Wm. Davis

MONOGRAPH

ON

SENTENCES FOR CRIME,

WRITTEN FOR THE

NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS,

BY

FREDERICK HOWARD WINES,

Secretary of the Illinois State Board of Public Charities.

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SENTENCES FOR CRIME.

Preface.

The increase of crime in the United States, in proportion to the population, is a demonstration of the failure of existing methods of dealing with it, and must arrest the attention of thoughtful and honest men. No single answer to the question, what is to be done? will cover all that should be done, in the way of preventive measures, the more vigorous prosecution of criminals, and the improvement of morals in the community at large. I confine myself to the question, what should be done with criminals after their arrest and conviction? I do not even propose to discuss the relative value of different modes of punishment, but to speak only of punishment by imprisonment. My special purpose is to throw light, if possible, upon the vexed question of the indeterminate sentence, not as an advocate nor as an opponent of it, but with as much judicial impartiality as may be within my power.

PART FIRST.—THE INDETERMINATE SENTENCE.

I.—The Indeterminate Sentence Defined.

What is the indeterminate sentence?

Time Sentences.

Properly speaking, it is a sentence of imprisonment, whose duration is not determined in advance, either by the law or by the courts. It is a sentence with no minimum nor maximum limit. It is therefore the opposite of a time sentence.

Labor Sentences.

The first voice raised against time sentences, so far as I know, was that of Archbishop Whately, of Dublin, in 1829, or a little more than a half century ago. He suggested that the convict, instead of being imprisoned for a certain length of time, should be sentenced to perform a given amount of work. He desired to see the experiment of labor sentences tried, believing that the exchange would be an improvement.

Capt. Maconochie, of Norfolk Island, apparently without any knowledge that Whately had preceded him, expressed the same opinion. In his mind it took the form of the Mark System. In his own words: "The mark system proposes, 1. That instead of sentencing criminals for a time fixed, they be required to earn, in a penal condition, a proportion of marks corresponding to their several offenses. 2. That these marks be used to stimulate and restrain them, precisely as money is used to stimulate and restrain free people in ordinary life. 3. That a reasonable number be thus credited to them daily for work performed; a fair charge be made in them for provisions and other supplies furnished; moderate fines be imposed

in them for misconduct; and the balance, after all deductions made, alone count towards liberation." This principle, he says, is "just that of Fine, with Imprisonment till it is paid."

Definite labor sentences are no more indeterminate, than are definite time sentences; yet they approach somewhat nearer to the idea of the indeterminate sentence, inasmuch as the length of imprisonment is made to depend more or less upon the will of the prisoner himself; and this was Maconochie's thought, for he argues in favor of the adoption of the mark system on the ground that "everything would be gained in dealing with prisoners, were their will won over. Under the influence of time sentences, it is active for evil; under task sentences, it would be drawn to good."

Sentences for Life.

The obverse side of the indeterminate sentence appears in the Fourth Report of Mr. Frederic Hill, Inspector of Prisons for Scotland, made in 1839, in which he expresses himself as follows: "As regards the question, how are convicts to be disposed of after their release from prison, supposing transportation to be abolished, I would humbly suggest that it is desirable that those whom there can be no reasonable hope of reforming should be kept in confinement through the remainder of their lives." Again, in 1843, he wrote: "There are persons who are wholly unfit for self-government, who should be placed permanently under control."

The same view was taken by Mr. Hill's brother, Recorder Hill, of Birmingham, in the original draft of a report prepared by him for the Law Amendment Society, in 1846, the year after Maconochie's return from Australia. "The right to isolate an individual from society is founded on its being repugnant to the welfare of one or the other of the parties, or both, that they should be together, until a change is wrought in the individual. If, however, he is so constituted as to resist this beneficial change, the reasons for retaining him in a state of separation, instead of being removed, gather strength."

Reformation Sentences.

The same year that Recorder Hill wrote the report cited, M. Bonneville de Marsangy delivered a discourse on Preparatory Liberation, before the court and the bar, at the opening of the civil tribunal of Rheims, in 1846. In it he still more nearly arrived at the pres-

ent conception of the indeterminate sentence. "If the judge," he said, "could know, in advance, the results of punishment, he would for the most part adjust punishment to the measure strictly necessary to effect the reformation of the offender. But the judge is required to fix the duration of punishment in advance. It follows that, in many cases, the reformation of the convict may be effected some time previous to his discharge; but in other cases not at all. Now, as the skillful physician ceases or continues his medical treatment, as the patient has or has not arrived at a perfect cure, so, on the first of these two suppositions, on the full reformation of the prisoner, punishment should cease; since further detention has in his case become unnecessary, and by consequence as inhuman toward the reformed man as it is uselessly burdensome to the state."

The Ticket-of-Leave.

It is of the highest importance that we should distinguish sharply between the indeterminate sentence and the principle of conditional liberation or the ticket-of-leave. Much confusion of thought and some error have resulted from the neglect of this distinction. Conditional liberation is possible under a code which provides for fixed sentences for crime; the indeterminate sentence is a substitute for fixed sentences. Thus Mr. Brockway said, at the Cincinnati Prison Congress, in 1870: "Sentences should not be determinate, but indeterminate; by this is meant (to state briefly) that all persons in a state, who are convicted of crimes or offenses before a competent court, shall be deemed wards of the state, and shall be committed to the custody of a board of guardians until, in their judgment, they may be returned to society with ordinary safety and in accordance with their own highest welfare." Several of the writers and speakers at Cincinnati expressed the same opinion, and the Congress adopted a resolution to the effect that "Peremptory sentences ought to be replaced by those of indeterminate length. Sentences limited only by satisfactory proof of reformation should be substituted for those measured by mere lapse of time."

The history of the ticket-of-leave will be given by me presently, but I wish first to conclude all that I have to say upon the subject of the indeterminate sentence, properly so called, as just defined, without minimum or maximum limit.

II.—The Indeterminate Sentence Ideally Considered.

Objections to Time Sentences.

The argument against time sentences was succinctly stated by Mr. Brockway, in a paper on Prisoners and their Reformation, contributed by him to the International Penitentiary Congress at London. "Any predetermined graduation of time sentences for crimes must appear to those affected thereby as vindictive in spirit, thus destroying that spirit of harmony between the law and the subject so essential to obedience. The attempt to retribute to a criminal what is proportional to his offense, either by imprisonment or by imposing fines, produces a pernicious effect, both upon him and upon all who are his interested observers, because the penalty must seem inadequate—either insufficient, in which case the effect is to encourage crime, if it exerts any influence whatever; or exaggerated, tending to exasperation and depression; or if by any possibility the penalty imposed should seem to be just, it is then esteemed expiatory, and therefore, when endured, absolutory. It will be readily seen how, in either case, such impressions are a hindrance to reformation.

"The present system of sentences unavoidably supplies the mind of the prisoner with an object of thought so fascinating as to prevent the necessary process of reformation. I allude to the date of termination of his sentence, and the expectation of renewing the experiences of his former life."

Short Sentences.

The injurious influence of short sentences for crime, often repeated, is universally admitted and deplored. In the opinion of Lord Brougham, "short imprisonments are utterly useless."

Long Sentences.

The injurious influence of imprisonment, when unnecessarily protracted, is believed to be equally great.

Mr. Milligan has said, in his article on Executive Pardons, read at Cincinnati, "To keep a man in prison from a mere ideal sense of justice, until hope, self-respect and manhood give place to a morose, indifferent or vindictive spirit, is by no means the best method to repress crime. Every conscientious and closely observant prison officer knows of many prisoners under his charge who, if he would confess it to himself, would be saved to society and the ranks of honest industry, if, by executive clemency, they were made citizens again."

How much has been written on the subject of prisoners for life! Sir Walter Crofton has even gone so far as to say that a separate prison for life prisoners is the missing link in our existing prison systems.

Unequal Sentences.

Again, the indeterminate sentence is a protest against the existing inequality of sentences.

This was the ground on which it was advocated in the Declaration of Principles circulated in advance of the meeting of the Cincinnati Congress. "The law fixes a minimum and maximum for the period of incarceration, leaving a broad interval between the two extremes, so that a wide discretion is left to the courts in determining the length of each individual sentence." After citing some striking illustrations of the inequality of sentences pronounced by courts for the same or similar offenses, the writer remarks: "Surely, such inequalities—and they are occurring every day—are beyond all bounds of reason. They engender great dissatisfaction among prisoners, and the discipline suffers in consequence." This evil has been animadverted upon, before the Conference of Charities, at Cleveland by Mr. Henry W. Lord, and at Madison by Col. Burchard. Discretionary power vested in the court can have no other result.

Thus, in England, Sir Edmund DuCane remarks that "the graver sentences of long duration are a matter of apparent chance; a sort of unthinking, conventional fashion prevails among judges, in passing sentences of penal servitude. They administer their five, seven, ten, five, seven, ten, apparently as unintelligently and parrot-like as

the childish jingle of ding-dong-bell, ding-dong-bell." And M. de Lamazan, vice-president of the tribunal of Vienna, says, in a preliminary report prepared for the International Penitentiary Congress at Rome, "the most important and at the same time the most difficult task which devolves upon a judge is that of finding a measure by which to apportion justly to each prisoner the duration of his incarceration."

Contradictory Codes.

Judge Young, of Minnesota, pointed out another aspect of the inequality of sentences, arising out of the multiplication of codes due to the local criminal jurisdiction of states, at the Conference of Charities at St. Louis, last year. Among other illustrations given by him, he said: "Suppose that a man, under peculiar temptation, commits burglary in Alabama; the mitigating circumstances are such, that he receives the lightest penalty which the law allows, which is one year in the penitentiary; after his release, he crosses the line into Louisiana, and, under like conditions, commits the same offense; under all the circumstances, and without any knowledge of the former offense, the court is disposed to give him the lightest punishment which the law permits, and so they hang him. And that man will never be able to tell whether the causes to which this difference in punishment for the same offense is due, are legislative, judicial or climatic. For the same offense in New Jersey, a fine of ten dollars would meet the requirements of the law." He added, that the differences in the criminal codes of the several states "appear to be entirely arbitrary, the degree of severity of each depending more upon the temper of the legislature than upon the nature of the offense. More of harmony could perhaps be secured by the adoption of a national code, but the same objection would still exist in the administration, unless we could in some way codify the several courts of the country."

Proportionate Sentences.

The indeterminate sentence commends itself to those who, impressed with the impossibility of adjusting punishment to guilt, assume that retribution forms no part of the judicial intention of punishment for crime. It appears to me unfortunate that it should have been advocated on this precise ground. The effect of such advocacy is to prejudice the public mind against it, and so to

alienate from it support which it might otherwise receive. To avoid a diversion from the point at issue, I have thrown into the form of a note some remarks upon the theory of punishment; but disputes concerning it can have no practical outcome, and they will never lead to an agreement between the disputants. The only remedy for injustice is justice. The denial of the necessity or possibility of justice in the administration of the criminal law is not essential to an acceptance of the principle of the indeterminate sentence; for some of the most earnest supporters of that principle are firm believers in retributive justice, and in the need of exemplary punishments, among whom I may name Sir Walter Crofton, M. Bonneville de Marsangy, and Capt. Maconochie. It is enough to say that the progress of civilization is marked by a steady abatement of the severity of legal punishments; that vindictive penalties for crime are improper and unwise; that measures of repression and deterrence have far less practical effect than is commonly supposed; and that the indeterminate sentence is, in this regard, in the direct line of the general movement of the best thought both of Europe and America upon the prison question.

What the Indeterminate Sentence Proposes.

The strength of the indeterminate sentence lies not in its merely negative merits as a remedy for existing evils in criminal jurisprudence, but in its positive power to accomplish two distinct and desirable ends, namely: to reform criminals who are susceptible of reformation, and to relieve society perpetually of the presence of such as are irreclaimable. It proposes to institute reliable tests for determining to which of these two classes—the corrigible or the incorrigible—each individual convict belongs, and to treat him accordingly. It commends itself, therefore, both to those who believe in the reformation of criminals and to those who do not. The former hope that it may prove the means of their rehabilitation; the latter, of their extirpation. In either event, society will be rid of them and of the perils arising from their association with honest men. If the one method of dealing with them fails, the other may succeed.

The Reformation of Criminals.

That the reformation of criminals is one of the ends to be sought in the administration of the criminal law is not disputed; nor is it a new thought. In a room of the prison of St. Michele, at Rome,

Pope Clement XI., nearly two centuries ago, caused to be inscribed the motto, *Parum est improbos coercere pœnâ, nisi probos efficias disciplinâ.* And John Howard wrote. "To reform prisoners, or to make them better as to their morals, should be the leading view in every house of correction, and their earnings should only be a secondary object. We owe this to them as rational and immortal beings, nor can any criminality of theirs justify our neglect in this particular."

As to the possibility of their reformation, no one can deny that many of them have reformed, and have, after their discharge from prison, led honest lives. The only question is what proportion of them are reformable. That more are not rescued is largely due to the lack of intelligent and persistent effort in this direction, and to the want of faith in the possibilities of prisoners, as well as in the power of God.

The philosophy of the indeterminate sentence, in its bearing upon the reformation of convicts, is the influence which it is believed to have in securing their co-operation in the process. This it does, first, by convincing them that, under the law, there is no prospect whatever of their being allowed to resume a life of crime; second, by impressing them with the conviction that society, in taking this course with them, is not actuated by a vindictive purpose, but by a desire to promote their welfare, at the same time that it protects itself; and finally, by keeping alive in them the hope that they may be able to secure their release through their own exertions.

Two comparisons are frequently employed to illustrate its aim—the insane hospital and the training-school for imbeciles. In the Cincinnati Declaration of Principles, it was said: "Crime is a sort of moral disease, of which punishment is the remedy; the efficacy of the remedy is a question of social therapeutics, a question of the fitness and measure of the dose."

There is an undoubted resemblance between some forms of crime and some forms of insanity. More than that, there is, physiologically speaking, a relation between them. But Dr. Despines, who is a champion of the indeterminate sentence, cautions us against supposing them to be identical. "Let it not be imagined," he says, "that I look upon the criminal as diseased in such a sense that, like the insane, he stands in need of medical treatment. If, in certain cases, crime is committed under the influence of a pathological cerebral condition, little apparent to the magistrate, but in general recognized by the physician versed in medical jurisprudence,

the ordinary criminal, the criminal who peoples the prisons, is almost always healthy in body; his mental state does not grow worse, like that of the insane patient, in the sense of the gradual destruction of all his faculties. Let us then settle this preliminary point, namely, that the criminal is not a patient, and that, in this respect, he must not be likened to the insane."

If we regard crime as moral idiocy, the experience of our training-schools for feeble-minded ought to furnish some useful hints as to the probability of eliminating or overcoming it. But all that is claimed by the superintendents of institutions for idiots is, not that idiocy can be cured, but that the idiot may be modified and improved, so as, in a certain percentage of cases, to be self-sustaining under competent direction; not that the process of development can be carried to the point of obliteration of the distinction which divides idiocy from normal intellectual capacity, but that it can be carried to a certain point in selected cases, while the existence of a large number of hopeless idiots is conceded, for whom custodial care is all that is practicable. And the method of training pursued is that recommended, more than thirty years ago, by Dr. Seguin, which has been described as a physiological education of defective brains, based on cultivating the hand, eye and ear.

Another view of the criminal character was presented at Stockholm, by M. Kühne, director of the penitentiary of St. Gall, in Switzerland, namely: that the successful treatment of convicts for their reformation depends not upon any prison system, but upon the character of the education given in the prison. "What is penitentiary treatment," he said, "except delayed education? Is not its true aim to supply that which has been overlooked in the education of the child, that which has given to his character a false bent and made of him a criminal?" The only question which he cared to discuss was that of the proper duration and nature of penitentiary education.

This is the view taken by Mr. Brockway, who said at Cincinnati, "If culture has a refining influence at all, it is only necessary to carry it far enough, in combination always with due religious agencies, to cultivate the criminal out of his criminality;" and at St. Louis, "The great lever for lifting prisoners into a higher moral and intellectual atmosphere is their education."

But Dr. Despines, after pointing out that the criminal character is the result of the absence or deficiency of the moral faculties, goes on to say that "the understanding, however great, does not

prevent or diminish the shock caused to the reason and the moral liberty of the criminal by his moral insensibility; on the contrary, the understanding, when guided exclusively by perverted moral instincts, becomes a power all the more dangerous, in proportion as it is developed. Mere intellectual knowledge has very little influence in holding back these morally insensible natures from the perpetration of the crimes to which they are urged by their evil instincts," especially when their "moral idiocy extends to the imbecility or absence of the sentiment of fear—a thing by no means rare." He quotes with approval the remark of Gov. Seymour: "Crime grows in skill with every advance of the arts and sciences; knowledge is power, but it is not virtue; it is as ready to serve evil as good."

Whatever may be in fact the seat of criminality; whether it is in the physical constitution of the brain, whether it is disordered cerebral action, or due to defective education, or the outgrowth of moral depravity; upon any theory whatever of its origin, all who hope for a cure must agree that time is requisite for the operation of the agencies by which such cure can alone be effected. If, for the application of the cure, it is necessary to gain possession of the person of the criminal and hold him in custody during the process, the experiment must fail, if the subject of it is released prior to the determination of the probability of a cure. Evidently, the time needed for this can not, in individual instances, be foreseen; and from this point of view, the absurdity of fixed sentences for crime is apparent.

Incapacitation.

But if the criminal character proves ineradicable, if its victim is incurable, what then?

The indeterminate sentence proposes to hold him a prisoner for life.

Said Recorder Hill, in 1855, in his charge to the Grand Jury, "As no training, however enlightened and vigilant, will produce its intended effect on every individual subjected to its discipline, what are we to do with the incurable? Gentlemen, we must face this question. We must not flinch from answering that we propose to detain them until they are released by death. You keep the maniac in a prison (which you call an asylum) under similar conditions; you guard against his escape until he is taken from you, either because he is restored to health or has departed to another world.

If, Gentlemen, innocent misfortune may and must be so treated, why not thus deal with incorrigible depravity? This is a question which I have asked times without number, without ever being so fortunate as to extract a reply."

Discrimination.

The indeterminate sentence, as has thus been shown, rests upon a clear recognition of the distinction which exists between criminals of different types.

Privy Councillor d'Alinge, of Saxony, at the Congress of London, characterized the criminal as a moral invalid, whom we desire to help. But those who are so depraved that they have no power of doing good remaining, and those who still have sufficient power to rouse themselves and strike out a better path on the strength of their spontaneous resolves, are to be discriminated from each other. To the first class, in whose case another will must be substituted for their own, he thought that we should say, "You shall become a better man;" but we should teach the second class to say, "I will become a better man."

At the Stockholm Congress, this distinction between habitual and casual criminals was again insisted upon by M. de Wahlberg, professor in the University of Vienna. The treatment to be accorded to those whose crimes are the expression of a physical and moral depravation resulting from their previous life, and to those whose offenses are exceptional and sporadic, should be radically different.

M. Von Lizst, professor in the University of Marbourg, still further subdivides habitual criminals into two groups—those who are and those who are not susceptible of reformation. He suggests that the incorrigible should be incapacitated, the corrigible reformed, and the occasional criminal intimidated.

And M. Van Hamel, professor of law in the University of Amsterdam, adopting this triple classification, argues that for the first group the law should prescribe imprisonment for life; for the second, the indeterminate sentence; and for the third, a definite sentence, not to exceed a maximum limit to be fixed by statute, but discretionary with the judge in respect of the minimum.

Tests.

But prior to the application of a reformatory discipline to the prisoner, it is not possible to form an estimate of the degree of depravity which marks him as belonging to one class or the other, the corrigible or the incorrigible.

The criminal must be tested, in this regard, which can only be done while he is under duress, either in the prison or outside. I defer the examination of this point until I come to speak of the practical application of the indeterminate sentence.

Juvenile Delinquents.

Let us now consider briefly to what extent the way has been prepared for the adoption of the indeterminate sentence, by the accomplished introduction into the criminal code of measures which involve the abandonment of fixed penalties for crime, and the grant to the prisoner of power to shorten the duration of his imprisonment by good conduct.

Juvenile offenders are not sentenced for a term of years, proportionate to the gravity of their offenses, but are committed, irrespective of their age, to a reformatory institution during their minority. They may be released at any time by the managers, when satisfied that their reformation has been achieved, or that the interests of society will not be jeoparded by their discharge. The indeterminate sentence is merely an extension of the same method of procedure to adults. If crime is moral idiocy, and idiocy is prolonged infancy, resulting from arrested development, the law of guardianship, which applies to idiots as well as to infants, might probably be interpreted to include criminals who are of the imbecile type.

Good Time Laws.

Laws by which a commutation of sentence is given, for good behavior in prison, have been passed by nearly all the states of the Union and by the government of the United States. Under the operation of these laws, the maximum period of time during which the prisoner can be held in custody is the number of years named in the sentence pronounced upon him by the court; the minimum period is the same, diminished by the total amount of good time allowed him by the statute of commutation; between these limits, the actual duration of his incarceration depends upon himself.

The indeterminate sentence is a variation of this method of pronouncing sentence. It is virtually a life sentence, which may be

The first law authorizing a commutation of sentence for good behavior while in prison was that passed by the legislature of New York, in 1817, but never enforced. In 1836, the state of Tennessee enacted a commutation law, which is still in force. But the good time laws of this country are not traceable to either of these states, but to the example of the state of Ohio, in 1856, followed by Iowa in 1857, Massachusetts in 1859, Wisconsin in 1860, Michigan in 1861, New York and Connecticut in 1862, Illinois in 1863, and so on.

commuted, not through the action of the executive, but by the prison officers, acting under the direction of the statute, and basing their action on that of the prisoner himself.

Fixed Sentences.

Still another line of thought leads up to the indeterminate sentence. Under the threefold distribution of political power between the legislature, the executive and the judiciary, the legislature alone is authorized to define what shall be regarded and punished as crimes. It has also the right to specify what shall be the punishment for every offense. The vesting of this right in the popular branch of the government is a guaranty of freedom; it protects the citizen against the tyranny of rulers and of courts.

The penalty attached to a specific offense by the code may be variable or invariable. Beccaria favored the highest possible degree of precision in the code. "In every criminal case," he said, "a judge should form a complete syllogistic deduction, in which the statement of the general law constitutes the major premise; the conformity or non-conformity of a particular action with the law, the minor premise; and acquittal or punishment, the conclusion." The discretionary power which he feared to grant to judges seems, however, to have been rather discretion as to the definition of crimes, by interpretation, than as to the degree of punishment, which probably was not in his mind.

The Code Napoleon is an example of a fixed and invariable scale of penalties.

Discretionary Sentences.

But the character of an act is not the test or measure of the guilt of the man who commits it. To form a just estimate of the degree of reprobation which it merits, the circumstances which extenuate or aggravate it must also be considered; the motives of the actor and the injury resulting to individuals or to the community. These can not be weighed by the legislature which frames a code.

Legislatures, therefore, in this country, seek to relieve themselves of a portion of the responsibility which naturally belongs to them, by conferring upon courts of criminal jurisdiction the power to fix penalties. The legislature prescribes a maximum and minimum limit of imprisonment or pecuniary fine for each offense listed in the code; but within these limits the power of the court is absolute.

This transfer of authority and responsibility is unquestionably a source of great embarrassment to judges, for two reasons:

The first is the difficulty of estimating the relative magnitude of crimes. One of the oldest and ablest judges in Michigan, a writer of standard authority, who had had thirty years' experience on the bench, said to Mr. Lord: "I have long since ceased to form for myself any conception or idea whatever of the moral status of any prisoner whom I may have brought before me."

The second is the impossibility of knowing definitely what amount of punishment in each case will be approved by public opinion, which is the original source of all law; whether the punishment inflicted will be sufficient to satisfy the public demand for an adequate expression of the horror which the crime inspires, and yet not excessive. For insufficient punishments lead to the assumption of authority by mobs; and excessive punishments defeat the ends of justice, by weakening the popular desire for a vigorous prosecution of crime.

To these may be added a third, namely, the impossibility, in a country like ours, of ascertaining the previous criminal history of the convict.

Thus we are led up to the question whether a redistribution of power might not be a wise step in advance, in criminal jurisprudence; whether it might not be well to restrict the responsibility of the legislature to the definition of crimes; and that of the courts to the determination of the guilt or innocence of the prisoner at the bar; but to entrust to the executive, as represented by the authorities directly in charge of the prison, the duty of deciding at what stage of imprisonment the ends sought thereby have been accomplished, and the convict may safely be released. This, in the final analysis, is the precise question involved in the proposal to adopt the indeterminate sentence.

Pardons.

To governors, as to judges, the indeterminate sentence might prove a welcome relief, by diminishing the frequency of applications for pardon. The conditional liberation which this system contemplates, though not a pardon, is a substitute for it.

Recapitulation.

To sum up all that has been thus far said, the indeterminate sentence offers itself to us as a remedy for the admitted evils of time sentences, (short or long), of life sentences, unequal sentences, dispro-

portionate sentences and retributive sentences; it holds out to us the hope of a real reduction in the number of criminals at large, either by their reformation or their incapacitation; and it is foreshadowed by the existing laws relating to juvenile offenders, the commutation of sentences, and the discretionary powers of courts.

When we consider how many distinct lines of thought tend in its direction, like pathways converging at a common center, in what a clear light it puts so many of the problems of penology, and what a power it has to fix the position of disputants in the various controversies regarding the proper treatment of criminals, in order to the more effectual suppression of crime; it is not surprising that it has proved already a fruitful theme of discussion, and that it continually attracts a larger measure of attention on the part of thoughtful men. Even the most extreme statement of it is useful, by awakening public interest in a question than which none can be of more vital consequence to society.

A Caveat.

The desire to rid the world of criminals, by their reformation, is noble; it is akin to all that is godlike in human nature. The extermination of the criminal class, by their reclamation and rehabilitation, would be an achievement worthy of commemoration by pen, pencil and chisel; it would add volume and sweetness to the music of the spheres.

But have we indeed faith in such a result? Is not the hesitation which is manifest in the acceptance of the new method due to a doubt whether it can redeem its glowing promises?

On the other hand, the selfish desire for protection, born of the sentiment of fear and hatred, willing to eradicate from the community those whom it fears, at any cost, regardless of the demands of that ideal justice which, it argues, has no place in criminal jurisprudence, is a sentiment less admirable. Might it not, if pushed to an extreme, defeat itself by its own excess?

"I do not think," said Dr. Channing, in his Discourse on the Life and Character of the Reverend Dr. Tuckerman, "only or chiefly of those who suffer from crime. I plead also, and plead more, for those who perpetrate it. In moments of clear, calm thought, I feel more for the wrong-doer, than for him who is wronged. In a case of theft, incomparably the most wretched man is he who steals, not he who is robbed. The innocent are not undone by acts of

violence or fraud from which they suffer. They are innocent, though injured. They do not bear the brand of infamous crime; and no language can express the import of this distinction. What I want is not merely that society should protect itself against crime, but that it shall do all it can to preserve its exposed members from crime, and so do for their sake as truly as for its own."

III.—The Indeterminate Sentence Considered Practically.

When, from the theoretical advantages of the indeterminate sentence, we turn to the contemplation of the practical difficulties in the way of its adoption, they rise before us like some mountain barrier seen from the plain below.

Its adoption involves: (1) the entire revision of the criminal code, and (2) the reconstruction of our prison system throughout.

Before this can be brought about, there must be created a public opinion on the subject of crime and punishment, foreign to any of which we have had experience.

The Criminal Code.

The criminal code of all civilized nations is founded in the perception of the moral distinction between offenses and the recognition of degrees in guilt requiring gradation in penalties.

The indeterminate sentence is the assimilation of all offenses and of all punishments.

To go no deeper into the subject, the law makes a broad classification of offenses under the two heads of felonies and misdemeanors. Is this distinction to be maintained or abandoned?

I find, in fact, that some who uphold the indeterminate sentence in theory, favor its application to misdemeanants, but not to felons; others, to felons, but not to misdemeanants; others, to both; while still others would classify criminals according to the number of times that they have been convicted, and confine the indeterminate sentence either to casual or to habitual criminals, as the case may be. This uncertainty arises from the double application of the law, which seems to some to promise an earlier release than the present system, while to others it appears to promise more complete protection by means of longer detention.

For my own part, I can see no reason for any restriction of its application to all offenders alike, if it is sound in principle and beneficent in practice, as is claimed. Unless it is applied to misdemeanants and first offenders, it must be less effectual as a reformatory agent; and unless it is applied to felons and hardened criminals, it will fail to rid society of their presence. Yet, in its application to first offenders, it is in direct contravention of the accepted rule of law, that punishment for a first offense should be merely nominal, especially where the consequences are not serious.

As to degrees in guilt, Edward Livingston has said that courts must compare the evil which results from a given offense with that which would result from the infliction of punishment, and weigh the one against the other, in order to determine what degree of punishment is just. Does the indeterminate sentence accept or reject this principle? I quote also from Beccaria: "If an equal penalty is attached to two crimes of unequal injury to society, the greater crime of the two, if it promises a greater advantage than the other, will have no stronger motive in restraint of its perpetration." On its face, the indeterminate sentence ignores this difficulty.

If, however, it is said that the officers of the prison must take into account the gravity of the crime, in passing upon the liberation of the convict, I ask, what guaranty have we that they will be competent for this duty, or honest in its discharge? And again, supposing them competent and honest, how can the criminal know in advance what their judgment will be? I fear that, under that system, the law would lose its value as a teacher of morals.

If, on the contrary, it is said that it is not proposed to estimate the gravity of offenses, but only the moral state of the man by whom an offense is committed, then it is pertinent to inquire how a man's moral state is to be estimated otherwise than by his acts? and if the morality of actions is beyond the scope of human capacity or authority to pass judgment upon them, is not the morality of human character and motives still more difficult of determination?

Prison Discipline.

Three important questions relating to the administration of the indeterminate sentence have next to be met: (1) What are the methods to be adopted for securing reformation? (2) By whom are they to be carried into effect? (3) How is it to appear when they have accomplished their purpose?

The first and third of these questions arise equally under the system of conditional liberation; and it will economize time, to postpone their consideration until that topic is reached in this discussion.

But what are the qualifications which are requisite in the chief executive officer of a prison organized for the reformation of convicts?

He should, first of all, be in sympathy with the reformatory purpose of the law, and have confidence in the possibility of reclaiming the men committed to his charge; for without faith in himself and in them, he is powerless for good in this direction. He should be a judge of men, capable of forming a correct diagnosis, so to speak, of the physical, mental and moral condition of each prisoner subjected to examination by him, and of seeing through the artful pretences by which criminals seek to impose upon their keepers, without therefore concluding that their professions and promises are totally unworthy of credence. He should have a just appreciation of the actual and relative value of labor, education, and religious training, not only in general, but in their application to individuals; for each prisoner will require to be treated in accordance with his personal characteristics and capacities; routine treatment is of no more value here than in the practice of medicine. In order to do this, it is important that he should be, if not technically an educated man, at least a man of native intellectual force, with mental faculties fully developed and strengthened by use; and, if not professedly a christian man, yet a man of the highest moral character, with a profound respect for religion, and no constitutional tendency to skepticism, least of all himself profane or a scoffer. He must be essentially a kind man, of humane disposition, who rules more by love than by fear; for it is the affections of prisoners which chiefly need to be awakened, through contact with him, and nothing else than love has any power to soften the heart and make it better. At the same time he must be just, free from all weak sentiment, firm and inflexible, whose word can not be questioned, and whose resolutions can not be shaken. His moral perceptions need to be both quick and accurate, and to dominate over his will, which, in all other respects, should be indomitable. Finally, he must have the gift of patience in an unusual measure.

To find such men, or those more or less nearly approaching the ideal standard here sketched in outline, is at all times difficult; yet, for the successful application of the ineterminate sentence, it is

essential that they should be found, and, when found, retained in office. The political habits of thought of the American people render the probability of such a result very remote. But if the discipline of a prison is not reformatory; if reformation is not its aim and its effect; if it is not in the hands of men of adequate capacity and of elevated character; then it would be the height of injustice to commit to prison, for an indefinite period, any convict. To demand of him that he shall reform, while in prison, and deny to him the means of reformation, would be to require bricks without straw. To hold him for life a prisoner, because he can not accomplish an impossibility, would be to commit an outrage upon him, beyond the power of language to characterize as it deserves. Far better trust to the reformatory influences exerted outside of prison walls, in the ordinary course of life.

This is perhaps the greatest practical difficulty in the way of the acceptance of the indeterminate sentence. The necessity for the highest order of ability in the warden of a prison under that system would be even greater than at present, since he would be called to the exercise of semi-judicial duties, and must have a sufficient knowledge of law for their proper discharge. He would also be, in a certain measure, himself the chaplain of his prison, which would necessitate his being a man of religious character and devotion not less pronounced than are expected of a clergyman faithful to his trust.

Whether, in the face of obstacles such as these, the indeterminate sentence, properly so called, will ever be more than an ideal, is doubtful. The conditional liberation of prisoners under definite sentences is in principle closely allied to it, and probably includes all which is essential in it, without being open to the same objections. We will now proceed to consider that.

PART SECOND.—CONDITIONAL LIBERATION.

Conditional liberation is not the indeterminate sentence. The indeterminate sentence has no maximum nor minimum limit.

The law of the state of New York provides for the conditional liberation of prisoners sentenced to the Reformatory at Elmira; but it does not sentence any inmate of that institution for an indefinite period of time. The language of the statute is: "Such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted."

It is probable that many persons have declared themselves in favor of the indeterminate sentence, who really meant nothing more than that they favored conditional liberation, as practised at Elmira, which is quite another proposition.

History of the Ticket-of-Leave.

The prison question can never be comprehended by any person who does not study it historically. So studied, it appears that the progress of prison reform is inseparably connected with the history of transportation of convicts to Australia by the English Government.

The British Parliament, in 1718, enacted that all convicts sentenced to imprisonment for not less than three years should be sent to North America. It made no provision for their transportation, and in fact they were brought over by private individuals, masters of vessels, who sold them, on their arrival, to planters, for a term of years, in payment of the expense of the voyage, unless they were able to pay their own way, in which case they were set at liberty upon their arrival.

The American Revolution put a stop to this practice, so repulsive to the colonies most affected by it; and England found herself obliged to provide for her own criminals at home, until the discov-

ery of Australia opened to her a new outlet for those whom she would not tolerate upon her soil, if she could rid herself of their presence.

On the eighteenth of January, 1788, Commodore Phillip, who had been commissioned as Governor of New South Wales, landed at Botany Bay, with eight hundred convicts. When, in the course of years, the expiration of the term of sentence of convicts in Australia, and the arrival of colonists not under sentence, had created a class of free citizens of the new country, who were engaged in the work of developing it, it became possible to assign convicts to such citizens as laborers. But the evils which grew out of the system of assignment led to a Parliamentary inquiry in 1837, and its abandonment.

It was about this time that the government invented the ticket-of-leave, as it was called. The convict, having served his "probation" on the hulks, if he had conducted himself well, was shipped to Australia, and, on his arrival, was given a certificate, which enabled him to hire himself out to any citizen who would employ him; and in case of misconduct on his part, the government reserved to itself the right to withdraw his ticket.

In 1847, Parliament passed a bill for the division of the term of imprisonment into four stages: (1) cellular confinement, (2) labor on the public works, (3) transportation, with a ticket or the promise of a ticket-of-leave, and (4) conditional liberation. At Portland, where there was an establishment for the employment of convicts upon the public works, they were divided into classes, according to their previous history and the gravity of the crime proved against them, but passed from one class to another by good conduct.

But the opposition of the colonies to the entire system of transportation was so intense and persistent, that, in 1853, by a new bill, Parliament authorized the substitution for it of penal servitude, in the case of prisoners sentenced for not less than fourteen years: the same bill provided for the issue of tickets-of-leave to convicts incarcerated on English soil.

This, in brief, is the history of the origin of conditional liberation.

Recorder Hill said of it, in his charge to the Grand Jury of Birmingham, in 1855: "It embodies two most salutary principles: First, that the criminal should have the opportunity of working his way out of gaol; and second, that he should, for a limited period,

be liable to be deprived of his liberty so regained, if his course of life should be such as to give reasonable ground for belief that he has relapsed into criminal habits."

The Irish System.

In 1854, Capt. Walter Crofton was appointed Chairman of the Directors of Convict Prisons in Ireland. For his services in the organization of the Irish prison system, he was made a Baronet.

The course recommended and carried out by him was, that no convict should be liberated on ticket-of-license without proving his fitness for the privilege by industrious conduct during detention; that his conduct should be tested by a system of marks, and by his being placed, towards the termination of his period of detention, with diminished supervision, in a position analogous to that of freedom.

Sir Walter Crofton's interest in prison discipline was first awakened by the charges of Recorder Hill; but the elements of his system were derived from the writings of Capt. Maconochie, whose principles he applied in the solution of the problem of the successful introduction into the United Kingdom of the ticket-of-leave.

Without turning aside to speak of the spread of the principles and methods of the Irish system into England, Australia and other countries, the partial introduction of it into the United States appears to have been largely due to the efforts of the late Dr. E. C. Wines. In 1866, in his annual report for that year, he proclaimed his adhesion to it. "Can the Irish system," he wrote, "be adopted to advantage in our own country? For my own part, I have no hesitation in returning an affirmative answer, with emphasis, to this question. There are, to my apprehension, but two obstacles in the way. These are: the vastness of our territory, and the inefficiency of our police."

Elmira.

The establishment of the Elmira Reformatory was the American offshoot of the movement whose history I have so succinctly sketched in outline. Mr. A. B. Tappen, one of the State Prison Inspectors for the state of New York, called the attention of the State Comptroller to the need of an intermediate prison, on the reformatory plan, in 1863. The bill for the appointment of a commission to select a site for a new state prison, introduced by Senator Chap-

man, in 1868, was amended, at the instance of the New York Prison Association, so as to designate the new institution a Reformatory, and in that form it became a law. The commissioners, of whom Dr. Theodore W. Dwight, of the Columbia Law School, was one, and Mr. Gaylord B. Hubbell, warden of the Sing Sing Prison, was another, reported to the legislature a plan of organization, in which they proposed that no person be sentenced to the Reformatory whose age is less than sixteen nor more than thirty years, or who should be known to have been previously convicted of any felonious offense; that the main design of the institution should be reformatory, as distinguished from penal; that the sentence should, in every instance, be until reformation, not exceeding five years; that the contract system of labor be discarded and the prisoners employed by the state; that the buildings be so constructed as to admit of the classification of prisoners; that the board of managers be charged with the duty of determining when reformation has taken place; and that instead of the English ticket-of-leave, the board be empowered to appoint an inspector of discharged convicts. They selected Elmira as the location of the Reformatory. These suggestions were substantially adopted, and thus the foundation was laid for the work of our friend and colleague, Mr. Brockway.

Conditional liberation, as practised at Elmira, has in it all the elements of the indeterminate sentence, except the power to hold the prisoner beyond a definite limit. It aims at the reformation of the prisoner; it supplies to him the most powerful of all motives to submit to the reformatory processes of the prison, namely, the hope of liberty as a reward; it divides prisoners into classes, and they pass into a higher or lower grade according to their conduct and record; it discharges them on parole, when all the preliminary conditions of discharge have been fulfilled by them; it retains in its own hands the right to return to the prison any convict who violates his parole. At the same time, it is fair to remark that the results obtained with a selected class of prisoners are not a sufficient basis upon which to found positive predictions of the consequences of the application of the same methods to all prisoners, without distinction.

Prison Systems.

The question of reformatory methods opens up the long continued and never settled controversy over prison systems—the congregate and the cellular. The importance of this controversy is, in my

judgment, greatly over-estimated by the participants in it. That system is best, which is administered best. No convict was ever reclaimed but through the exertion of personal influence over him for good; and such influence may be gained and exercised in any prison, under any system. Systems are valuable in proportion as they afford facilities for its acquisition and conserve its fruits. But the principle of conditional liberation lends itself more readily to the congregate than to the separate system. This will appear, as we proceed. Yet M. Stevens, of Belgium, stated, at London, that in his country, conditional liberation takes place, under certain circumstances; and Mr. Vaux, of Philadelphia, in a paper contributed by him to the Stockholm Congress, appears to accept the principle of the indeterminate sentence in full.

Agencies.

A more important inquiry relates to the reformatory agencies which are essential, under any system. These are three—labor, education and religion. A prison organized without either can be nothing else than a moral pest-house.

But as the physician compounds his prescriptions, not merely of certain ingredients but in certain definite proportions, so the success or failure of the prison to reform prisoners may depend largely upon the degree of relative importance attaching to each of these three elements in the mind of the officers in charge, as well as upon the mode of their administration.

Labor addresses itself to the physical nature of the convict, education to his intellect, and religion to his conscience. Any asymmetrical development of him is inadequate and injurious. What he requires, for his restoration to a normal type, is the restoration of the lost balance between his faculties. He needs to have those faculties most exercised, in which he is most deficient.

For this reason, it seems to be indisputable that, inasmuch as criminals as a class are most deficient in the moral sense, it is the moral sense before all which in them needs cultivation. Intellectual culture, unless the prisoner is mentally defective, is of secondary consequence; and labor, except in so far as it is essential to his health, is principally valuable on account of its reflex influence upon his moral nature. Nothing which fails to reach and stimulate that, will produce the desired alteration in his sentiments.

Tests.

But what shall be the test of reformation?

Recurring to the threefold constitution of human nature above alluded to, and the resultant triple division of the instrumentalities in a warden's hands for achieving the aim which he has in view, it follows that the tests of a prisoner's progress while in prison are also three, no more and no less, namely: (1) the amount of labor performed by him, and the manner in which he does it; (2) the degree of attention paid by him to his intellectual culture, and the advance made by him in knowledge, in the prison school; (3) obedience to rules, and especially the observance of religious duties, together with the utterance by him, from time to time, of correct moral views and sentiments, uncontradicted by his actions as a prisoner.

The determination of the moment of cure must be, in a prison, as in a hospital for the insane, a matter of judgment on the part of a man who has had opportunities for observing the prisoner or patient, and is believed to be capable of arriving at a correct decision.

Marks.

In order to a just estimate of individual under treatment, some form of record of their condition from day to day is important. Obviously the most practicable method of keeping such a record is by marks, as children are marked in school. Mere marking should not, however, be mistaken for the "mark system" of Capt. Maconochie. But an approach to his system is made, when, in addition to a record of marks, resort is had to "progressive classification."

Progressive Classification.

By progressive classification is meant the division of the population of a prison into groups, the composition of which is governed by the character of the prisoners as shown by their conduct. Prisoners are promoted or degraded from one grade to another, according to their deserts. The prisoner must ultimately work his way into the highest grade, and remain there for some specified time, before he can be released upon parole.

At this point, we meet the objection of the friends of the separate system of imprisonment, that there can be no classification in prisons; that each individual is a class by himself; and that every step in the direction of classification is a concession to the principle for which they contend.

English law makes the cellular stage of imprisonment the initial stage. Perhaps we might do well to do the same. But the prisons of the United States are not constructed on the separate plan, and we must make the best of what we have.

Paroles.

The conditions upon which a parole may be granted are various. At Elmira they are: that the prisoner shall go directly to the place designated and remain there, if practicable, for at least six months from date, that he shall report to the superintendent on the first of every month, that he shall not change his employment or residence without first obtaining the consent of the managers through the superintendent, and that he shall in all respects conduct himself with honesty, sobriety and decency, avoiding low or evil associations, and abstain from intoxicating drinks.

The question has been much discussed, where should the right to grant conditional release be vested: in the executive or in the judicial department of the government? For various reasons, it seems to be better that the prison officers should be responsible for it, chiefly because the court must, in any event, act upon their testimony.

Whether they should also possess the power of absolute release, as at Elmira, is a question open to debate. There are arguments pro and con. In favor of it is the facilitation thus insured of early rehabilitation of the convict. But in some states, this would be regarded as impinging very closely on the governor's prerogative. A conditional release is in no sense a pardon, since the liability of the prisoner is not terminated by it; but there can be little difference between an absolute release and a pardon.

CONCLUSION.

Of the indeterminate sentence, Dr. Wines, in his posthumous work on the State of Prisons, has said: "I confess myself to be of the number of those who believe that God never made a truth into which he did not put a power which sooner or later would cause it to prevail." But he also said: "The principle must first be applied (perhaps always) under limitations. The courts must assign a maximum duration to the punishment, and within that limit leave the time of release discretionary." If he had said "both a maximum and a minimum," he would possibly have expressed his thought still more completely. But it is not necessary to put this burden upon the courts. Why should not the legislature assume it?

The indeterminate sentence is an ideal; conditional liberation a wise and practicable measure. It is a striking fact that so many of the names illustrious in the annals of prison reform have been identified with this principle, and apparently owe their reputation to its adoption. I cite Maconochie, Crofton, Obermaier, Montesinos and DeMetz, as illustrations, all of whom believed that a prisoner should be discharged as soon as he can be trusted.

Nevertheless, we must not forget that prison walls have in themselves no regenerating, life-giving power. All depends upon the treatment given within them. And I cannot forbear one closing observation. That treatment will itself depend upon the view of human nature held by the officer in charge. If he denies or ignores the dual nature of man, his spirituality, his immortality and his moral responsibility, his own low estimate of manhood must react upon the men entrusted to him, and prevent him from doing for them what another man of finer sensibilities, sounder judgment and loftier aims, might accomplish.

At last, the question arises, whether to imprison offenders against law is in all cases the best disposition to make of them. It is to be hoped that a future generation may devise some method of securing their reformation without secluding them for so long a time from the outside world.

NOTE.

M. de Marsangy, as has been stated, was perhaps the first to advocate distinctly the principle of the indeterminate sentence. But we have from the pen of de Marsangy himself the following declaration of his belief concerning the end of punishment: "Suppose a crime committed and proved. With a view to a just punishment, what must be taken into the account? Three things: (1) the gravity of the wrong done to the injured party; (2) the alarm caused to society; (3) the degree of perversity in the criminal, who has henceforth become a peril to all. It is only by weighing these three elements, that the punishment can be justly and effectively proportioned. Punishment is efficacious only when, on the one hand, it dispels social alarm, by the sufficiency and exemplary character of the suffering inflicted, and when, on the other, it guarantees the public security against a relapse, by the regeneration of the criminal. Whence it follows that, in order to its being the true remedy for crime, it must be at once repressive, deterrent and reformatory. Every punishment which fails to produce this triple result is radically inefficacious and useless."

Similarly, Sir Walter Crofton has written: "It is, I maintain, right for the public and right for the criminal himself, that there should be suffering for sin; that the preliminary period of punishment should be one of suffering, not dictated by vengeance, but as an example to others and a wholesome discipline to the criminal. I am satisfied that any attempt to eliminate suffering from punishment would have such an effect upon public opinion as to very materially damage, if not entirely destroy, our reformatory and progressive system. No one has a greater right to be heard upon this point than myself; because I have carried the progressive system further than any other person, even to a state of semi-freedom. But this would have been impossible, had I not been able to carry public opinion with me, and to show (as Count Cavour expressed it) that punishment and suffering formed a portion of the system."

The error of those who reject the retributive principle in punishment, consists in their confounding justice with vengeance, and supposing that vindictive feeling is essential to it. There is no justice which is not retributive, any more than there can be justice which does not reward those who merit reward. The familiar quotation from Cicero is in place here: *Præmio et pœnâ respublica continetur.* The same is true of the universe, to whose moral order justice stands in the same relation which gravitation holds in physics—it is its central principle. The one can no more be overthrown than the other; and nature has provided, in the organization of everything which exists, for the preservation and enforcement of justice, and placed it beyond the reach of accident. In the words of Emerson: "Every act rewards itself, or in other words integrates itself in a two-fold manner; first in the thing, or in real nature; and secondly in the circumstance, or in apparent nature. Men call the circumstance retribution. The causal retribution is in the thing and is seen by the soul. The retribution in the circumstance is seen by the understanding; it is inseparable from the thing, but is often spread over a long time and so does not become distinct until after many years. The specific stripes may follow late after the offense, but they follow because they accompany it. Crime and punishment grow out of one stem. Punishment is a fruit that unsuspected ripens within the flower of the pleasure which conceals it. Cause and effect, means and end, seed and fruit, can not be severed; for the effect already blooms in the cause, the end preëxists in the means, the fruit in the seed."

In confirmation of the position taken by me at Saratoga, I quote also the following observations by James Anson Farrer, in a little book on Crime and Punishments, published in London, in 1880. "Suppose it were proved to-morrow that punishment fails entirely of the ends imputed to it; that, for example, the greater number of crimes are committed by criminals who have been punished already; that for one chance of a man's reformation during his imprisonment there are a hundred of his deterioration; and that the deterrent influence of his punishment is altogether removed by his own descriptions of it; shall we suppose for a moment that society will cease to punish, on the ground that punishment attains none of its professed ends? If resentment is ever just, is it wrong to give it public expression? If it is natural and right in private life, why should it be a matter of shame in public life? If there is such a thing as just anger for a single man, does it become unjust

when distributed among a million? The law weighs offenses according to their different degrees of criminality; in other words, it feels that the fair retaliation for burglary is not a fair retaliation for a slight theft. The child's simple philosophy of punishment is the correct one, when it tells you that the reason a man is punished for a bad action is because he deserves it. The notion of desert in punishment is based entirely on feelings of the justice of resentment. The primary aim of legal punishment is, as may be shown historically to have been its origin, the regulation by society of the wrongs of individuals. In all early laws and societies distinct traces may be seen of the transition of the vendetta, or right of private revenge, from the control of the person or family injured by a crime to that of the community at large. The latter at first only decided the question of guilt, leaving its punishment to the pleasure of the individual directly concerned. Even to this day, in Turkey, sentences of death for murder run as follows: So-and-so is condemned to death at the demand of the victim's heirs; and such sentences are sometimes directed to be carried out in their presence. By degrees the community obtained control of the punishment, and thus private might became public right, and the resentment of individual injuries the retributive justice of the state. The recognition of this regulation of resentment as the main object of punishment affords the best test for measuring its just amount. For that amount will be found to be just, which is necessary; that is to say, which just suffices for the object it aims at—the satisfaction of general or private resentment. It must be so much, and no more, as will prevent individuals from preferring to take the law into their own hands and seeking to redress their own injuries. This degree can only be gathered from experience, nor is it any real objection to it, that it must obviously be somewhat arbitrary and variable. Both Vladimir I., the first christian czar of Russia, and Vladimir II. tried the experiment of abolishing capital punishment for murder; but the increase of murders by the vendetta compelled them to fall back upon the old modes of punishment. Some centuries later, the empress Elizabeth successfully tried the same experiment, without the revival of the vendetta, the state of society having so far altered, that the relations of a murdered man no longer insisted on the death of his murderer. But had Elizabeth abolished all legal punishment for murder—had she, that is, allowed no public vendetta of any kind—undoubtedly the vendetta would have become private again."

In all discussions of legal penalties, it must be borne in mind that the law aims to suppress crime, rather than to reform or wage war against criminals, and that criminal jurisprudence has a far wider scope than mere prison discipline. The discipline of a prison must be administered not simply with a view to its effect upon prisoners, but also upon those not in prison. The latter is, if it can be brought about, in the eye of the law, the more important of the two. The prevention of crime is the law's supreme end.