ON CRIME AND PUNISHMENT

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"Trying a man is easy," once said Mr. Justice McCardie, "as easy as falling off a log compared with deciding what to do with him when he has been found guilty."[1] These graphic words are somewhat of an exaggeration. They must be taken as rhetoric, not as an exact statement of fact. The dividing line between guilt and innocence is sometimes as fine as a pin's point; and, a judge, acutely conscious of his responsibility, must search his soul to its very depths before he can pronounce a verdict of guilty or not guilty. But McCardie's statement does serve dramatically to call attention to the difficult task which faces a judge when he has to pass sentence upon someone who has been convicted of a crime.

The inherent difficulty of this task is sometimes made more difficult by a want of expert, up-to-date, knowledge on the part of a judge. "The training of a judge before appointment," says Dr. Glanville Williams:

> . . . does not include the all-important question of sentencing policy, and there is no preparatory period during which the new recruit to the Bench is required to learn the actual working of the penal and remedial methods now established for the reclamation of wrongdoers. If his practice was at the Commercial Bar, he may even be largely ignorant of criminal law and procedure.[2]

In his autobiography, Claud Mullins, who served for fifteen years as a magistrate, speaks much to the same purpose:

> In his book, *The Sentence of the Court*, Sir Leo Page wrote with some courage that "there is nothing whatever in the professional education of a barrister which will fit him to pass sentence" on criminals. The result is, to quote this book again, that "under present day conditions the preponderance of the judges (and by this word Sir Leo meant all on the Bench of any criminal court) of this country are not required to possess, and do not possess, the skill and the knowledge they should have." I said much the same in the last chapter of my *Crime and Psychology*, though I was less frank than Sir Leo, as I was still a Metropolitan Magistrate when that book was published. Thus sentences in all courts are passed by "hit or miss" methods, as in the days before this modern science (of penology) came into existence.[3]

Some judges, excellent in other phases of their judicial work, have not even realized their shortcomings in the field of deciding what to do with an

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1. Quoted by George Pollock, in *Mr Justice McCardie*, (1934) p. 152.
2. *The Proof of Guilt*, (1955) p. 17.
3. *Fifteen Years' Hard Labor*, (1948) p. 181.

accused when he has been found guilty. In his book, *Crime and Psychology*, Mr. Mullins gives an excellent illustration of a judicial attitude which, happily, is becoming rarer, but which is still far from extinct. Lord Alverstone sat as Lord Chief Justice of England from 1900 until 1913. He was once asked by Mr. R. C. K. Ensor:

> . . . at a dinner whether he was interested in books on criminology and penology. He replied that he never read any, adding in his downright way, without the slightest suspicion of its absurdity, "I prefer to rely on common sense." What would now be thought of a doctor who, when asked about books on medicine, answered that he had never read any, but that "common sense" was his guide.[4]

In one of his lighter moments, George Bernard Shaw suggested a desperate remedy for curing such judicial unenlightenment:

> Judges, magistrates, and Home Secretaries are so commonly under the same delusion (that the criminal is better off than he deserves to be) that people who have ascertained the truth about prisons have been driven to declare that the most urgent necessity of the situation is that every judge, magistrate, and Home Secretary should serve a six months' sentence incognito; so that when he is dealing out and enforcing sentences he should at least know what he is doing.[5]

The introduction of such a policy would considerably lessen the attractions of an appointment to the judicial bench; but, to be serious, no such drastic policy is necessary. An open and enquiring mind does not need first-hand experience of prison to be able to deal competently with the problem of sentencing criminal offenders. Study and reflection are much more satisfactory tools for dealing with this perplexing problem. As a wit once said one does not have to be a hen to know the taste of an egg.

In former times, even for very minor offences, punishment took the form of removing a criminal offender from the world by way of the gallows, or from the country by way of transportation. Little imagination has been shown in dealing with the problem of punishment. As Morris Raphael Cohen once well said:

> . . . when we think of the great diversity of crimes, the paucity of our means of punishment is amazing. Death, imprisonment and money fine pretty nearly exhaust the field, just as the calomel pill and the lancet for blood letting exhausted the remedies of the old fashioned medical practice.[6]

In nine cases out of ten, when we speak of criminal punishment today, we mean depriving an offender of his liberty, for a definite period, by placing him behind bars. This is a confession of our inadequacy. "Of all methods of penalizing culprits," said that great pundit, Sir Paul Vinogradoff:

> . . . the one most usual in our days, imprisonment, appears to be the most unsatisfactory. There is nothing to recommend it but the ease of its application to large numbers of delinquents. It has been described by all competent observers as an active incitement to further wrong-doing . . .[7]

4. 3rd Edition, (1944) p. 207.
5. *The Crime of Imprisonment*, (1946) p. 19.
6. *Reason and Law*, Collier Books Edition, (1961) p. 66.
7. *Historical Jurisprudence Introduction*, (1923) p. 59.

What is criminal punishment—not in its various outward manifestations, but in its essence? How may it be defined? Dr. Philip A. Parsons offers this useful definition:

> Punishment, properly speaking, consists of pain or inconvenience imposed upon the offender by the will of society with a view to securing certain desirable results.[8]

Why does organized society punish criminal behaviour? What are the theories which govern the infliction of punishment? Two hundred years ago, Beccaria boldly held that "the only justifiable purpose of punishing offenders is the protection of society by the prevention of crime."[9] This sensible view has never commanded general acceptance. Various theories have been put forward to justify the infliction of criminal punishment. They may conveniently be reduced to five. These five are:

First, to secure for the public a period of protection from the offender. In this sense, punishment acts on the person of the offender by depriving him of his freedom, and thus, at least temporarily, of the opportunity to commit another offence. If the law adheres strictly to this theory, punishment is measured off in units of time to meet the crime, not the criminal. Emily Murphy, the first woman to be appointed a Police Magistrate in the British Commonwealth, once indicated the weakness of this theory of punishment. "The method now in vogue," she said:

> . . . is as if one sent a smallpox case, a fractured limb and a maternity case to the hospital and gave them all the same treatment, making them stay for an allotted period without any consideration as to whether they have recovered or not.[10]

Second, to deter others from the commission of offences. In this sense, punishment is presumed to act on the minds of others by instilling in them a sense of fear. As a spokesman for the old school, Sir John Salmond once said:

> Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him.[11]

This theory was once more popular than it is today; but its echo is still heard, from time to time, from the judicial bench. Some two hundred years ago, a prisoner who had been found guilty of stealing a horse, then a capital offence, said to the presiding judge, Mr. Justice Burnett, "It seems a hard thing, my Lord, for a poor man to be sentenced to death for stealing a horse." "Oh, you are not sentenced to death for stealing a horse," replied His Lordship, "you are sentenced to death in order that horses may not be stolen."[12] Many experts who have made a special

8. *Crime and the Criminal*, (1926) p. 251.
9. Cited by Professor P. J. Fitzgerald in *Criminal Law and Punishment*, (1962) p. 206.
10. Quoted by Byrne Hope Sanders, in *Emily Murphy Crusader*, (1945) p. 148.
11. *Jurisprudence*, Eighth Edition, p. 121.
12. As recounted by Mr. Justice McCardie at a meeting of Magistrates, and reported in (1927) 164 *Law Times*, 318.

study of the mainsprings of human behaviour question the validity of this reasoning. To what extent the punishment of Peter can serve to keep Paul law-abiding is a good question. Roy E. Calvert and Theodore Calvert have pointed out, in their book *The Lawbreaker*, that when pick-pocketing was a capital offence, pickpockets habitually attended public hangings to ply their illicit trade, brazenly risking their necks in the very shadow of the gallows.[13]

Third, to deter the criminal himself from future crime. In this sense, punishment acts on the offender's mind, "counteracting his criminal habits," writes Dr. C. S. Kenny, hopefully, "by the terror it inspires, or even eradicating them by training him to habits of industry and a sense of duty."[14] Many authorities question whether a man can be kept from criminal behaviour by the fear of punishment alone. They reason that hope springs eternal in the offender's heart. If his offence is premeditated, he expects to get away with it. If his crime is one of sudden temptation or passion he does not have time to think of the possible consequences to himself. William Seagle makes so bold as to suggest that "the criminal does not, like the capitalist entrepreneur, calculate profit and loss, assess the risk of his venture, and study the price of his crime."[15]

Dr. Glanville Williams points out that:

> . . . there is a sense in which it may be said that the mere fact that punishment has to be applied demonstrates that that punishment was incapable of deterring. "Every instance of the infliction of a punishment is an instance of the failure of that punishment."[16]

Fourth, to gratify the demand of the public for primitive justice. Nietzsche may have been thinking of this theory of punishment when he said, "Penalty so calleth itself Revenge. With a lying word it feigneth a good conscience."[17] Primitive criminal laws gave full scope to the retributive aspect of punishment. Mr. Justice Holmes once said that though the passion which feeds on retribution is not one to be encouraged, yet it is one which must be taken into account. "The first requirement of a sound body of law," he said:

> . . . is that it should correspond with the actual feelings and demands of the community whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.[18]

Fifth, to reform the criminal. This is the theory of punishment which faces the future, which enlists the aid of modern scientific knowledge; which

13. (1933) p. 12.
14. *Outlines of Criminal Law.* My edition is the 13th, published in 1929, p. 31.
15. *Men of the Law*, (1947) p. 229.
16. *Criminal Law: The General Part*, (1953) p. 579.
17. *Thus Spake Zarathustra* (Modern Library Edition), p. 150.
18. *The Common Law.* My copy is the 39th printing, p. 41.

declares, with Sheldon Glueck, that "the sentencing judge of the future must be a social physician;"[19] and says of criminal offenders, with Havelock Ellis:

> . . . what they need is not a cell for philosophic meditation, but an active treatment directed to the cure of defects which vary in each individual and can only be discovered after careful expert investigation. That is to say that what is needed is not a prison but what has been termed a "moral hospital." And, as in hospitals for sick bodies, the period of detention for sick souls cannot be fixed beforehand by judges completely ignorant of the delinquent before them, but must be indeterminate. The claims of humanity thus become one with the just claims of society for protection from the injuries inflicted by those who have not yet learnt what they owe to society.[20]

Black-letter lawyers have been slow in coming to recognize the claims of the reformative theory of punishment. The law, until it felt the impact of modern social science, tended to regard a criminal offender as a person to be punished, not as one to be reformed, both for his own good and for the general good of the community. But the old order of things has been changing gradually. The signs for the future seem hopeful.

In any discussion of the theories of punishment, one fact must be kept in sight: organized society has a right to protect itself from criminal offenders. In exercising its right of self-defence, it may take such steps, consistent with humanity, as may be necessary to protect itself effectively from those addicted to criminal behaviour. As a means of protecting itself from lawbreakers, society tried severity (and savagery) of punishment over a period of centuries. Severity had a long, long inning, before the truth slowly dawned that it was not an effective deterrent of crime. Indeed, in some quarters, this truth has not dawned even yet.

Legal history amply demonstrates that severity of punishment has always tended to defeat its own purpose. In England, when over two hundred criminal offences were punishable by death, crime flourished in that country as never before or since. In an essay in *The Rambler*, Dr. Johnson put his finger on the reason for this sorry state of affairs:

> He who knows not how often rigorous laws produce total impunity, and how many crimes are concealed and forgotten for fear of hurrying the offender to that state in which there is no repentance, has conversed very little with mankind.[21]

Not only moralists, but men of practical affairs shared Johnson's view of rigorous penal laws.

Speaking as a practical administrator, in support of a measure to humanize the criminal law, Sir Archibald Macdonald, Chief Baron of the Court of Exchequer, from 1793 to 1813, pointed out that:

> The infliction of capital punishment on crimes not of the most atrocious nature, renders prosecutors reluctant to proceed, witnesses reluctant to give evidence, and juries reluctant to convict; and therefore the chance that a criminal has of escaping with impunity is greatly increased by the existence of that punishment for such crimes.[22]

19. *Crime and Justice*, (1936) p. 226.
20. *My Confessional*, (1934) p. 185.
21. Everyman's Edition, p. 186.
22. Quoted by Sir William Holdsworth, *A History of English Laws*, vol. xiii, (1952) p. 284.

In his *Observations on the Criminal Law*, published in 1810, Sir Samuel Romilly gave a number of illustrations in which the humanity of juries triumphed over the severity of the law. In one case a woman pleaded guilty to the theft of two guineas, two half-guineas and forty-four shillings from a private dwelling. To save her from the gallows, the jury insisted on recording a verdict that she had stolen only thirty-nine shillings. In another case, a man was charged with stealing goods from a shop to the value of twenty-five shillings. The jury returned a verdict of guilty of the theft of goods to the value of four shillings and tenpence. Such subterfuges in the interests of humanity could not but help to bring the law into disrepute.

In 1797 the Bank of England was given authority to issue bank notes under the value of £5, and the forgery of these notes was made a capital offence. Because of the severity of the sentence, juries were reluctant to convict for the offence. As Gibbon put it: "Whenever the offence inspires less horror than the punishment, the rigor of penal law is obliged to give way to the common feelings of mankind." In 1830, a petition was signed by 725 hard-headed bankers from 214 cities and towns, and was presented to Parliament, praying "that your Honourable House will not withhold from them that protection to their property which they would derive from a more lenient law."[23]

An excellent illustration of two basic, and fundamentally opposed, approaches to the problem of criminal punishment is offered by the Ontario case of *Regina* v. *Jones*.[24] In this case an accused pleaded guilty to three charges of indecent assault, involving three girls of tender years. The presiding magistrate sentenced him to pay a fine of $150.00 and costs in respect of each charge. The Attorney-General appealed from these sentences. The appeal was heard in the Court of Appeal of Ontario by Chief Justice Pickup and Mr. Justices Laidlaw, Aylesworth, Chevrier and Schroeder.

Chief Justice Pickup wrote a judgment, with which Mr. Justices Aylesworth, Chevrier and Schroeder concurred. This judgment approached the problem before the Court from a strictly conventional legalistic point of view—a point of view in high favor with Crown prosecutors and policemen (with, of course, some exceptions.) After stating that a psychiatrist, who examined the accused, had reported that the accused, who suffered from a form of sexual repression, was not likely to repeat the offence and that a prison term would be detrimental to his condition, the Chief Justice continued:

> These are all considerations relating to the rehabilitation of the respondent and, in my opinion, entirely overlook the element of deterrence to others in the imposition of sentence for a criminal offence. It may be that this particular respondent, after continuation of psychiatric treatment, will not repeat the offence, and there is a possibility of his being cured of his condition by such

23. Fitzgerald, *Op. Cit.*, p. 212.
24. (1956) O.W.N. 396.

> psychiatric treatment, but these are matters of grave uncertainty. I think I would agree that, so far as the condition of this particular respondent is concerned, a prison term may be detrimental to his recovery, but in my opinion the offence is too serious for punishment by a fine or by suspending sentence and placing the respondent upon probation. It is said that the prison term will not have any deterrent effect upon other persons who are truly sex perverts. That may be so, but I do not think it justifies disregarding the deterrent effect upon those persons whom sentence will deter and who might be disposed to commit an assault of this character.

In a dissenting judgment, Mr. Justice Laidlaw took a broader approach to the problem—an approach which saw the problem, in its social implications, as more than a strictly legal problem. "From the standpoint of the safety of the public," he said:

> I am satisfied that no useful purpose would be served by sending the respondent to prison, but, on the contrary, there is substantial likelihood of detriment to him and increased danger to society upon his release.
>
> Then, would a term of imprisonment imposed on the respondent in the unusual circumstances of this case deter others from committing criminal acts of sexual misbehavior? In my opinion it would not. Certainly it would not restrain others who suffer from mental maladjustment or illness of a kind that makes them unable to resist the driving and overpowering sexual impulse to do a wrongful act, nor in my opinion would it be any appreciable restraint or deterrent on those persons who are vaguely and inaccurately described as "ordinary" or "normal," over and above their certain knowledge, and the warning given now and many times before by the Courts that their wilful sexual misbehavior will certainly be punished by imprisonment except in the most unusual and extreme circumstances.

Mr. Justice Laidlaw concluded his judgment with this affirmation of his faith in the modern theory of criminal punishment:

> Finally, I consider the matter of reformation. That consideration, in my opinion, is and ought to be one of the prime objectives of progressive penal science. The reformation and rehabilitation in society of the respondent depends upon the treatment for his mental condition. I cannot place him in the general category of criminals, and his social restoration would be impeded and made difficult in the extreme by subjecting him to a term of imprisonment for his "sporadic outburst" attributable to mental maladjustment.

As the poet says:

> And diff'ring judgments serve but to declare,
> That truth lies somewhere, if we knew but where.

In *Regina* v. *Jones*, four judges took one view, and the fifth judge another view. Where does the final truth lie? The answer to this question is not to be found simply by tallying-up votes. The voice of a majority does not speak for all future time. Sooner or later, its accents may fade. Many majority opinions, "many fighting faiths" have been overturned during man's long and tedious journey in search of ultimate truth; which, of course, he shall never find, but to which he will approach ever more closely, unless he loses the race between education and catastrophe which has become accentuated since his recent discovery of the means to annihilate himself.

No man can be certain of what the future may bring. But there is one thing that we do know. With the growth of scientific knowledge there

have been evolving steadily more enlightened methods of dealing with criminal offenders. We do know that the future has never been with those who sought to cleave to the old ways; as did Lord Ellenborough, Lord Chief Justice of England, for example, when, in 1810, he rose in the House of Lords to speak in opposition to Sir Samuel Romilly's bill, proposing the mild reform of barbarous criminal laws. "The learned judges are unanimously agreed," said the Lord Chief Justice, speaking with sincere passion:

> . . . that the expediency of justice and the public security require there should not be a remission of capital punishment in this part of the criminal law. My Lords, if we suffer this Bill to pass, we shall not know where to stand—we shall not know whether we are on our heads or on our feet. If you repeal the Act which inflicts the penalty of death for stealing to the value of five shillings in a shop, you will be called upon next year to repeal a law which prescribes the penalty of death for stealing five shillings in a dwelling-house, there being no persons therein—a law, your Lordships, must know, on the severity of which, and the application of it, stands the security of every poor cottager who goes out to his daily labor.[25]

More than a century and a half has passed since Lord Ellenborough spoke these amazing words. From the vantage point of time we know that he was talking nonsense. What will those who come 150 years after us think of our present penal methods? "The penology of the future is treatment," said Judge Curtis Bok, "not to fit the crime but to fit the prisoner. Some day we will look back upon our criminal and penal process with the same horrified wonder as we now look back upon the Spanish Inquisition."[26] Time may prove these strong words to be no exaggeration.

25. Quoted by C. G. Oakes, in *Sir Samuel Romilly*, (1935) p. 213.
26. *Star Wormwood*, (1959) p. 50.