in the hands of society, whereby society defends itself against those who threaten its interest in any way.[22]

The famous criminologist Lombroso is often identified with the deterrent school. This is true enough, but, as with Linstz and many others, his main interest is more concerned with the etiology of crime itself. He favored an anthropological approach, basing crime on inherited, atavistic forces in the human personality, elements which of course put the criminal's wrongful acts beyond the latter's control. Such a deterministic approach to the causes of crime

[20] HOLMES, THE COMMON LAW 41 n. 2 (1946), citing STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99.

[21] Pius XII, *Allocution to the International Penal Law Congress*, in 52 CATHOLIC MIND 118 (1954).

[22] Mooney, *The Morality of State-Punishment — Medicinal and Deterrent Theories*, 61 IRISH ECCL. REC. 104, 109 (1943).

was very popular in continental thinking during the last half of the last century. Just as often, however, the causes of crime were linked to environment, as sociological speculation on the problem developed. A leading advocate of the deterrency school of this latter stamp was the Englishman, Jeremy Bentham. A recent writer sums up Bentham's position:

> [He insisted] that the function of law should not be to achieve vengeance . . . but to prevent the commission of the act.[23]

Bentham stated that the purpose of society is completely eudaemonistic, that crime is the negation of this purpose and so has to be prevented by social control.

The same writer just referred to characterizes Bentham's position on punishment in this fashion:

> Bentham advocated social engineering primarily in the realm of political sanctions since this is the most malleable area in the pleasure-pain equation. He dismissed any idea of recourse to traditional or natural law ("nonsense on stilts" he caustically labelled the latter).[24]

In evaluating Bentham's theory, the same writer observes:

> Punishment is considered an evil, but a necessary evil to prevent greater evils being inflicted on the society and thus diminishing happiness. Bentham presumably does not consider the possibility that an outlawed act might actually serve to increase human happiness; the dilemma so brilliantly portrayed by Dostoyevsky in *Crime and Punishment* in which a murder is defined, with considerable justification, as a social good by its perpetrator and thus morally justifiable.[25]

The greatest indictment against the deterrent theory is that it simply does not hold up in practice. Threats of punishment on the law books do not deter the very many individuals who commit crimes anew every day. This is the consensus of the forty-eight state governors of the United States with regard to the deterrent aspect of the death penalty, as revealed in a poll conducted by the *New York Herald Tribune* and published in a feature in July, 1954.[26] Despite its undoubted value as a deterrent to crime, capital punishment simply cannot supply us with the fundamental justification of the state's right to punish the criminal.

c. *The Rehabilitation Theory*

The third of the traditional theories on the basis of state punishment is that of the rehabilitation, reformatory, or medicinal theory. This view is the most commonly held today by those most actively engaged in the work of criminal law administration and public order. Many testimonies from contemporary sources serve to bear this statement out. Thus, a report on parole procedures states:

> Since deterrence is at best a negative control, segregation effective only so long as it continues, and retribution merely retaliatory rather than corrective in aim, penological experts now believe that treatment which places primary emphasis upon reformation renders maximum service to the community.[27]

It is this theory of punishment policy

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[23] Geis, *Pioneers in Criminology*, 43 J. CRIM. L., C. & P. S. 159, 165 n. 2 (1955). For a more comprehensive treatment of Bentham, see ROONEY, LAWLESSNESS, LAW AND SANCTION 90 (1937).

[24] Geis, *supra* note 23, at 165.

[25] Geis, *supra* note 23, at 166.

[26] For a recent editorial treatment of this matter, see N. Y. Herald Tribune, Apr. 25, 1960, p. 14 col. 1.

[27] Comment, 53 YALE L. J. 773 (1944).

that lies behind the advocacy and use of the indeterminate sentence, probation and parole procedures. In the opinion of many, "reformation of the criminal" must be the aim of punishment, otherwise sanctions have no place in our legal system at all. So, it is argued that due to the total ignorance on the part of our courts of the psychology of the criminal act and its punishment, the individual good of the criminal is always neglected. The obvious answer to this is that such an individualistic approach to the problems of law completely overlooks society's true function, to implement and strengthen the common good through law.

Under the impact of the prison reform movements of the last century, the progressive revamping of the scope and techniques of our modern juvenile training schools, and especially through the influence of psychiatry, the rehabilitationist theory has gained considerable ground in our day.[28]

This theory, of course, considers what is to be done with the convicted criminal, and really tells us nothing concerning why he should be punished in the first place. Surely, the more efficient administration of our penal system with the rebuilding of men into good citizens both makes sense as respects the criminal and contributes to the common good of the community upon his release. Here the Church herself has long set civil society a good example to be followed because, in her Canon Law she carefully distinguishes between *poenae vindicativae* and *poenae medicinales,* where the latter are conceived to be suitable to work a change for the better in the delinquent. As Father Mooney, aptly declares on this point:

> If, then, the common temporal good of the members is the limit of the State's authority, it follows that the State has no mission to promote individual morality – its jurisdiction in the sphere of morality is limited to creating conditions where morality is not hindered but may progress unimpeded. We fail to see, therefore, how it can be said to be a State duty to promote the morality of individual criminals – to effect a real reformation of character. . . . [T]he State's authority is bounded by the limits of the common good and is not intended directly or immediately for the good of the individual.[29]

So much for a philosophical rejection of this rehabilitationalist theory as the basis for the state's right to punish the criminal. The theory has other defects. There is the germane question of responsibility. Too frequently, the defenders of this theory proceed on the assumption that free choice in criminal situations is the exception, and acts which are the product of mental disease, are the rule. Even a prominent American jurist recently wrote:

> Freudianism has carried the banner of scientific determinism into the inner sanctum of theology – the human soul. Darwin placed the human animal in nature, and Freud attempted to explain what occurred inside this human animal. His success has been substantial. . . . As a result, [speaking of Freud's concept of unconscious motivation] an expanded category of disease has supplemented or displaced the diminished category of "evil." Evil is not a scientific word.[30]

Such is often the narrow clinical view of the sociological, medical and welfare practitioner. Many are the instances of diminished responsibility, and for a great variety of reasons, running the gamut from

[28] See MARTIN, BREAK DOWN THE WALLS (1954).

[29] Mooney, *supra* note 22, at 105-06.

[30] Bazelon, *The Awesome Decision,* Saturday Evening Post, Jan. 23, 1960, pp. 32, 56.

blood chemistry, illiteracy, poverty and feeblemindedness to subtle psychological and environmental factors. There are a thousand and one anomalies in the general run of men. We also know by equally strong evidence that from an abuse of their precious gift of freedom men will conspire, plan and execute atrocious thefts, senseless murders and other criminal excesses — and all this for their own personal aggrandizement. In their attempt to find any explanation for crime except free will, the physical and social scientists can speculate on criminal instincts, a crisis catalyst and the like; yet they are unable to explain the well organized crime syndicate for the well-calculated, deliberate self-serving criminal activity that it is.

Akin to the notion that the state's primary duty is to best effectuate the purposes of the common good, is a view that in *exclusively* seeking rehabilitation in the over-all social context, the state is assuming a welfare responsibility that greatly exceeds its capacity and competency. An article in a 1938 law review points up this particular difficulty with an exclusively rehabilitatory policy:

> The healthy penal adjustment . . . would thus consist in professing policies looking toward the rehabilitation of offenders, and employing such professed policies as a premise, only to the extent to which we may be willing at the same time to assume collective responsibility for the welfare of that whole segment of human subnormality, wreckage and underprivilege, which we experience as crime or delinquency. Let us make no mistake about this. Given such cultures as we know, the welfare in question would have to include material as well as spiritual elements. Any very extensive program of rehabilitation would require an assumption of responsibility of a degree to which our communities are unaccustomed. For the strains and conditions which account for the deviational personalities and behavior in question run the whole gamut of human inequality and need. . . . Nor would it be easy to justify a rehabilatory policy toward criminals more generous than whatever may be the prevailing policy with respect to the other classes of unfortunates at any given time.[31]

It will probably be objected here that, from a viewpoint of Christian charity, social justice, etc., we should, as citizens, assume this vast responsibility of helping the weaker members of society to regain their social well-being and to restore them as useful, healthy, contributing members of the community. Of course this is true, but our precise point here is that this great objective, ideal and desirable as it is, cannot stand on its own feet as the ultimate basis for justifying the state's punishment of the criminal.

Our approach up to now seems so clearly negative with regard to the value objectives pursued by many who are working for social reform, that the question naturally arises: what seems to be the true notion of the basis for state punishment of the criminal? To that specific point, we now turn our attention.

A Proposed Solution

The various traditional theories on the basis for state punishment of the criminal have now been considered and rejected because of their insufficiency in providing us with a solid, unassailable ground for justifying criminal punishment. It remains, therefore, to evolve a theory which rejects the errors of the systems already reviewed and retains their good points, while staying at the same time within the framework

[31] Dession, *Psychiatry and the Conditioning of Criminal Justice,* 47 YALE L. J. 319, 339-40 (1938).

demanded by the teaching of Catholic moral theology and scholastic ethics.

It will be necessary first to apply the solution of scholastic ethics to our problem. This will give us a solid rational basis upon which to build the structure of our ultimate explanation.

The state, as correct natural law philosophy teaches, exists to provide for and to promote the common good of its members. Intrinsic to the nature of lawful government is the power to make laws to govern, guide, protect and provide for the peace and prosperity of its citizens, which is the common good of society in the concrete. In order to make laws which can achieve their desired purposes, the state must add sanctions to these laws — the observance of law must be honored and its breach must be punished. All this is to say that the power to punish is inherent in the state's power to make laws. The one without the other would be meaningless. In this connection, Father Mooney, in his article on punishment, says:

> Individuals are, however, often found to violate the social order, to infringe on the rights of society or of other individuals, and in this way public security and peace which the state is bound to maintain, is threatened. The fact that there is an obligation in conscience to respect the juridical order is not sufficient to prevent all violations. Hence, if society's right to pass laws is not to be vain or illusory, it must have some means, consonant with individual liberty, of ensuring their observance. The universal means is reward for observance and punishment for non-observance. . . . Accordingly, when the state in the interests of the common good, enacts certain laws, it attaches certain sanctions to the violation of those laws, and threatens to punish those who refuse to obey. Experience tells us that, in spite of the threat, crimes are nevertheless committed, and thereupon the state proceeds to inflict the punishment it has threatened, not merely as a deterent to the actual offender . . . but also as a deterrent to others.[32]

As Messner correctly observes, in agreement with the majority of Catholic moralists who have given consideration to the question:

> This right [the right to punish] is rooted in the state's fundamental function of safeguarding law and order in society in view of the partial perversion of human nature; punishment of anti-social behavior is an indispensable means for this end. Thus the deterrence theory is given its proper place; although the right to punish is grounded in the state's fundamental function, it is also intended as a deterrent to crime. . . . In its execution, punishment serves to restore the violated legal order, which is the highest good of the community. The so-called vindication theory rightly emphasizes this, but its attempt to justify the right to punish by the purely retributive function of government is very inadequate; this justification can be found only in the indispensability of punishment for maintaining law and order. The object of punishment is also the improvement of the criminal.[33]

Where does the state obtain this terrible power over the life and freedom of its members? The problem has often been a semantic one. Finality of state punishment has frequently been designated by Catholic theorists as expiation. This is theological terminology in a most unfortunate context. Expiation connotes a payment rendered a superior through suffering. This raises the question: must punishment involve suffering, pain? Saint Thomas answers this for us when he says all true punishment is such precisely because it is inflicted against the will of the punished. Otherwise, it would be a pleasure and no privation.

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[32] Mooney, *supra* note 22, at 167.

[33] MESSNER, SOCIAL ETHICS 591-92 (1952).

Yet this is not to say that punishment of criminals must take on characteristics of the savage brutality of an earlier age.

As we approach the nub of our solution, several important principles must be kept well in mind. First, state punishment can only be rightfully inflicted by the public authority itself, and only for a juridical crime (*peccatum juridicum,* as it has sometimes been called). This juridical crime has been aptly defined as "a deliberate external violation of the juridical order of society which undermines the confidence the citizens should have in the ability of the State to protect them."[34] Such a crime of its very nature implies an abuse of free will, of personal responsibility, and as such, demands punishment – the reaction of lawful government to a citizen's free act cannot then be considered unjust as respects the criminal, or using him as a means to the end of the common good, as Kant, Holmes, and others have often argued.

Note in our definition of the criminal act, the *peccatum juridicum,* the emphasis that has been placed on the *external* aspects of a violation of law. All human acts, of course, have an internal as well as an external aspect to them. But the state has competence to punish only the external aspect of crime. This is a key point. Public authority to govern is given to the state only in the area of external activity. It is not in the ambit of state competence to make laws governing, as such, the inner forum of conscience. That they do so in some cases is a per accidens, but not a per se effect of law. This is clear from what Saint Thomas says on this point: "Consequently, in matters touching the internal movement of the will, man is not bound to obey his fellow man, but God alone."[35] As said previously, the power to punish follows upon the state's power to legislate. So, when a legislator promulgates a law to be obeyed, he commands its observance, but not that it necessarily should be performed in a virtuous way or with a virtuous intention.

In the case of a juridical crime the state punishes the criminal act as such and does not [nor is it competent to] enter into the question of theological fault. This is evident from experience, for the state cannot competently investigate the inner forum of conscience; and even if it were able to do so, it should not, for this inner, sacred area of a man's conscience is the province of God alone. Grave faults in the interior forum do indeed merit strict retribution and in Catholic theology this means that such a grave fault merits hell, where the strict demands of divine justice are satisfied. These are considerations which the strict retributionists of the Kantian school overlooked.

For what then is the state seeking retribution when it punishes external violations of law, these juridical crimes?

The abuse of free will in such crimes calls, as we have shown, for punishment. How much punishment is dependent upon the amount of damage done for which justice demands satisfaction. Every crime does involve damage, and not just material damage. There is also further damage done, in the disturbance that is inflicted upon the peace and good order of any well-ordered community.

[34] Collins, *The Grounds and Purpose of State Punishment,* 19 IRISH THEOLOGICAL Q. 359, 366 (1952).

[35] SUMMA THEOLOGICA II-II, q. 104, art. 5. "In his quae pertinent ad interiorem motum voluntatis, homo non tenetur homini oboediri, sed solum Deo. Tenetur homo oboediri homini in his quae exterius per corpus sunt agenda." *Ibid.*

The relation between the freely placed criminal act and the resultant damage done to the community is sharply drawn in the address of the late Holy Father, Pope Pius XII, to the Congress of Italian Jurists:

> Connected with the concept of the criminal act is the concept that the author of the act becomes deserving of punishment (*reatus poenae*). The problem of punishment has its beginning, in an individual case, at the moment at which a man becomes a criminal. The punishment is the reaction required by law and justice to the crime: they are like a blow and a counter-blow. The order violated by the criminal act demands the restoration and re-establishment of the equilibrium which has been disturbed. It is the proper task of law and justice to guard and preserve the harmony between duty on the one hand and the law, on the other, and to re-establish the harmony if it has been injured. The punishment in itself touches not the criminal act but the author of it, his person, his Ego, which with conscious determination has performed the criminal act. Likewise the punishing does not proceed as it were from an abstract juridical ordination, but from the concrete person invested with legitimate authority. As the criminal act, so also the punishment opposes person to person.[36]

The remarks of the Holy Father in the same pronouncement are equally illuminating on the justification of punishment as the state's reaction to crime:

> Considered in the object affected by it, the criminal action is an arrogant contempt for authority, which demands the orderly maintenance of what is right and good, and which is the source, the guardian, the defender and the vindicator of order itself. . . . The object affected by this act is also the legally established community, if and in as far as it places in danger and violates the order established by the laws. Nevertheless not every true criminal act as described above has the character of a crime against the public law. Public authority must be concerned only with those criminal actions which injure the orderly society as established by law. Hence the rule concerning a juridical crime: no crime where there is no law.[37]

As indicated in the remarks of His Holiness, as well as in our own explanation above of a "juridical crime", there is in crime a loss of confidence on the part of the citizenry in the state's ability to maintain and protect basic social rights. It is this unbalance in society that must be righted. This is no vague, chimerical thing, for such confidence is largely what keeps any community going, be it large or small. What the roots of this confidence are, we shall presently describe. In inflicting punishment for crime, the state satisfies not Divine Justice, as we have indicated, but meets the demands of social justice by restoring the shaken confidence of the community in its law. It achieves retribution for the violation of its own juridical order. This is undoubtedly what Saint Thomas means when he says of the purpose of punishment, that it should be in terms of common good that peace and order be restored to the state.[38]

This, briefly, is the theory of juridical retribution, and in it retribution by the state is indicated as the primary purpose of punishment. As can easily be seen it is an objective theory, based ultimately on the true scholastic philosophy of the purpose of the state itself.

Our answer to the main question of the moral basis for state punishment of the criminal has been in accord with the

[36] Address of His Holiness, Pope Pius XII, to members of the Italian Association of Catholic Jurists, December 5, 1954, in 53 CATHOLIC MIND 364, 366 (1955).

[37] *Id.* at 365-66.

[38] SUMMA THEOLOGICA II-II, q. 68, art. 1. "Bonum rei publicae cujus quies procuratur per punitionem peccantium." *Ibid.*

theory of "juridical retribution." This theory finds strong support with the leading canonists of this century. Thus, Wernz speaks of the underlying purpose of criminal punishment as:

> The necessity either of preserving or protecting the public order of society itself.[39]

and again,

> So it happens that punishment held out as a threat deters one from a violation of law, and in this sense it is a legal sanction for it staunches up the law itself, while at the same time it protects and wards off the juridical order of society from threats to its security.[40]

The famous canonist Michiels[41] likewise favors our theory and gives an even more profound analysis than Wernz of its underlying principles. He views the theory as bedded firmly on traditional natural law philosophy. He outlines the development of the theory in nine steps: (1) Society must function securely in achieving its purposes by having its members, created beings, serve the eternal purpose of God, their Creator. (2) They achieve this purpose by using the means consonant with their created natures and (3) for humans this involves a proper utilization of their endowments of human intelligence and personal freedom – a pursuance by man of ethical purpose in the context of the divinely ordained moral order. (4) From the necessity of men conspiring prudently together as social beings to form lawful governments flows the realization in the concrete of our juridical order, (5) an order which is at the same time a social order (6-9). When man violates the juridical order, he of necessity, disrupts the social order. This violates social justice and results in injustice to the institution, the state, whose purpose it is to protect the rights of its members, as well as insuring its own survival from attack. Hence, from a divinely ordained plan assigning man's place in the universe, punishment as a necessary consequence of crime flows by the sweet logic of Divine Providence.

Catholic moral theologians who treat the problem of the moral basis of state punishment, following the lead of Saint Thomas,[42] invariably defend the juridical retribution theory on the basis of Saint Paul's famous text in Romans 13 on civil obedience to one's lawful rulers.

Beginning with chapter 12 of Romans, Saint Paul develops the moral section of the Epistle. In chapter 13 he exhorts the new Christians to obey the civil authorities (and this at the time was the hated and feared authority of the Roman Empire). His basic reason for this obedience is "because there exists no authority except from God, and those who rule have been appointed by God."[43] In speaking of crime and its punishment, Saint Paul says:

> Do you wish, then, not to fear the authority? Then do what is good and you will receive praise for it . . . but if you do what is evil, fear, for not without reason does it carry the sword. For it is God's minister, an avenger to execute wrath on him who does evil.[44]

Saint Thomas' gloss on this text from Romans is:

> If, however, the avenger's intention be di-

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[39] WERNZ, IUS DECRETALIUM 20 (2d ed. 1905).

[40] "Inde habet poena quad in statu comminationis deteret a legis violatione, et in hoc sensu est sanetio legis, legem ipsam firinate et ordinem jurisdicum contra perturbationes tuetus et prategat." *Ibid.*

[41] MICHIELS, DE DELICTIS ET POENIS 13-14 (1943).

[42] SUMMA THEOLOGICA II-II, q. 108, art. 1 ad 1.

[43] *Romans* 13: 1-2.

[44] *Id.* at 2-5.

> rected to some good, to be obtained by means of punishment of the person who has sinned (for instance that the sinner may amend, or at least that he may be restrained and others be not disturbed, that justice be upheld . . .) then, vengeance may be lawful, provided other due circumstances be observed.[45]

In his allocution to the Italian jurists in 1954 His Holiness, Pope Pius XII, sums up the case for the juridical retribution theory so well that it can serve too as a conclusion of our discussion of the problem of state punishment. His Holiness says:

> What We said in Our discourse on international penal law on, Oct. 3, 1953, referring to the theory of retribution, is to the point here. Many, though not all, reject vindictive punishment, even if it is proposed to be accompanied by medicinal penalties. We then declared that it would not be just to reject completely, and as a matter of principle, the function of vindictive punishment. As long as man is on earth, such punishment, can and should help toward his definitive rehabilitation, provided man himself does not raise barriers to its efficacy, which, indeed, is in no way opposed to the righting and restoring disturbed harmony, which, as We have already pointed out, is an essential element of punishment.[46]

The law in setting down its penal sanctions makes an important distinction between the threat of punishment and the execution of that threat in actual fact.

We can in conclusion, at the end of our investigation of the basic question proposed at the start of this paper, state that, as Father Collins in his article on punishment puts it:

> We conclude, therefore, that the primary purpose of threatening punishment is to deter people from breaking the law. When, however, the law has been broken and the threat of punishment has been carried into effect, it does not lose its deterrent character but this ceases to be primary. The primary aim of punishment that has been inflicted is retributive in a juridical sense. It is meant to undo as far as possible the social effects of the external crime. Emendation of the criminal is not the primary purpose of State inflicted punishment. In fact, it may not be compatible with the punishment that the common good demands, as when the common good demands the death penalty. However, when it is compatible, it is an object that is secondary and to be achieved through the common good and in subordination to it. If this explanation be correct, it is still true to say that punishment is only inflicted for a *peccatum,* in the case of State punishment, a *peccatum juridicum.* It is also true to say that in punishing juridical crimes the State uses delegated authority and acts as God's viceregent in vindicating the external order in civil society.[47]

In our explanation of a valid philosophical position, we believe we have achieved what we set out to accomplish, namely, to discover the primary, moral basis for state punishment, while giving allowance for the best features of the various traditional theories. In itself, the juridical retribution theory is not a popular one. The reason for this is due mainly to the desire of many would-be social reformers to achieve their purposes with

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[45] SUMMA THEOLOGICA II-II, q. 108, art, 1, ad 1. "Si vero intentio vindicates feratur principaliter ad aliquod bonum, ad quod pervenitur per poenam peccantis, puta ad . . . quietem aliorum et ad justitiae conservationem . . . potest essevindicatio licita, alliis debitis circumstantiis servatis." *Ibid.*

[46] Address of His Holiness, Pope Pius XII, to members of the Italian Association of Catholic Jurists, December 5, 1954, in 53 CATHOLIC MIND 364, 369-70 (1955).

[47] Collins, *The Grounds and Purpose of State Punishment,* IRISH THEOLOGICAL Q. 359, 368 (1952).

a program based on a Platonic "philosopher-king" concept. This tendency to dominate and to fashion the state itself into the vehicle of one's own prepossessions is one of the most dangerous variants of totalitarianism to appear in democratic society today. It must be the purpose of the Catholic moralist, the Catholic lawyer, as well as the Catholic worker in the broad field of social welfare, constantly to urge, direct and moderate well-intentioned movements by the sagacity and fundamental truth of his own moral heritage. To the perennial task of reasserting the riches of that moral heritage, the foregoing discussion has been directed.

CRIME AND PUNISHMENT

(Continued)

May these considerations of Ours contribute with the richness of Christian thought toward illuminating the true meaning, morally and religiously purified, of punishment, and, with the outpouring of charitable assistance, may they help to make smooth for the condemned prisoner the way that must lead him to the longed-for liberation from guilt and punishment.