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MAKING THE PUNISHMENT FIT THE CRIME

JOHN ALAN HAMILTON¹

However original the genial *Mikado* may have been in his selection of deserving offenders, there was nothing novel in his desire to establish a pleasing correspondence between crime and punishment. His "object all sublime" has been an age-long quest of the generality of mankind, whose persevering attempts to let the punishment fit the crime are witnessed by countless penal codes from the time of Hammurabi to the present day.

The persistency of these efforts might seem more admirable if there were not reason to believe that they have been mainly instinctive, and that men generally have devoted less thought to the accomplishment of any rational purpose through punishment than they have to the discovery of moral sanctions for their own vindictive impulses.

Man's mental attitude toward crime and punishment has been, indeed, always so greatly influenced by his reflex actions that clear thinking on these subjects has never been an easy matter, and it is difficult today for one to turn to the consideration of the uses of punishment without finding one's mental processes soon deflected from a rational course by the pull of obscure, primordial forces far older and stronger than one's reasoning powers. Of these subjects, as truly as of any, it can be said that one is apt to think that he thinks, when, in fact, he merely feels.

One may readily see these influences reflected in one's own emotions and impulses, and nowhere more clearly than in one's reactions to dramatic or fictional situations.

It is natural to enjoy seeing virtue rewarded and wrongdoing punished, provided always that one is in a position to view these awards impartially, and in the mimic world self-interest adds no complexities, and art sees to it that one's sympathies are not divided. So with unmixed feelings one rejoices at the fate of the villain in the last act, and if a nice balance is attained between the suffering caused by his villainy and the retribution visited on him as the curtain falls, one's pleasure is sensibly augmented, for Nemesis has ever been a popular goddess with all except her victims.

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When villainy recoils upon the head of the villain, the appropriateness of his fate satisfies a craving that lies far deeper than one's rational processes. The despoiler is despoiled, the liar-in-wait has fallen into the pit of his own digging, and the thought that the suffering which he planned to inflict on others is visited on himself comfortably gratifies one's sense of the eternal fitness of things.

Men have even given a name to this—shall we say—boomerang type of retribution. They have called it poetic justice, or ideal justice, unconsciously testifying to their innate conviction that crime and punishment should forever show an equal balance in the scales of their cosmos.

This is the sub-conscious ideal, the goal one instinctively aims at, but perfection is difficult of attainment, and whether or no one's villain receives retribution in exactly equal measure, it is essential to one's peace of mind that he be punished sufficiently. One is apt to be satisfied if justice is meted out with a liberal hand, and not inquire too meticulously into the possibility of a slight overpayment. There is a certain comprehensiveness about the revenge of Dare-Devil Dick, cutting the ninth and last significant notch in the stock of his trusty rifle, or of Monte Cristo, grimly turning the screw on his former persecutors, that simulates for one the operation of natural law, so that one forgets to appraise the exact justice of the retribution in one's instinctive sympathy with its catastrophic completeness.

Yet even here there is no intentional demand for more than an equal measure of reprisal. Were poetic justice always possible, it would always satisfy. But man has no scales that will weigh suffering, and being psychically in the condition of a savage who can not count above ten, he must needs repay a mortal injury with revenge heaped up and overflowing, or else suffer doubt as to the adequacy of the payment.

Like for like, a blow for a blow, and a life for a life—this is a principle that man can comprehend, and can roughly apply. But it is beyond his power to balance imponderables. He can not inflict a measure of remorse in return for a measure of sorrow, nor a measure of humiliation for a measure of anxiety, nor a measure of shame for a like amount of fear. Nor can he measure any of these against bodily pain. And so, for lack of the ability to weigh or measure either the suffering received or the suffering returned, man, in spite of his ideals, is very prone to give to vengeance the character of overpayment.

In real life one's impulsive reactions to crime are complicated by self-interest, and by the play of divergent or conflicting sympathies.

Each of us becomes the protagonist of his own drama, and each ordinarily finds his vindictive emotions most strongly excited by those wrongful acts which happen to be injurious to himself.

It is to be remembered that one's sub-conscious impulses have their own standards of criminality, which are not always those recognized by the law. Instinct draws no distinguishing line between crime and tort—between an act punishable by law and an act answerable in damages. Instinct arranged her penal code some time before these distinctions were invented, and devised it with an eye single to the gravity of the injury, so that the difference between an act of discourtesy and a mortal aggression is to the reprisal instinct a difference only of degree.

Whether one thrusts an elbow into the man who has trod on one's toes, or empties an "automatic" into the man who has stolen one's wife, one is in either case reacting to the same instinctive impulse that caused the punishment of the first crime, and that underlies the penal systems of today.

And whether it is called the vindictive instinct, or the retaliatory instinct, or the reprisal instinct, or the retributive instinct—for it has all the aliases that one might expect from its constant association with crime—it is the same spirit of vengeance under whichever name, and has played a useful, and on the whole an elevating, part in the world.

It is true that the term *revenge* carries with it a popular connotation of spitefulness and excess, but one should understand that it is here used in its broad, primary sense of retribution exacted for a wrong to oneself or to another.

It is in the last three words of the definition just quoted that one may find the key to the social significance of the vengeance instinct. For the impulse to retaliate can be stimulated by sympathy scarcely less readily than by self-love, and whereas retaliation for an injury to oneself remains always simple vengeance, retaliation for an injury to another becomes when organized, social retribution, and when systematized, becomes statutory punishment.

Through sympathy, which is the emotional identification of oneself with another, one may feel compassion—may *suffer with* the injured person, as the word implies—and may be moved by the reflection of the sufferer's natural emotions to an indignant desire for the offender's punishment, as well as to a merciful inclination to succor the victim.

Pity for those whom he has wronged may be considered the moving cause that rouses the vindictive instinct of the community against the criminal, and whether pity is (aside from self-interest) the sole

moving cause of such reaction, or whether, as some think, there also exists in us an innate hatred of the criminal as an alien and abnormal type, is a question whose intricacies are more interesting to the criminologists than they are essential to our inquiry. It is enough for the present purpose if one is led to realize that society instinctively demands reprisal against the individual who grossly disregards its subconscious standards of humanity or of probity.

But if the punishment of the offender is instinctively demanded, it is also instinctively limited in its severity. Nature long ago decreed that the strength of the anger reaction must normally correspond with the violence or danger of the attack that rouses it, and as this is but an illustration of the universal law that action and reaction must be equal, one accepts the phenomenon as a matter of course. The very word *retaliation* bears witness, in its root implication of an equivalent return, to this characteristic of the reflex action which it describes.

And whenever retaliation visited on the wrongdoer seems to belie its name, and punishment is continued until society, its own vindictive emotions satisfied, feels the punishment to be itself a fresh offense, then pity for the criminal speedily takes the place of pity for his victim, and society is led to condemn the overseverity of the punishment by the same emotional process that inspired the demand for its original infliction.

Although the vindictive impulse was undoubtedly one of the primitive influences that Huxley had in mind when he spoke of the survival of the "ape and the tiger" in us, the instinct has proven rather more amenable to training and domestication than some other of our inherited impulses. Selfish as it was in its origin, pity has drafted it into the service of altruism, and lawless as it is in its nature, it has nevertheless become the father of criminal justice.

It is truly a paradox among instincts!

But alas! No amount of training will suffice to instill rationality into an instinctive emotion, and however useful the retributive impulse may be as a monitor, one must admit that it lacks reliability as a guide. Even though it be the parent of all penal codes, an instinct that will lead an unsuspecting child to waste time and energy in kicking a chair that has tripped him up, can not be held worthy of unquestioning confidence. It is as much in need of a guardian as the child is.

It must be granted in fact that the retributive impulse, since it is instinctive, is quite unconcerned with its own utility. It demands reprisal, not as a means to an end, but as an end in itself. The fact that retributive punishment is of value in preventing crime does not

interest the retributive instinct, which demands the punishment, not with the aim of benefiting society, but for its own satisfaction.

What the reprisal instinct seeks is the punishment of crime, not its prevention. It is not concerned with safeguarding the future, but only with atonement for the past. It calls for the suffering of the offender and will accept no substitute.

The avenger of blood does not consciously seek security against future aggression. He claims his pound of flesh, and holds with Shylock that if it will feed nothing else it will feed his revenge.

The attitude of the avenger is the unconscious attitude of all of us in our reaction to crime, whether our emotions are violently excited by self-interest, or are more feebly stimulated through sympathy. A vile or monstrous crime committed within one's purview reflexively induces a loathing hatred of the criminal, and a strong desire for his punishment, not primarily for the sake of example, but because he deserves to suffer. Nor would the knowledge that every deterrent or preventive purpose of punishment could be equally well served by some other and milder treatment of the criminal appease this instinctive demand in any degree.

Such inward insistence on punishment as a requittal, or an atonement—such an exigent demand of the "sense of justice" that the offense shall be expiated—must obviously be acquitted of utilitarianism. Society's demand for the criminal's punishment is not merely purposive; it is unconditional and absolute.

This characteristic automatism of instinct is a phenomenon of which man has been aware ever since he began to speculate upon the attributes of his own faculties, and, as concerns most of his appetites, passions and instinctive impulses, he has set himself to discover their functions, and, having found these, to guide his instincts toward the accomplishment of what he has conceived to be their purposes.

But in the case of the reprisal instinct, a number of circumstances have combined to restrict this self-examination, and although civilized man has endeavored to stamp out entirely the practice of individual vengeance, he has so far evinced very little concern at the sway of the reprisal instinct over the actions of society as a whole.

It is not unlikely that this indifference has been, in part, due to the fact that men have never felt the reprisal or retributive instinct to be a matter purely of biological significance. In its higher manifestation, as the impulse to visit justice on the wrongdoer, it has generally been felt to be closely related to, if not a part of the ethical sense, and

therefore to be exempt from any requirement to justify itself, and to be beyond the necessity of accepting the proffered guidance of reason.

But the explanation fails to explain. How did men come to attach any higher authority to their reprisal instincts than they did, for example, to their amatory impulses, which they have never tired of mortifying? It is scarcely to be supposed that they could overlook the evidence in their daily lives, testifying unceasingly to the fact that the one impulse is as blind as the other.

The question goes to the root of the problem of society's strangely complacent, almost reverential attitude toward its own vindictive reactions. In order to envisage the collective mind of today as it faces the problem of controlling crime, one must contrive a glance, however fleeting, at the origin of the vindictive instinct, and at its interpretation by primitive man's unfolding mentality. For the effects of that interpretation, brought forth in the shadows of a past almost inconceivably remote, are, apparently, to be seen in the punitive concepts of the present day.

II

The reprisal instinct undoubtedly has existed from a very early period of organic life. Even in the ooze of the remote Pre-Cambrian Age the Protozoan life of the period probably developed a bio-chemical irritability that foreshadowed the instinct of self-defense. As multicellular organisms succeeded those of the single-cell type, the stage of development was early reached wherein the anger reaction was pronounced and persistent. Evolution needed only to add to such an organism a memory center sufficient for the recognition of an assailant after an interval of time, and revenge took its place in the recurring life-cycle.

The characteristic must have proved highly protective from the first. Indeed, terrorization has so frequently shown itself to be of great utility in the lower stages of organic life that there was some excuse for the pathetic bewilderment of the atavistic Prussian mind at its failure to prove effective when practiced upon higher racial types.

When man first emerged as the dominant genus, the strength of his vindictive instinct was not the least important item in his equipment as the jungle's overlord. And just as man, the vengeful animal *par excellence*, rose to mastery over his fellow beasts, so for ages the man of wrath, ruthless and terrible, was the type that dominated his fellow men. The meek ones perished; the aggressive, quick to resent

and revenge an injury, survived and transmitted their characteristics to their progeny.

Throughout man's whole history down to recent times prompt and vigorous reprisal for each injury received or attempted has been the price of respect and security for the individual, the family and the tribe.

So the spirit of retaliation continually made for the survival of its possessor. It operated through the use of fear to protect the individual, or group, from the cunning or violent aggression of enemies. It was an integral part of a character complex which proved, in a world of struggle, its fitness to survive.

As society progressed the instinct resulted, through impulsive mob vengeance, in eliminating those whose anti-social natures led them to violate sacred tribal customs, or otherwise to threaten the security of the group.

When at length the pressure of warlike neighbors forced society for the sake of internal peace to take over first the regulation and finally the execution of private vengeance, the change served merely to add to the list of crimes—that is, of acts punishable by the state—without in any way affecting the instincts that had governed men's actions from the beginning.

The reprisal instinct has survived in us because it served a useful end, or, to speak more accurately, our progenitors survived because they possessed, along with other characteristics, the reprisal instinct. Punishment therefore was, in its origin and early development, strictly an utilitarian institution—the expression of a protective characteristic—which served chiefly to prevent the commission of various predatory acts that we now call crimes.

So it may be said that the innate impulse to punish the criminal displays itself in us today because it is socially protective, and there does not appear to be any other rational motive or ethical basis for the infliction of social punishment than this same protective utility—the prevention of crime.

But to the mind of primitive man vengeance presented itself primarily as the gratification of a legitimate desire, rather than as an intimidative measure. He could perceive that a relation of cause and effect existed between vengeance and safety, but not that this relationship furnished the key to the existence within him of the vindictive impulse. He readily recognized the value of punishment as a minatory force, but he looked upon intimidation rather as a gratifying by-product of reprisal than as a predominant motive for its exaction. The blind

call of his instinct for vengeance upon his assailant was for him the categorical imperative, tolerant neither of questioning nor delay. It is not to be wondered at that he sought a justifying reason for revenge that should be as absolute and unconditional as his vindictive impulse.

In his incessant search for an explanation of this, as of every phenomenon that he observed, there are many evidences that primitive man found in the ever-present powers of magic an early solution of his vindictive impulses that ran with his inherent desires while it satisfied the requirements of his juvenescent mind.

He conceived that in putting out the eye of the enemy who had destroyed his own, he was transferring to himself the vital force that he had taken from his assailant. Through the influence of those unseen powers of nature, which he was always conjuring up, and always seeking to control for his own ends, he imagined that he obtained from his enemy, by means of successful reprisal, an equal vital value in exchange for the vitality that he had lost through the original injury.

As an illustration of the tendency of primitive man to reason in terms of "Homeopathic Magic" there was nothing strange or unusual in such an interpretation of the vengeance motive. The industry of Sir J. G. Frazer has brought together in the priceless volumes of *The Golden Bough* almost innumerable examples of similar deductions, the entire consonance of which with the preconceptions of early man can no longer be a matter of doubt. The savage mind moves to its conclusions along lines that seem to us illogical enough, but though its logic is its own, its reasoning processes are consistent, and the belief that like produces or influences like would probably have sustained an earlier test of truth, in that for ages it could have been affirmed with substantial correctness that the belief had been held "always, everywhere and by all."

But whether we concede that in establishing the idea of equivalence between crime and punishment, priority is due to this conception of an equal vital value obtainable through vengeance, or whether we ascribe the origin of the idea to a perception of the existing relation between the gravity of the offense and the strength of the vindictive reaction, or to a combination of these with ideas originating in primitive barter, in any case we have warrant for the conclusion that aboriginal man, apparently, from a very early period, conceived of retaliation primarily as a repayment or recompense rather than as a repressive force useful for self-protection.

And, since revenge figured in his mind as an atonement, it fol-

lowed that the suffering of the offender under the infliction of vengeance was a satisfaction to which the injured party was entitled as a matter of right.

Thus at the dawn of history punishment had already assumed in men's minds the character of a forcible collection of a debt due from the offender to the offended.

By the time the Pentateuch came to be written, this idea had produced in many lands a collateral moral conception of punishment as a necessary consequence of wrongdoing. In the case of a people so religiously inclined as the Jews, this inevitability of punishment was naturally ascribed to the omniscience of the Deity, by whose direct revelations their actions were guided, rather than to the operation of any natural law. As their law in its entirety came from Jehovah, all lawful punishment had its sanction in His command, and was the expression of His displeasure. Even private vengeance, regulated and implicitly sanctioned as it was by the Mosaic Code, took on a ceremonial character and became the exercise of a power delegated by a jealous Deity who claimed the right of vengeance as his own sole prerogative. "Vengeance is *mine*," said He. "I will repay."

No real distinction existed therefore among the Jews between sins and crimes, since they were equally violations of the law of God. And with the tendency to anthropomorphism that has been common to all primitive peoples, the Jews gave to divine punishment all the attributes of human vengeance. It was considered to be a payment exacted by an offended Deity as the price of reconciliation.

Numberless passages in the Books of the Law emphasize the existing disregard of any nexus between punishment and deterrence. The ox that gored a man was to be ceremonially stoned to death as if human, just as trees and rocks have been subjected to punishment among other primitive tribes. The accidental slayer, although offered a city of refuge, forfeited his life to "the avenger of blood," if he left the appointed asylum. Sins that were committed unknowingly required expiation as if intentional. "Though he knew it not," declares the Voice from the Tent, "yet is he guilty and shall bear his iniquity."

The earlier belief in an occult virtue supposed to inhere in the act of retaliation does not appear in the Mosaic Law. But the basic idea of the necessary equivalence of crime and punishment persists and is immortalized by the provisions (not peculiar to the Jews) expressing the Law of the Talion: "And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot."

So the People of the Covenant, our ethical and religious progeni-

tors, continued to look upon punishment, as did their cave-dwelling ancestors, less as a means of preventing wrongdoing than as a payment for wrong done.

In this they did not differ from their neighbors, except in so far as their more perfect Theocracy, in its absolute denial of the distinction between crimes and sins, served more effectually to give to practical, finite justice the metaphysical character of a divinely imposed institution. Their neighbor's theories, however, are "one with Ninevah and Tyre," whereas the punitive concepts of the Jews left their impress on the whole of Western civilization, and, as a mere incident of larger results, have profoundly influenced the Western world in its treatment of the criminal for nearly two thousand years.

For with the rise of the Christian Church, a system of theology based on the Deuteronomic conception of punishment spread slowly westward from Palestine, and at every stage of its progress its doctrinal insistence upon future punishment as the expiation of sin helped to fix more firmly in the mind of society the already present, but inchoate, idea of mundane punishment as the expiation of crime.

And this influence grew more potent, as with the lapse of time the theory of atonement assumed ever greater importance and subtlety in the religious tenets of Christendom.

From the Pauline doctrine of the Vicarious Atonement through the Augustinian dictum of infant damnation, to Calvin and the doctrine of Reprobation, succeeding generations built their theological structure upon the Levitical idea of Divine Retribution, until there existed a complete eschatology, or rather a series of eschatologies, with this concept as their foundation.

Baptism and belief, according to the generally accepted doctrines of all Christianity, were the conditions of salvation. Christ's atonement, it was held, removed the doom pronounced against all mankind for the sin of man's first parents, but without baptism and inward conviction the atonement was inoperative. The unbaptized and the unconverted were condemned to eternal punishment.

The Reformation, far from mitigating the unhappy lot of the unbaptized, had boldly affirmed and emphasized their predicament, and with the coming of Calvinism and Puritanism the doctrines based upon expiatory punishment had reached the final stage of their logical development.

Instinct itself at length rebelled against the somber vengefulness of these creeds, and even in the seventeenth century so devout a believer as our own Michael Wigglesworth found it difficult to reconcile

the demands of orthodoxy with the dictates of his humanity. His lurid poem, "The Day of Doom," in picturing the fate of unbaptized infants, consigns them indeed to the place of everlasting torment, but yields so far to the impulse of pity as to promise them, apparently quite without authority, "the easiest room in Hell."

This whole body of doctrine dealing with the dooms of the Last Judgment was, of course, the antithesis of the idea of punishment as a practice of simple utility. No deterrent or disciplinary purpose can be apparent to any one but a casuist in the condemnation of each succeeding generation forever for the fault of its original ancestors; or in the punishment of infants for an omission of which they were unconscious; or in the chastisement of the heathen for failing to perform a rite of which they had never heard. One can still hear the Voice from the Tent proclaiming: "And if any one sin, though he knew it not, yet is he guilty, and shall bear his iniquity."

The moral and spiritual ideas thus inculcated could not fail to have an unceasing effect upon men's social theories, and, in fact, during the greater part of the Christian era the criminal jurisprudence of the Western world, like its philosophy and much of its science, has reflected the ideas and beliefs of the prevailing theology. No uncritical society, indeed, could fairly be expected to entertain at the same time two different conceptions of the nature of punishment, the one confined to its functions as a divine institution, and the other dealing with its attributes as a social agency.

Thus criminal law followed ever close in the wake of the Church, and finite justice, accepting the rulings of the higher court of revealed religion, continued with ever strengthening conviction, to look upon punishment, divine or human, as an atonement due to God or to the State.

It is to be noted, moreover, that this acquired conviction was the deeper seated in that it arose from and coincided with the dictates of instinct, whose impulsive and unreasoning conclusions now found themselves reinforced by all the intellectual subtleties of the dialecticians. The right of reprisal in their hands became the duty of chastisement, and the primordial satisfaction of retaliation became the moral necessity of retributive justice.

Philosophy itself yielded to the force of ideas so long entertained that they had become worked into the warp and woof of men's beliefs, and Kant did not hesitate to formulate a system of ethics which held that if society were on the verge of dissolution it would still be under the moral necessity of putting to death the last murderer found in its

prisons, so that every offender might be made to bear the punishment of his crime.

III

The doctrine of infant damnation has fallen into disrepute, and the rising generation, wise in many things, is unaware that "In Adam's fall we sinn'd all"; the temperature of Hell has subsided, in popular estimation, to—let us say—78 degrees Fahrenheit or thereabouts; and the modern church-goer is apt to give no more thought to the doctrine of reprobation than he does to the antinomian heresy; but our jurisprudence is still constructing penal codes based on the punitive theories of Calvin, of Augustine and of Moses.

Our collective conviction as to the essential nature of punishment has not changed in the last four thousand years, and it is not strange that the mind should recognize slowly and reluctantly the instinctive, irrational nature of a concept so fixed by the force of immemorial belief and tradition, so indurated by the impact of centuries of precept.

Our very vocabulary has been formed for the expression of punitive ideas based on the instinctive concept, and the repayment theory is implicit throughout the terminology of penal science.

Rational social punishment is not a blow struck at the criminal in return for one struck at society; neither is it a price exacted by society for the commission of crime; but the expression of the true disciplinary functions of punishment is impossible without the use of cumbersome locutions, whereas synonyms containing the implication of a return are so numerous as at times to render a choice embarrassing.

When one wishes to say that a criminal has been punished, one may speak of him as having paid the penalty, or as having made reparation, or atonement, or expiation, or requital, or amends, or satisfaction for his crime—the list is by no means exhausted. In each of these phrases there is contained the instinctive idea of punishment as an end in itself—as the repayment of a debt.

But where is one to find equally concise and variant expressions to convey the rational ideas of punishment as a warning, of punishment as an example, of punishment as a cure, of punishment as an elimination? They do not exist.

Instinct and tradition have combined to make us look upon the administration of criminal justice as almost exclusively concerned with the culpability of the criminal, and with the price he should be compelled to pay for his crime.

The effects of this endorsement and perpetuation of the instinctive regime in criminal jurisprudence have been as far-reaching as the retributive and preventive purposes are divergent and irreconcilable. Society's profound belief in the expiatory theory of punishment, and in its corollary, the theory that the offender's recompense must be measured out to him according to his deserts, has, as we have seen, inevitably tended to center society's attention on the attainment of an exact equipoise between crime and punishment, and to implant the conviction that such equilibrium represents the perfect ideal of justice. The ascertainment of the offender's deserts being thus the main consideration, it has naturally followed that the social value of the penalty administered has been a secondary matter, and that preventive efficacy has been an incident of punishment, instead of being its criterion.

Inasmuch as the chief purpose of social chastisement has been felt to be the infliction of suffering upon the culprit as an atonement to society, society has ever felt cheated if it did not receive its payment. The offender has been thought of as owing a certain amount of suffering, which the community has been disposed to collect in full, and it has commonly happened that society, desiring no more than its due, but having no accurate means of measuring distress, has inflicted an amount of suffering greater than was socially desirable.

This attitude of the stern but just creditor—an attitude justified by the accepted doctrines and traditions of centuries—has necessarily been unfavorable to the reform or advancement of prison conditions, or of penal methods. Whether the proposed change was deemed likely to diminish or add to the suffering of the convict, in either case the collective opposition of his creditors was inevitably to be expected.

For if the projected reform was calculated to lessen his misery, it was clearly inadmissible, since his suffering would then be less than he "deserved"; whereas, if the proposed plan involved new or strange measures of deterrence or of prevision (such as the sterilization of degenerates and defectives) instinctive justice rushed to defend him from the threat of an unaccustomed and therefore "undeserved" infliction. Every reform accomplished in prison and penal condition in the past has been achieved in the face of the fiercest opposition of the instinctive regime.

Another result of society's surrender of its correctional functions to instinctive control is to be seen in the spasmodic character that has generally distinguished criminal justice. Impulsive pity, as has been said, is Nature's counter-force for the regulation of impulsive retaliation, and the periodic overflow of instinctive compassion to offset the

excesses of instinctive vengeance is a phenomenon that is no less familiar today than it was during the reign of Henry VIII of England, or than it must have been in the hey-day of the Cro-Magnards. This pendulous quality of instinctive justice, characteristic though it is of Nature's methods of progress, is almost as unsuited to the conditions and needs of modern civilization as would be the unchecked operation of the primitive law of the jungle. For the very complex of reactions that served to moderate the justice of prehistoric times when social vengeance was "half punishment, half outrage," unavoidably tends to lead the judicial processes of today into a vicious circle of impulsive excesses. Intent upon the offender's "just deserts," the vindictive instinct obstructs humane reforms, insists blindly on the infliction of oversevere sentences, and makes prison life a hell upon earth. Compassion at length rebels, and in its unreasoning efforts to limit the suffering of the wrongdoer, hinders and hampers the administration of justice until the delays and miscarriages become a scandal. The reaction follows in still greater extremes of legalized cruelty, or in the lynching-bee.

The excessive technicality of our criminal courts today merely reflects the inordinate callousness of the criminal laws of yesterday. The same courts' disregard of all established safeguards of innocence tomorrow may be confidently expected as the natural sequence of the increasing sentimentalism of today.

Blind vengeance and blind pity contend in the existing scheme unceasingly for mastery, and whether the one or the other is for the moment in control, the predominance of either brings in the wake of the victory all the evils of emotional justice.

And so it has come about that the very instincts that led to the institution of punishment as a measure of racial benefit now threaten to retard society's further progress toward the control of crime.

For social punishment as a "moral" necessity and social punishment as a protective agency are two ideas that are as incompatible in their practical application as they are widely separated in their points of view.

The theory of moral necessity—the instinctive theory—asks concerning the criminal, "What punishment does he deserve?" Or, in other words, "What amount of suffering will expiate his offense?"

The theory of protective agency—the rational theory—asks, "What treatment of the offender will be best calculated to protect and benefit society?"

Our penal codes of today, like their predecessors, are, in effect, catalogues raisonnés of crimes, with the price marked opposite each

crime in plain figures. Their instinctive basis is, perhaps, less obvious than in the case of those early Teutonic codes in which the prescribed penalties faithfully mirrored the subsidence of the vindictive impulse, bearing most harshly on the transgressor caught red-handed, and least severely on him who for the longest time eluded his pursuers.

Nor is the repayment theory so frankly expressed in our codes as in those ancient laws, marking a transitional stage in many civilizations, which have permitted or compelled the compounding of private injuries (including murder), for money considerations in accordance with a predetermined scale.

But although the instinctive principle is less boldly avowed in the codes of the present day, it is not less pervasive. To prescribe fixed and all but definite prison terms for a hundred different crimes, to each crime its pre-ordained penalty, is an existing practice that would be quite unassailable if the true social purpose of punishment were retribution. But judged by the standards of preventive utility, a code so constructed is merely a sad exhibition of misdirected effort. For a given penalty does not exert the same deterrent force on all individuals, nor on the same individual under all circumstances; nor is it equally correctional in all cases; nor does a given offense always carry the same menace to the community.

If the prevention of crime is the true basis of statutory punishment, the indeterminate sentence insistently presents itself as the logical foundation on which to build a penal system.

Our existing penal establishments reflect even more clearly than do our codes the retributive basis of our present system of punishment. Prisons and penitentiaries that turn out more confirmed criminals than they receive—institutions whose opening portals pronounce a moral death sentence on every young and unhardened offender who passes through them—are perhaps successful instrumentalities for exacting reparation, but they can scarcely be considered efficient agencies for the protection of society. It is obvious that a society which punishes its criminals, but neglects a matter of such ordinary prudence as their proper segregation, is more interested in the punishment than in the punishment's effect. When a prison system is permitted to exist which breeds criminals as filth breeds flies, it can scarcely be denied that punishment is generally looked upon, not as a means to an end, but as an end in itself.

The sway of the retributive instinct is no less evident in the case of our courts and our procedure than in our codes and our prisons. Our judicial machinery concerns itself scarcely at all with forestalling the criminal, but begins to operate only after the harm has been done,

and our judges are utilized rather as the avengers of society than as its protectors. They are rendered powerless in the face of imminent crimes which they can plainly foresee, but are required to pass sentence upon the convicted prisoner on the basis of his "deserts"—a task beyond human wisdom.

Our existing criminal procedure is admirably adapted to guard the rights of the individual at the expense of the community, and our courts are at present so pre-occupied with the ethical necessity of protecting innocence that they are apparently in danger of forgetting the social necessity of condemning guilt.

If our procedure were upon a rational preventive basis, it could scarcely fail to show in its construction and in its operation recognition of the oft-demonstrated fact that the deterrent value of punishment rests finally upon its speed and certainty, and that a comparatively light penalty, if it be certain of prompt infliction, is of more intimidative force than the heaviest of punishments threatening in the uncertain future. This truth has always remained sealed from the instinctive consciousness.

Every advance made in the past toward a humane and enlightened treatment of the criminal, and every approach toward a wiser and saner handling of the problems related to crime, has been consciously or unconsciously a rejection of the retributive idea. The introduction of the reformatory plan, the use of probation, the establishment of children's courts—these and the many other notable reforms of the past half century have all been steps toward rational justice. Uncorrelated as they have been, and antagonistic as they necessarily were to the general spirit of the system into which they forced their way, each has proved its value to society, and each has done its part to undermine the walls of the retributive structure which tradition has reared upon the foundation of instinctive vengeance.

But our progress in substituting rational for vindictive justice has been far less rapid than our advance in obtaining command over the forces of nature.

Let us not underrate the seriousness of the situation that confronts us. Unless society shall prove able to make much more rapid progress in the future than it has hitherto in its attempted solution of the problem of controlling crime, there is danger that it may itself succumb to the destructive forces it has placed in the hands of its more lawless elements.

The high-powered motor car, the automatic revolver and the Maxim silencer form a combination, now at the command of our criminal classes, that is sufficiently threatening, but the prospect before

us becomes even less reassuring when we reflect that the lawless will probably soon have at their disposal a perfected, inexpensive airplane and chemical agents which will be at the same time a deadly menace to the unprepared victims and entirely harmless to the aggressors.

We are rapidly approaching the time pictured by Bulwer-Lytton in "The Coming Race," when every man will hold the lives of all his fellow men in the hollow of his hand, and when the mysterious and lethal force of "Vril" will place us all constantly at the mercy even of our children.

It is scarcely less than suicidal for society, in the face of such a situation, to permit itself to continue to be swayed in its treatment of the criminal by instinctive theories and emotional reactions that were socially protective in a more primitive environment, but are so no longer.

It is time for reason to take command—time for it fearlessly to analyze and appraise our common emotions of vengefulness and of pity, and to call to the attention of all thinking men and women the hidden and unrealized influence that these emotions have exercised over all our penal measures.

We are faced with the necessity of an entire overhauling of our criminal jurisprudence—a complete re-orientation of the generally prevailing ideas with regard to the nature, the functions and the limitations of statutory punishment.

Furthermore, such a revision as the situation requires cannot be brought about by the delegated labors of one or two or of twenty eminent penologists. They may hasten its coming, but the revision itself must derive from a realization of existing conditions on the part of all of us who are capable of self-examination and of logical deductions.

We must all become, for the nonce, criminologists, and if we adopt henceforward an attitude of severe skepticism toward every accepted tenet of criminal justice, we shall thereby serve society. In so far as society's treatment of the criminal is justified of its results, let our common sense by all means approve of it, but let us insist that the burden of proof be placed squarely on every criminal statute and every penal institution to show that its utility and efficiency entitle it to preservation.

Every musty maxim of the penal law should be dragged into the light and forced to justify itself. Every constitutional and statutory right of the accused or of the convicted prisoner should be put to the question whether its social value is greater than its social men-

ace. Every penal statute, rule and practice should be examined for traces of instinctive (that is to say, irrational) influence.

This will be no light or easy task, for no other of our instincts have so fortified themselves behind a rampart of man-made ethics as have the emotions of vindictiveness and pity, and no others are more capable of cunningly confusing an issue. Our punitive concepts are among the most ancient of our mores, and only necessity, brought about by a changed environment, can hope to alter them. But the necessity is here.

We shall have to be constantly on the lookout for the retributive jargon. Whenever, for example, the criminal's "deserts" are brought in question, we shall know that we are dealing with an instinctive concept. We shall, it is to be hoped, be content to leave his deserts to his Creator, and instead of giving our attention to what the criminal deserves in view of his crime, we shall try to ascertain what the welfare of society requires in view of his character.

We shall be concerned, so far as possible, to let the punishment fit not the crime but the criminal. We shall examine his crime not more closely from the viewpoint of its conventional culpability than from that of its symptomatic character.

We shall turn our consideration to the possibilities that our courts offer us as the guardians of society, and shall study the powers that may profitably be conferred on them for the prevention (through the prevision) of crime.

We shall inspect our prison and penitentiary systems with an eye single to their pragmatic justification, here, as always, steeling ourselves against the insidious influence of our inherited standards, and asking only whether the institution under inspection is serving its proper social end.

If we find, as we may, that institutional treatment is inherently ineffective, we shall not hesitate to advocate the substitution of other forms of punishment that shall be equally deterrent and less subversive of character.

We shall not take for granted the intimidative efficacy of all threatened punishment, but shall demand that the deterrent force of each threat, and of all corrective measures, be tested in the light of experimental psychology.

We shall take cognizance of the many gradations of defective mentality that play so prominent a part among the causative phenomena of crime, and shall urge that the law cease to apply Procrustean rules of insanity in our criminal trials. We shall, no doubt, curiously examine the prevalent delusion that an insane criminal is less dangerous

than a sane one, and that acquittal on the ground of insanity ought to carry with it the prospect of the early release of the prisoner.

We shall be forced to consider whether it would not be in accord with propriety and wisdom for society to confine its regulatory statutes to such enactments as have behind them the force of a fairly unanimous public opinion, in order that the criminally inclined may not be surrounded by an atmosphere of successful defiance of the law.

Always should we bear in mind that instinct constantly tends to excessive severity in the treatment of the criminal, and that excessive severity invariably defeats its own ends; that instinctive justice is short-memored; that the desire for retribution burns fiercely, but quickly dies out; that a forgotten crime, so far as our primitive selves are concerned, is a forgiven crime, and that, under the instinctive regime, justice deferred is justice defeated.

The brief experience of civilized man, if it can be relied on to furnish any safe rule for our guidance, would seem clearly to indicate that promptness, certainty and moderation of punishment must be the predominant characteristics of that as yet untried experiment—the rational treatment of the criminal.

Up to the present time, as we have seen, we have not advanced beyond his expiatory treatment, and it has given us instinctive justice.

Would that one had the power, with the searing phrase of a Carlyle, to brand upon the mind of each of us a picture of all that is represented by those two words in the civilization of today!

For instinctive justice is emotional justice; emotional justice is sentimental justice; sentimental justice, in this day and generation, is a welter of Beggar's Opera and Auto-da-fé. From the nightmare confusion of its unrestrained ritual there rise to heaven the mingled odors of roses piled in the murderer's cell, and of charred flesh from the faggots of the lynching party.