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CAPITAL PUNISHMENT AND IRRESISTIBLE IMPULSE AS A DEFENSE

By JOHN H. A. WHITMAN

At no more opportune moment could the question of capital punishment be brought before the minds of intelligent beings than at the present when crime is so open and rampant, and when prominent lawyers and criminologists are advocating a total abolition of the death penalty on the grounds, that men being moved by certain irresistible impulses, are not responsible for their actions. The rapidity with which crimes of violence have increased and the disregard with which human life is held today has already merited for us the appellation, "the most lawless nation claiming place among civilized nations of the world". If life and property are to be respected, the potential criminal must be made to realize that the commandment, "thou shalt not kill", is more than a mere law embodied in our statute books. The law must have a sanction and that sanction is capital punishment since it is the only punishment that fits the crime.

The infliction of the death penalty as a punishment for crime is of great antiquity.* It dates back to the very dawn of creation when Cain, the first murderer, uttered his fears that "whosoever should find him would slay him". Holy Writ is rich in citations showing conclusively that both Israel and Judea retained capital punishment as a part of their criminal code to the time of their destruction. Both Greece and Rome subjected their criminals to most inhuman torments. The favorite methods of executions with the Romans were by crucifixion and by breaking on the wheel. With the Greeks, the freemen were forced to drink of the hemlock,¹ while criminals of low grade were beaten to death. Extreme severity in the execution of criminals marked the reigns of the European monarchs; and at the end of the eighteenth century, the criminal law of all Europe was so ferocious and violent in its administration that abolitionists rose in indignation

* Sir Matthew Hale. *Historia Placitorum Coronae*. "By the ancientest divine law, that we read, the punishment of homicide was with death."

¹ Socrates.

and brought about a mitigation of the severity of existing laws.² The death penalty has ever been recognized in the United States. For the most part it is regulated by the laws of the constituent States.

Both advocates and abolitionists of the death penalty admit that some curb to crime is necessary, but differ as to what is the most efficient method of attaining the desired end. With those who are opposed to the death penalty, it is the tendency to regard crime as a manifestation of abnormality if not of disease.³ Hence they advocate segregation and education against death. They claim, "Intelligent segregation will afford present safety and protect future generations. Society can afford to forego its lust for revenge as manifested in hangings and turn to the method of treatment which holds out promise for genuine progress".⁴ The doctrine of humanitarianism has gained such momentum during recent years that many otherwise intelligent beings have come to the conclusion that the death penalty is unchristian since it makes no attempt to reform the criminal, which should be the object of all punishment, inhuman and serves no purpose among civilized people. Others maintain that capital punishment is not authorized by any right and that the State, in executing a criminal becomes criminal itself. Still others as Dr. C. B. Davenport and Clarence Darrow, teaching the doctrines voiced by Herbert Spencer of a half century ago, have advanced the theory in which they deny human responsibility in toto and consequently any idea of punishment for crime.⁵

To argue that capital punishment is contrary to nature and hence unchristian is to deny the veracity of the word of God as contained in the Scriptures, since both the Old and the New Testament prove most convincingly that the death penalty prevailed under repeated divine sanctions during the entire period of the Law and the Prophets. He who claims to be a christian and believes in the inspiration of the Bible must admit that the death penalty was at one time lawful and right "He

² Precario in Italy, Montesquieu in France and Jeremy Bentham in England.

³ Darrow, *Crime Its Cause and Treatment*.

⁴ Segregation vs. Hanging. *Journal of Criminal Law and Criminology*. Vol. 2., p. 512.

⁵ Darrow, *Crime Its Causes and Treatment*.—C. B. Davenport, *Heredity Culpability*, etc. *Popular Science Monthly*, July 1913. Sir Matthew Hale. *Historia Placitorum Coronae*. pp. 1-10.

that striketh and killeth a man, dying let him die." Lev. 24:17—Whosoever shall shed man's blood, his blood shall be shed; for man was made to the image of God." Gen. 9:6—The idolater and the blasphemer as well as the murderer were subjected to the same punishment. Num. 25:3—Lev. 24:16.

Under the New Dispensation, the law did not lose its sanction even though the spirit of the law was one of love and forgiveness. The precepts of the Sermon on the Mount were never intended to abrogate the authority of legitimate governments; for St. Paul discussing the formation of governments affirms that it is derived from God. "For he is God's minister to thee for good. But if thou do that which is evil, fear, for he beareth not the sword in vain. For he is God's minister." Rom. 13:4. He also says "If I have wronged any man or done anything worthy of death, I refuse not to die". From which we may conclude that even after the promulgation of the Gospel, there were crimes which justice not only allowed but required to be punished with death. The logical conclusion then is that capital punishment is not legal assassination and having received the repeated divine sanction both in the Old and the New Law, it cannot possibly be unchristian or contrary to nature.

Omitting entirely any idea of divine sanction, it has been the universal practice for nations both civilized and barbaric to visit certain crimes with the death penalty. Frequently institutions have revolted at the cruelty that so often attended executions; but never has the lawfulness and the justice of a state or a nation to protect its own integrity and the security of its citizens been questioned. Take away this sanction and you imperil the very existence of society and jeopardize the lives and property of its members. Hence the common consent of mankind, which in matters of common morality is a criterion of truth, shows the fallaciousness of the humanitarian argument against capital punishment.

Inflicting punishment according to the humanitarian idea, the safety of the injured is not to be considered, but simply the reformation of the injurer. Assuredly the reformation of the offender is one of the objects a humane judge will have in view in the adjustment of his judgments; but it cannot be viewed as the primary object, since the criminal has cut himself off from

consideration in acting contrary to the dictates of reason, his only claim to consideration, or as supplying the sole standard. The protection of the unoffending, if we reduce the question to a mere personal balance, is at least as important an object of the humanitarian as the reform of the offender. Moreover if we examine this theory critically, we find that we are reduced to this absurdity, that we can punish only when we can reform hence that the desperate and irreclaimable criminal cannot be punished at all. The present theory of punishment follows the principle that the more incorrigible a criminal appears to be by reason of his relapsing into crime, the longer and more severe should be his chastisement, but the humanitarian teaches the more incorrigible the wrong-doer is, the less is he to be punished and he is to be relieved in proportion to his steadfastness and persistency in iniquity. Hence in endeavoring to achieve morality they destroy it. To use the words of Horace Mann, "The object of punishment is the prevention from evil; it never can be made impulsive to good".

"The state, like man himself, together with the sovereignty which it enjoys, is the creature of the eternal law, one of the chief among the agencies through which the Infinite Reason works out its designs. Man is by his nature a social being. His inherent attributes and instincts irresistibly impel him into association with other men. His happiness and development depend upon the effect produced upon him by the actions and the reactions which in society alone are possible and hence human society is an essential factor in the advancement of the universe itself. But society implies peace and order. Conflict and antagonism are not society, nor is it possible that in an atmosphere of strife and contention human relations should long subsist and exercise their proper influence upon mankind.

The existence of society requires that rights should be defined and respected, that duties be recognized and observed, that injuries, when committed, should be redressed. It also requires that when necessary these rights should be protected, these duties enforced, and these wrongs punished by an authority which cannot be resisted or gainsaid. In a word the law must have a sanction if it is to subsist. Therefore, as sovereignty alone can adequately protect these rights, enforce these duties

and redress these wrongs, it follows that from the eternal law which establishes society the sovereignty of the State and its right and obligation to make and administer laws for its own government are likewise derived. Hence human laws made in accordance with the dictates of the Supreme Reason are sanctioned not merely by human authority but also by the authority of God."⁶

If the end for which civil society exists is to preserve justice and promote the common good of all concerned, it must of necessity enjoy the means adequate to that end. Experience has taught men that some criminals are so debased, so destitute of any idea of morality and have become so hardened in crime that they are insensible to any form of punishment other than the death penalty. Moreover there are some crimes that are so revolting that nothing less than death is capable of furnishing a proportional atonement. The very frequency of a crime must often supply a very strong ground for the infliction of a severe punishment. Consequently the right of the sword is an absolute *sine qua non* to society not only as a means of equalizing justice but especially as a deterrent to others. Furthermore, if the laws under which men live are violated; there is a disturbance of what was before, and this disturbance is the penal sanction of the law, otherwise the law, the violation of which was not attended by this disturbance, would be no law.

If no two human beings can live together without laws, neither can they without the penal sanction practically enforcing them. Penalty then is essential to law, but all crimes are not of equal enormity, and punishment must be proportionate to the offence; consequently such crimes as murder, matricide, etc. so is capable of restoring the moral order to its pristine condition.⁷ disturb the social order that no other penalty known to man

⁶ Blackstone, *Com* vol. 1 pp 47-49.—Robinson, A. M. *Jurisprudence*.

Cronin, *The Science of Ethics*, vol. 2 pp. 462-472.

Cardinal Mercier, *Manual of Modern Scholastic Philosophy*.

Vol. 2. (second impression) p. 328; 337-337.

Rikaby, *Moral Philosophy*, pp. 317-17. Lortie *Ethica*, p. 334.

Zigliara, "De auctoritate sociali", vol. 3, pp. 234-243.

"De origine societatis civilis", vol. 3 p. 228-234.

"De potestate judiciaria politicae auctoritatis", vol. 3. p. 251-257.

⁷ Coppens, *Moral Philosophy*, p. 152.

Cronin, *Science of Ethics*, Vol. 2; 472-477.

Lortie, *Ethica*, p. 330

Zigliara, vol. 3; 227. *Finis immediatus societatis civilis est procurare quibus et facilius et e...cacens hujus vtae imperfectam felicitatem socii consequi voleant.*

The law of exact retribution or vindictive justice demands that equity be preserved as far as it is possible between the injury inflicted and the punishment to be meted out. There are however some crimes that are so monstrous and unnatural that there is no method of punishment known to man other than the *ultimum supplisium* that is capable of equalizing justice. Hence death is inflicted not that it is always an equivalent for death but because it is the highest penalty that man can inflict and alone approaches a proportionate satisfaction.⁸

Nevertheless, there has come into being, of late years a school of modern thought which denies to man responsibility. The tenets of this naturalistic body may be summed up in the words of Professor Harry E. Barnes, "We have given up the notion of man as a free moral agent and have come to the conclusion that human conduct is the result of a vast number of influences, alike hereditary and cultural, which make our action at any time as thoroughly determined as any other natural phenomenon." This same doctrine is duplicated in the teachings of Clarence Darrow and Dr. C. B. Davenport.⁹

Where Professor Barnes gets his basis for such an argument is difficult to ascertain since the evidence of psychology, medicine and law proves the contrary to be true. To admit the negation of responsibility is to destroy the very foundation of all morality. If man is no longer responsible for his actions, he becomes a creature neither praiseworthy or blamable. All idea of merit and demerit is annihilated since an action to be meritorious or otherwise, must be free and proceed from a responsible agent. That the will is free is an indisputable fact of consciousness. Every man knows that he is free as assuredly as he knows his own existence. He knows himself as possessing the power of choice, of choosing one from two or more objects which may be before his mind. There is no normal being but knows that when he violates an obligation imposed by his conscience and does evil, that he might have fulfilled it and have

⁸ Coppins, *Moral Philosophy*, p. 152.

Rikaby, *Moral Philosophy*, p. 307.

Lortie, *EtEthica*, p. 350.

⁹ Professor H. E. Barnes, *The Crime Complex*, Current History vol. 21; 306.

Clarence Darrow, *Crime Its Cause and Treatment*.

Dr. C. B. Davenport, *Heredity, Culpability, Praiseworthiness, Punishment, Reward*. Popular Science Mo. July 1913.

done right. In this power of contrary choice, which is implied in the existence of will in its relation to right and wrong, is found the basis of moral responsibility and the reason for the praise and blame of conscience. Conscience, then, is an unimpeachable witness to this alternative power of the will. All moral distinctions are based on it. All law depends upon it and all punishment finds in it its reason and justification.¹⁰

The capacity of imputability Kraeplin says, "depends upon two elements. First, a faculty of intelligence; the general faculty of judging what is permitted or forbidden, what is useful or harmful, and the special faculty of comprehending the importance and consequence of the act which one commits. Secondly, the faculty of volition; that is, the faculty of choosing between several possible acts, and deciding after reflection and conformable to the tendencies of one's own personality. Hence imputability depends upon a certain amount of intelligence and will."¹¹ Both Binet and Kraeplin agree that normal man has the power of choosing between several possible acts and that he is therefore responsible. The criminal then, is a person whose intelligence is sound.

The theory of determinism repudiates the idea of free-will and makes man merely a biological product.¹² "His acts are absolutely determined for him on the basis of his biological heredity. Hence there is not the slightest iota of freedom of choice allowed to either the criminal or the normal citizen in his daily conduct."¹³

Most assuredly heredity and social environment does influence responsibility to a limited extent. It weakens a man's power of resistance but by no means does it destroy it. Moreover heredity and social environment weakens an individual's power of resistance only in so far as he has permitted himself to follow the lines of least resistance in an atmosphere of vice and wickedness. His condition is, in reality, the result of repeated crime and consequently he is at least responsible in *causa*. He chooses crime because he loves it. Binet says, "To our minds, neither the accumulation of physical stigmata nor the most

¹⁰ Cardinal Mercier, *Manual of Modern Scholastic Philosophy*, Vol. 1; 257-77.

¹¹ *Journal of Crim. Law and Criminology*, vol 5: 68.

¹² Dr. C. B. Davenport. *Heredity etc. Popular Science Mo.* July 1913.

¹³ Prof. H. E. Barnes. *The Crime Complex. Current Hist.* vol. 21; 306-31.

charged heredity is sufficient to stamp a man who commits a crime as irresponsible."¹⁴ Hence Binet maintains "that normal human beings are responsible for their acts, and that crimes can with justice be imputed to them. Irresponsibility can only arise when the subject is not normal."¹⁵

Even students of medicine tell us that though all action be determined by physiological brain state which immediately antecedes the action; yet that same physiological state is in part made up of past experience impressions.¹⁶ Such impressions influence the translation of the impulse into action. On this basis, then giving away to the impulse is indefensible, for the individual has choice; i.e. by virtue of the past experiences. And punishment for the sake of deterring others is necessary in order that these preventive brain impressions be created in others. Again, though some medical scientists maintain that irresistible impulse does exist, yet much uncertainty concerning the question is found among psychiatrists. Many conceive genuine cases of irresistible impulse as being exceedingly rare and as being always open to suspicion.¹⁷ From this standpoint it is easy to derive the corollary that psychiatrists themselves experience considerable difficulty in determining when such a state of mind obtains.¹⁸ In the face of such diversity of opinion among medico-legal authorities; how can a lawyer urge the irresistible impulse as an ameliorating circumstance?

To plead irresistible impulse as a defence for crime is to beg the question of our entire system of jurisprudence. Our American system of judicial procedure is based squarely upon the doctrine of responsibility. If by application of the irresistible doctrine a criminal is excused, then by the same token a defendant in a suit for breach of contract could excuse himself by maintaining that the breach on his part was irresistible, and that he is not responsible therefore for the damage of the plaintiff. If no punishment can be imposed upon one who violates his neighbor's natural and inalienable right of life, then how can punishment be imposed upon one who merely violates a

¹⁴ *Journal of Crim. Law and Criminology*, vol. 5.

¹⁵ *Journal of Crim. Law and Criminology*, vol. 5, p. 68.

¹⁶ Aschaffenburg, *Crime and Its Repression*, p. 262.

¹⁷ Singer and Krohn, *Insanity and The Law*, p. 161.

Rasanoff, *Manual of Psychiatry*, p. 322.

¹⁸ Jacoby, *The Unsound Mind and The Law*, p. 62.

Barret, *Legal Medicine and Toxicology*, pp. 552-58.

contractual right of his neighbor? To admit the theory of irresistible impulse and the consequent doctrine of irresponsibility is to adjourn the civil and criminal courts by denying their jurisdiction.

Moreover upon the question of irresistible impulse there is an irreconcilable conflict in the legal authorities. The doctrine that there can be an irresistible impulse that will excuse from responsibility for crime, one who is able to distinguish right from wrong is expressly rejected in the following cases. Reg. vs. Burton.³Fost. & F. 772; U. S. vs. Holmes.¹Cliff.981; People vs. Hoin.⁶²Cal.120; People vs. Coleman.¹N.Y.Crim.1. For other cases see Am. Digest.

In Choice vs. State. 31.Ga.424. it was held that responsibility depends upon the possession of will and not the power over it.

In State vs. Harrison.³⁶W.Va.729. the court held that if at the time of the act the criminal knows right from wrong and knows the nature and character of the particular act and its consequences, and knows that it is wrong and is hurtful to another, and deserves punishment, even though he be partially insane; yet he is responsible for his criminal act. In such cases no mere irresistible impulse to do an act will exempt him from criminal responsibility for such act.

In United States vs. Young 25.Fed.Rep.710. the court maintained that a man may be driven to a desperate and homicidal act by morbid impulse, but that the cases in which the defendant is wholly irresponsible are rare, the difficulty in the way of applying the test very great, and that the court was compelled to adhere to the right and wrong test until something better was devised. State vs. Bundy.²⁴S.C.439. held the same opinion.

In fine, if the objective in inflicting the death penalty is to deter others from criminal acts and thus safeguard the interests of society, this theory is not inconsistent with the theories of Behaviorism, Mechanistic Determination and Irresistible Impulse, since it has no immediate connection with moral wrongdoing. It simply strives to place before the minds of others than the persons punished a barrier, an inhibition or a fear against committing like acts." Hence why then should the mental state of the doer of the act make a difference in the consequence?"