## ORIGIN OF STATE PUNISHMENT.

"Punishment," says Oppenheimer, "is in its origin a measure of social hygiene." It is an operation which the state performs upon itself in order to preserve its well-being, a disinfectant to prevent contagion, an inoculation. The cause, the source of state punishment, is fear, *i.e.*, it is an act of protection, of self-defence:

"The acts first punished as crimes were such as imperilled, or were believed to imperil, the safety of the community, either by jeopardizing its security from external foes or by exposing it to supernatural dangers, to the vengeance of the Spirit World, to the risk of contracting the pollution of guilt to public calamities resulting from the quasi-mechanical operation of these occult forces which the deed set in motion."[1]

It has long been argued that private vengeance is the source of state punishment for crime. This contention, supported, as it is, by the great majority of authorities on the subject, can not be discarded without a careful examination. It is not necessary, however, to go back to the most primordial man, for I do not propose to enter into a discussion of the philosophy, nor the psychology, of vengeance, but merely to show that state punishment at its inception was not retributive, but utilitarian.

It will be sufficient for this purpose to turn to that state of evolution when man lived united in families closely bound by domestic ties and isolated from other similar groups. At this stage, as De la Grassiere puts it, vengeance is "neither a right nor a duty, but simply a fact." An injury to one member of the family has its immediate reaction in the passion felt in every other member to avenge him. It is the era of feuds which, unless something stops them, end in one family becoming totally subjected to the other.

As soon as these isolated families become ever so imperfectly welded into a community or tribe, the injury consequent upon strife between two units becomes apparent and unlimited vengeance gives way to the "*Lex Talionis.*" This appears to be the first attempt on the part of the community to compel its members to obey a custom at the risk of incurring the common enmity of the remainder of the tribe. It is to be noted that it is not a collective vengeance on the offender, but rather a restraint on the injured family. It is apparent, then, that this is not punishment by the state. If there is any punishment

[1] *The Rationale of Punishment,* Oppenheimer, p. 172.

it lies in the steps taken by the community to prevent excess of this law.

As property becomes a factor to the daily life of the community, avarice enters into competition with revenge, and compositions begin to displace the exactions in kind. It is at this stage that vengeance becomes a right. If one man kills another, the murderer's family must surrender him to the family of his victim or pay the dead man's price, for, in an age when man power was the determining factor in the social position and safety of a family, the loss of a member was an actual injury to every other member. It followed, then, that the murderer's family must compensate that of the deceased or be correspondingly weakened.

Disputes would naturally arise in the course of these settlements and weak families would consequently apply to the Chief to enforce the right which was theirs, as is done to-day in East African tribes, in the tribes of the Sandwich Islands, and elsewhere.[2]

Such a request would result, of course, in an investigation by the Chief as to the relative merits of each side. It is to be noted, however, that this is not in the nature of a criminal trial, but is to determine whether the "*right*" to compensation or retaliation exists. The state merely governs private vengeance, just as laws relating to business are enforced by the state to-day. The claimant has sometimes to give notice, as by Salic or Chinese law, or by "*Kataki*" of Japan; but, this done, he can freely proceed to revenge himself according to "*Lex Talionis.*" Oppenheimer says, "In whatever manner and from whatever cause the public authority acquires jurisdiction, the only question which the primitive tribunal is called upon to decide, is the existence or non-existence of the right of revenge or of a claim to compensation.[3]

Only those directly affected can institute proceedings; the plaintiff, himself, carries out the sentence of the Court, not as the agent of public authority, but in the exercise of his right; he is not bound to do so; and only he can pardon if the claim be established, public authority having no power to suspend the plaintiff's right of action when once it is established. The exercise of the sanction at the discretion of the injured party is, according to Austin, the distinction between civil and criminal procedure. The sentence of Outlawry was employed merely to get the accused into Court or to force payment from him as a judgment debtor.

Now, as we have seen, the vengeance of a small group like the

[2] Burton, *Lake Regions of Central Africa*, p. 662 (1860). Westermark, *The Origin and Development of the Mora* Ideas, i. p. 180.
[3] *The Rationale of Punishment*, Oppenheimer, p. 14.

family is not social, but private vengeance. An injury to any member is an injury to each other member separately. Social vengeance, it will appear, is a totally different thing. To use Greene's words, "Just as the love of God borrows the language of sensual affection," so social vengeance borrows the language of primitive retaliation: and the conceptions are almost as widely different. Individual or private vengeance is necessarily egoistic and self-centered. Social vengeance, on the other hand, arises out of that saintly quality, Pity, and is altruistic in its nature. The average man first feels sorry for the victim and prior to this sympathy he has no hostility toward the perpetrator of the crime. That is subsequent and arises out of his finer feeling.

The well-known theory, that punishment is "the passionate reaction of a community against an act that stirs its corporate conscience," has a still stronger following than that which finds in private vengeance the source of state punishment of crime. John Stuart Mill, Sedgwick, and Bain, all combine to find in the gratification of the collective and sympathetic resentment of the community, the source of criminal justice. Stephen says, "The criminal law stands to the passion of revenge in much the same relation as marriage to the sensual appetite.[4] Again, he says, "The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals the punishments which express it."[5] Westermark finds in public resentment the common ancestor of the custom of revenge and of punishment.

In speaking of the elements of crime, Durkheim contends that, to constitute a crime, an act must wound the feelings which in the community (1) Are shared by all its normal members; (2) Attain a certain average intensity; (3) Are definite and precise. Public resentment, however, is not the only sentiment which contains these elements. "It is incorrect, then, to say that an act gives a shock to the feelings of the public because it is criminal; it is criminal because it shocks those feelings."[6]

To recognize social vengeance as the mainspring of criminal punishment is to accept the theory that criminal law finds its origin in wrongs done to the individual. I have, however, attempted to show that this is not so, and, on the contrary, that wrongs to the individual may better be looked on as the source of the law of Torts. One cannot deny that there is this collective sympathy in primitive societies, but we have seen that even where they are comparatively well organized, it is not strong enough to produce independent action. The offender

[4] *General View of the Criminal Law*, Stephen, p. 98.
[5] *A History of the Criminal Law of England*, Stephen, vol. II, p. 81.
[6] *Rationale of Punishment*, Oppenheimer, p. 40.

goes unpunished if the injured party, himself, makes no move to retaliate.

To arrive at the true origin of criminal punishment we must consider the nature of those acts which were first punished as crimes. Steinmetz gives the following list as representative of acts punished as crimes by primitive peoples: Witchcraft, incest, treason, sacrilege and miscellaneous offences (mostly sexual).

Oppenheimer, while adopting this list as a model, slightly modifies it. He suggests the following grouping: Treason, witchcraft, sacrilege and other offences against religion, incest and other sexual offences, poisoning and allied offences, and breaches of the hunting rules.

*Hammurabi's Code* ordains capital punishment for the following: Misconduct in public office (par. 26, 33 and 34), for a votary to open an inn or enter a beer-shop (par. 10), for an inn-keeper to harbour seditious persons (par. 108), for giving short measure (par. 108), for a woman to commit bigamy while her husband is captive, if he has made provision for her (par. 133), for committing highway robbery (par. 22), for a woman to be accessory before the fact to the murder of her husband (par. 153), and for incest (par. 154-157).

"*The Ten Abominations*" of Chinese law were: Rebellion, *i.e.*, an attempt to change the divine order of things on earth, disloyalty to the Emperor, desertion and endangering the security of the state, parricide, sacrilege, massacre, *i.e.*, killing three or more of the same family, impiety (which included disrespect to parents), sowing discord in families, insubordination of inferior magistrates to those above them, and incest.

The Egyptian Code punished capitally the following crimes: Magic, sacrilege, treason, rebellion, conspiracy against the state, perjury, parricide, murder, and false accusation of capital crime.

The list of capital offences under Japanese law was similar: Conspiracy and other offences against the Emperor, sacrilege, emigration, murder of a near relation, murder of anyone under certain aggravating circumstances.

Several other similar codes might be cited. I will, however, quote only that of ancient Peru, which is a very fair sample of early legislation. This code punishes capitally the following: Treason, rebellion, corruption of magistrates, blasphemy, seeing a "chosen virgin," incest, sodomy, rape, abduction, fornication, parricide, homicide, larceny, and "*to be a loafer.*"

To gather the full force of these ancient codes we must remember the part which the supernatural plays in the psychology of primitive man. What man cannot understand, he fears. This, then, is why all

primitive codes attack magic except when performed by one privileged by religious office. It also accounts for the outstanding aversion to poison, which is nearly always found to be classed as magic in primeval civilizations.

Moreover, the primitive man understands by religion "A propitiation or conciliation of powers superior to man which are believed to direct and control the course of nature and of human life."[7] After every offence to his deities they must be propitiated or they will send down their wrath, not only on the offender, but upon the whole community. Something of the same idea may be seen in all the ancient codes now extant, *e.g.*, Numbers 19, 13: "Whosoever toucheth the dead body of any man that is dead, and purifieth not himself, defileth the tabernacle of the Lord; and that soul shall be cut off from Israel." Otherwise his offence becomes that of the whole community.

Glancing back over the ancient codes cited, it will appear that there are three great classes of offences punished as capital crimes: (1) Offences against the state, (2) religious offences, (3) magic and kindred offences. Self-protection and fear are thus seen to be the true motives underlying the first state punishment of crimes, *i.e.*, as stated in the quotation from Oppenheimer. (*Supra* (*1*)). The acts first punished as crimes were such as imperilled, or were believed to imperil, the safety of the community.

"For long periods of time the idea survives that the state is collectively answerable to the gods for the crime of any one of its citizens. When at last it gives way to the recognition of individual liability, to the principle that the wrongdoer alone is responsible for his misdeeds, the belief that punishment is divinely ordained has struck roots too deep to lose its hold upon the mind of man. The state, in striking down the malefactor, is now looked upon as fulfilling a divine mission. Social punishment has been divested of its utilitarian character and has become the blind instrument of divine justice."[8]

Because of the prevalence of this conception we find the early kings regarded as something more than mere humans. The nature of these super-beings may be best illustrated by the Hindu belief that the Rajah was composed of particles drawn from the chief deities. Incas was the "*Son of the Sun.*" Similar beliefs were held concerning the Mikado of Japan, and the Pharaoh of Egypt. Even in Greece he is hailed, if not as a god, at least as "*The man but for whose intervention no prayer was efficacious, no sacrifice acceptable,*"[9] and "*The man*

[7] *The Golden Bough*, 2nd ed., i. 63, Dr. J. G. Frazer.
[8] *The Rationale of Punishment*, Oppenheimer, p. 151.
[9] Fustel de Coulanges, *La Cité Antique*, 20*e* ed. p. 208.

*most powerful to conjure up the wrath of the gods."*[10] (In view of the foregoing paragraph this phrase of Sophocles is particularly significant):

"When religion is too advanced for actual deification of the king, he may yet be God's representative."[11] Here lies the germ of the "*Divine Right of Kings.*" To resist the will of the king is to resist the will of God in him and criminal law "ceases to be evolved out of the soul of the people."

The conception of the king as God's earthly representative compels the realization of his power over all things in the state. From this it is but a step to think of the king as owner of all things in the state and "*L'etat c'est moi*" is evolved. Thus all the rights of the subjects become the rights of the king, and in defending his own rights, the sovereign incidentally defends the rights of the subject. Out of this the realization that a wrong against the individual is a wrong against the state is at last born.

## The Right to Punish.

Whether the state should punish "*quia peccatum est,*" or "*ne peccetur,*" depends on the source of the states' authority to control the actions of its individual members. I propose to show in a subsequent section of the essay, that, unless the state be a theocracy, the mere agent and servant of the Divine, retribution can play no part in state punishment. It is for this reason that I say that the decision of the state to punish "*because a man has done wrong,*" or "*because it is not safe to leave him at large,*" must rest on the source of its authority to govern; and it is for this reason that we must pause for a moment to consider what is the real source of that authority.

Nations ruled by priests are the best examples of theocracy. The Jewish Nation from the time of Moses till the annointment of Saul, was absolutely theocratic and it would appear that, even after the institution of kingship, government was by "Divine Right," and Jehova was directly consulted by the sovereign.

A theocracy can exist under two sets of conditions: (1) Where the sovereignty rests in one person who is "*God's lieutenant*"; (2) where the sovereignty rests in the priesthood or the church. Without entering into a discussion on free will and pre-destination, we may conclude that no representative and democratic government, as we understand the terms, can be theocratic. The one is government by man, the other government by God.

[10] *Oedipus Rex*, Sophocles, 34.
[11] Hobhouse, *Morals in Evolution*, i-62.

A theocracy bases its right to punish on the right of its God or Gods, to do as may seem best with mortals. "Vengeance is mine, I will repay, saith the Lord." Under theocratic reasoning God delegates this power to the sovereign, and therein lies the justification of state punishment.

We have seen, however, that government by the people cannot, by its very nature, be theocratic. Where, then, in a non-theocratic state, lies the justification of state punishment?

We can do no better than to quote Beccaria: "Laws," he says, "are conditions, under which men, naturally independent, united themselves in society. Weary of living in a continual state of war, and of enjoying a liberty which became of little value, from the uncertainty of its duration, they sacrificed one part of it to enjoy the rest in peace and security."[12] He continues: "It is upon this, then, that the sovereign's right to punish crimes is founded; that is, upon the necessity of defending the public liberty entrusted to his care, from the usurpation of individuals."[13]

## Some Prominent Theories of Punishment.

I propose in this section to examine, very briefly, the constituents of punishment as contained in the best known theories, starting with those usually termed retributive. By retribution I conceive punishment simply and solely because of the commission of a crime and *for no other reason.* Retribution can no more be mixed with utilitarian motives than oil with water. Punishment may, however, be utilitarian up to a certain degree, and above that there may be a further infliction of *useless* suffering, which is retribution. It would seem that the only "*use*" to which retribution may be put is to make the criminal suffer. Inasmuch as it serves any other purpose, it is not retribution.

"Juridical punishment," says Kant, "can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime.*

"The penal law is a categorical imperative, and woe to him who creeps through the serpent windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the clear measure of it, according to the Pharisaic maxim: 'It is better that one man should die than that the whole people should perish.'"[14]

[12] *Essay on Crimes and Punishment,* Beccaria, p. 5. [13] *Ibid.* p. 7.
[14] *The Philosophy of Law,* Kant; Rosenkrantz, LXI, p. 80; Hartenstein, VII, 149; Caird, vol. II, 343.

"This is the right of retaliation (*jus talionis*); and properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty."

"Even if a civil society resolved to dissolve itself with the consent of all its members . . . the last murderer lying in prison ought to be executed before the resolution was carried out."[15]

It is apparent from the foregoing quotations that Kant finds in punishment a simple rather than a complex conception, and the synonym thereof is "*retribution.*" Oppenheimer (p. 202, Rationale of Punishment), however, quotes a section from "*Einleitung in die Rechtslehre,*" dealing with Lord Bacon's famous proposition concerning the two shipwrecked sailors and the plank, and another section from "*Kritik der praktischen Vernunft,*" both of which treat with deterrence as a proper object of criminal law.

Oppenheimer hails Grotius as the "intellectual father" of that school which would punish "*quia peccatum est,*" and ascribes to him the view that the criminal pays the penalty because, having committed a crime, he owes it, and "*for no other reason.*"

True, he finds in the law of nature justification for punishment, which is an evil of suffering which is inflicted on account of an evil doing, "*Malum passionis, quod infligitur ob malum actionis.*"[16] The evil doer, he maintains, ought to suffer evil.[17] He goes beyond mere retribution, however. Evil may never be inflicted for its own sake, but should be a means to a good end.[18] Punishment should be useful and should satisfy one of three ends: The utility of the offender, or of the sufferer, or of people in general.[19] The criminal may be removed, incapacitated, or reformed.[20] Punishment may have a good effect on others by its deterrent influence.[21]

In Hegel's theory, or, as it has been termed, "*The Logical Theory of Punishment,*" we have one of the most plausible, logical, impractical, and difficult theories in the whole realm of philosophy of crime and punishment. In order properly to understand it, we must first glance at Hegel's philosophy of life in general. Reason consists in the harmonizing of the individual with the universal. He holds that the reasonable, normal man will act according to *universal will.* Any act in contravention of the *universal will* is irrational.

[15] *Philosophy of Law*, Kant; Rosenkrantz, IX, 183; Hartenstein, VII, 151; Caird, 344.
[16] *De jure Belli et Pacis*, Grotius, i. 1.
[17] *Ibid.* i, 2.
[18] *De jure Belli et Pacis*, Grotius, IV, 1.
[19] *Ibid.* VI, 2.
[20] *Ibid.* VIII, 1.
[21] *Ibid.* IX, 1.

Further, "That only is real which is rational."

It follows from the first principle that crime is irrational, law being the concrete expression of the *universal will.* According to the second principle it is unreal, since it is irrational. "An accomplished violation of the law as law," he says, "is a positive external fact; yet intrinsically it is a nullity. This nullity is rendered manifest by the annihilation of such violence likewise accomplishing itself as a fact. This means the realization of the rule of law in the necessary process of its overcoming its own violation."[22]

Again, "What is null must manifest itself as such, that is to say, must declare itself to be violable. The criminal act is not the primary and positive, punishment supervening as the negative. It is the negative and punishment is, therefore, but the negation of a negation."[23]

His theory is not retributory, although it punishes, "*Quia peccatum est.*" Punishment is not an injury for an injury (*Lex talionis*) but an *injury of* an *injury*—a very different thing. His only justification of punishment is the exposure of the crime as unreal and the manifestation of law as real.

Let us now examine the corresponding "*Moral Theory*" of Bosanquet. Crime is not, as in Hegel's theory, a violation of the *universal will,* but "A violation of *right* within the *moral* community."

"If the rule is not to stand," he says, "is not, that is, to be, with a greater or less degree of consciousness, a persistent factor and make weight in the communal mind . . . then the act or fact must be cancelled, annulled, undone."[24]

Punishment is *prima facie* retrospective; retribution is its central character, its backbone, and main ingredient: "It is justice, pure and simple." "Deterrence and reformation are expansions, outgrowth of its central character, the negation of evil will."[25]

"The true place of deterrence and reformation in punishment is simply to determine the method and degree of details which no estimate of moral guilt can supply."[26]

Beccaria's theory of punishment introduces a new stage of thinking, in that it disregards the retributive element altogether. The following quotations will suffice to give the reader a complete grasp of it:

"It is upon this, then, that the sovereign's right to punish crimes

[22] Hegel, *Philosophy of Rights.*
[23] *Philosophy of Rights,* Hegel.
[24] *Some Suggestions in Ethics,* p. 190, 191, Bosanquet.
[25] *Ibid.* p. 195.
[26] *Some Suggestions in Ethics,* Bosanquet, p. 203.

is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals."[27]

"The intent of punishment is not to torment a sensible being, nor to undo a crime already committed."[28]

"The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from the committing of the like offence."[29]

Hobbes adopts the following definition of punishment: "An evil inflicted by public authority on him who hath done or omitted that which is judged by the same authority to be a transgression of the law, to the end that the will of men may thereby the better be disposed to obedience."[30]

From this he infers, "That all evil which is inflicted without intention or possibility of disposing the delinquent, or, by his example, other men, to obey the laws, is not punishment but an act of hostility, because without such an end no hurt done is contained under that name."[31]

This conception is well set out in dealing with the proportion to be kept between the benefit of the crime and the evil of the punishment. "It is of the nature of punishment to have for end the disposing of men to obey the law; which end, if it be less than the benefit of the transgression, it attaineth not, but worketh a contrary effect."[32]

The purpose of punishment as held by Jeremy Bentham, may be gathered from the following extracts from his works:

"Morality in general is the art of directing the actions of men in such a way as to produce the greatest possible sum of good . . . Legislation ought to have precisely the same object."

"Legislation has the same centre with morals, but it has not the same circumference."[33]

"Legislation can have no direct influence upon the conduct of men, except by punishment. Now these punishments are so many evils, which are not justifiable except so far as there results from them a greater sum of good."[34]

He also introduces the question of compensation to the injured party. This, however, is most decidedly not an object of criminal, but of civil jurisdiction, not a consequence of punishment, but of indebted-

[27] *An Essay on Crimes and Punishment*, Beccaria, p. 7.
[28] *Ibid.* p. 43.
[29] *Ibid.* p. 43.
[30] *Leviathan*, Hobbes, p. 209.
[31] *Leviathan*, Hobbes, p. 210.
[32] *Ibid.* p. 211.
[33] *Theory of Legislation*, Bentham, p. 60.
[34] *Ibid.* p. 60.

ness.[35] "In like manner," says Hobbes, "if the law impose a sum of money to be paid to him that has been injured, this is but a satisfaction for the hurt done him, and extinguisheth the accusation of the party injured, not the crime of the offender."[36]

Bentham holds the purposes of punishment to be five: *Example, reformation, incapacitation, compensation or satisfaction* and *economy.*[37]

The last two, I submit, are not properly included. The former is, as I have said, not an object of criminal law, but of civil; the latter is not a purpose of punishment but a guide to the methods to be used.

We now come to the pure preventative theory as laid down by Anslem Von Feuerbach. The whole purpose of criminal law is to deter. There is the law and its sanction (*i.e.*, the threat), and there is the infliction of the sanction. Both have the same object—to deter.

He is quoted by Oppenheimer thus: "(1) The objects of the legal *threat* of punishment is to deter all, as possible offenders, from violating the law. (2) The object with which it is actually *inflicted* is to render the threat of the law effective, since, without such execution, it would remain an empty threat. Since the law is to deter all citizens, and since the execution is to render the law effective, the *mediate* (ultimate) end of its infliction is likewise to deter all citizens *by means of the law.*"[38]

## Conclusions Drawn.

It is commonly said that the purposes of punishment are threefold: Retribution, Deterrence and Reformation. These last two, however, are both included in the wider term, *Prevention.* I propose, therefore, to divide this section into two main parts, (I), an examination of *Retribution* as a proper purpose of state punishment; and (II), a similar examination of *Prevention* as a just ground.

## I.

I hope I will not appear presumptuous when I say, that, in all my reading on this subject, I can find no argument which establishes retribution as a proper source of state punishment. On looking back over the authorities cited, it will be seen that only two of them include retribution as a ground of punishment.

Kant claims retribution as the sole purpose and end of punishment. Why? Because of two deeply rooted convictions: (1) The

[35] Bentham, *Works, Vol. I*, p. 396, 397.
[36] *Leviathan*, Hobbes, p. 213.
[37] Bentham, *Works, Vol. IV*, p. 174.
[38] *Rationale of Punishment*, Oppenheimer, p. 266.

wages of sin is death, (or the equivalent, that evil must come of evil); (2) Human personality must be respected.

His theory is not convincing, likewise, for two reasons: (1) It amounts to a command to return evil for evil,—to return evil, mark you, not that good may follow, but as an end in itself; (2) According to the first conviction cited above, one might ask, why should mere man interfere if by the will of the Divine, or in the course of Nature, evil will naturally result to the evil doer on account of his evil act.

Kant is consistent. He bases his argument on morals and defends it from a moral standpoint. Bosanquet bases his argument on a moral-logical basis and defends it as utilitarian. Let it be remembered that retribution is an end in itself, that it must of necessity have no ulterior motive, and Bosanquet may be confuted by his own words.

In "Some Suggestions in Ethics," (p. 194), he says: "What good does it do, we are asked, if it does not produce better states of consciousness in the mind of the past offender or of future possible offenders?" He answers, "It maintains the moral standard of the general mind and will."

Neither Grotius nor Hegel can properly be said to advocate retributive punishment,—for the former holds that for punishment to be good it should serve the utility of the offender (reformation), the sufferer (compensation), or the people in general (prevention of crime); while the latter would punish to manifest the law of reason (just as Bosanquet would punish to manifest the law of morality), a purely utilitarian purpose.

It would therefore appear that Kant is the only one who really advocates retribution and that he is actuated solely by his moral reasoning.

Now, it is evident that criminal law does not, and should not, enforce sanctions on account of moral guilt, for man is no proper or capable judge of moral guilt. He is not a proper judge, for all men have sinned and are consequently themselves immoral. Nor a capable one, for no man knoweth another's heart, and there have been instances of crimes where the perpetrator has been actuated by the highest motives. Most men guilty of high treason, for example, are sincerely doing what they believe to be best for others. Further, even when immorality is self-evident, the degree of moral turpitude will not be apparent. Does not Shakespeare say,

"For there is nothing either good or bad but thinking makes it so."[39]

Again, only to their Gods will men concede the right to punish *merely* because they have offended. It follows, as shown in Section

[39] *Hamlet*, Act 2, Scene 2.

One, that if the sovereign be conceived as either divinely guided, or a God himself, that he has this power of retributive punishment. This is the only case I know of where retributive punishment is justified.

The source of punishment is not the evil the criminal does to himself, but that which he does to others. It follows that the basis of his punishment should be the utility derived therefrom for others.

## II.

There is, therefore, only one purpose proper to state punishment, the prevention of crime. Perhaps I should say the prevention of crime through the treatment of convicted offenders against the criminal law, for the prevention of crime includes much that is not germane to the subject of punishment.

The reformation and education of the prisoner, incapacitation, deterrence, and selection, all these may be used as preventative measures against crime. Space will neither permit a review of methods formerly used to attain these ends, nor a discussion as to what methods will best realize them in the future. All I can do, is to indicate which I consider most important, and why.

Those systems of punishment which have held deterrence as the chief end of punishment, have been much criticized for appealing to one of the basest influences (*fear*) to effect their object. Admitting that fear is a base feature of man's make-up, is it not something to make the base fight against the base, to utilize evil to kill evil? As Bernard Shaw says, "There are people to be dealt with who will not obey the law unless they are afraid to disobey it, aand whose disobedience means disaster."[40]

Deterrence has two aspects. Firstly, it seeks to deter the offender from committing any more crimes. Secondly, it seeks to deter "future possible offenders," to use Bosanquet's phrase. It is this second aspect which is one of the greatest arguments in its favour, for the deterrent element in *punishment* is the only one which tends to prevent others giving away to criminal tendencies. I have emphasized the word "punishment," since it is obvious that there are other influences which tend to prevent the spread of crime, but they are not contained in punishment.

Nearly all authorities, in dealing with this phase of the subject, have pointed out that the degree of deterrence derived was dependent more on the promptitude and certainty of punishment than on its severity.

It is difficult to reform a criminal; but it is more difficult to reform

[40] *English Local Government*, Webb & Webb, p. 16.

a prisoner. The mere fact that an end is difficult will not excuse us from trying to attain it when that end is, as this one is, beneficial both to the state and the criminal. If crime be a disease, as some hold, then therapeutic treatment will take the place of reform in the theory of punishment. I do not think, however, that man is at present sufficiently able to tell when that reformation (or, if crime be a disease, that cure) is complete, to make it wise to make sentences determinate on such completion.

"The most certain method of preventing crimes," says Beccaria, "is to perfect the system of education." Victor Hugo holds, that "To open a school is to close a prison."

Modern criminologists have rendered a valuable service in this connection. Certain types of crime have been shown to be more prevalent among uneducated, than among educated classes. Education, then, may be the most suitable means of reforming such prisoners.

If a man can neither be deterred nor reformed, crime must be made a physical impossibility for him. Let his criminal tendencies arise from insanity, disease, moral deficiency, or what you will, the duty of the sovereign being "the procuration of the safety of the people" (Hobbes), and the right of the sovereign to punish being founded "upon the necessity of defending the public liberty" (Beccaria), it follows that the dangerous character must be incapacitated by imprisonment, or, if necessary, by death.

It is held by some that crime is an hereditary, mental or moral defect, or disease. There is, indeed, considerable evidence that tendencies to commit certain types of acts, which under our laws are criminal, are in many cases hereditary. Lombroso, Drahms, Ferri, and Boies all quote instances and statistics in support of this. But the percentage, in my opinion, is not sufficient to warrant the limitation of natural reproduction by artificial restraint. There may come a time when the hereditary influence in certain classes of crime is so definitely established that selection by sterilization or extermination will become a proper function of punishment. That time, however, has not as yet arrived.

I therefore submit to the reader of this essay that there is but one proper purpose for State punishment of crime, and that is the prevention of crime by deterrence, reformation, and incapacitation.

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