

THE PREVENTION OF CRIME.

(First Article.)

I. IN every department of life, science, and the culture arising from it are in modern times asserting their claim to universal importance. It was especially necessary in politics and morals that this should be asserted. A year before the INTERNATIONAL JOURNAL OF ETHICS appeared, the International Criminological Association was founded. Although there was no outward, there was an inward connection between the two. Moral problems concern everybody. The special moral problems are alike, in proportion as the conditions of civilization in different countries are similar. Penal law must be recognized as a direct moral problem, or, at least, as having pre-eminently moral consequences. The Criminological Association has found numerous supporters in about twenty countries of Europe and America. Membership implies assent to a number of propositions, the first three of which are as follows :

1. The object of punishment is the suppression of crime as a social phenomenon.
2. The results of anthropological and sociological investigations must, therefore, be taken into account both in the science of punishment and in penal legislation.
3. Punishment is one of the most effective means of suppressing crime. But it is not the only means. Accordingly, it must not be taken out of connection with the other means of suppressing, and especially the other means of preventing, crime.

In these propositions the old philosophical doctrine—*Punendum esse non quia peccatum est sed ne peccetur*—assumes a new and striking form. It is natural that the opposite doctrine also should be set up anew. This latter is expressly a moral doctrine, since it explains punishment as a postulate of justice and demands that it should be equal to the deed, or—put more

exactly—to the quantity of the *guilt* contained in the deed. The evil which the punishment decrees should cancel the good which the criminal would wrongfully procure for himself; it should be an equivalent of the wrong done. This is without doubt the primitive intention of all penal law, so far as it originated in revenge and has risen above it. Revenge demands *satisfaction*,—that is, it wishes to inflict as much pain as it has suffered. The man who is insulted or injured, will, in the simplest case, only try to get back what had been taken from him, or to do to the other what had been done to him. Whatever the angry man takes or does, over and above this, may be to the satisfaction of his own feelings and those of the spectators, and may be called just, because the effects of the aggressor reach beyond the limited object, and the condition of the person attacked cannot be restored by the mere return of like for like. In daily life, as well as in the intercourse of states, revenge is continually met with either under the name of retribution or under that of punishment, and in the wide domain of civil law it has maintained its position in the legal claim to indemnification. *Just* retribution is a universally recognized ideal: its realization is desired and lauded by him who wants to take the law in his own hand, and is required as a duty of the judge who dispenses justice. The idea of justice postulated by our conscience does not exclude vivid emotions. There are such things as righteous indignation and righteous anger. But the will, bent on a just action, does not get its standard from any emotion, but through the simple perception of the right which it is to realize. The function of the judge is to perceive the right, and we Germans call the verdict itself a “perception” (*Erkenntnis*). The question is, By what means does the judge perceive the justice of an act? Let us consider this question as applied to penal law. When the judge has before him the written law, which prescribes definite punishments for definite classes of actions, the answer is simple enough. The judge classifies the given case whose reality is presupposed. His “perception” or judgment is a syllogism of the first figure; and it is possible to imagine that the rules are specialized in such a way that no case can occur

whose general features could not be foreseen, thus *forcing* the judge to a definite verdict. Frederick II., king of Prussia, thought that a code of law must be brought to this perfection. The judge would then resemble an executive officer. His judicial activity, like that of modern juries, would be limited to a perception of the fact and *the guilt*. Actually, however, considerable latitude is allowed to the judge for the adjustment of punishment, according to the special circumstances of the case and the individuality of the criminal. Within this latitude he is bound, independent of positive right, to administer justice,—viz., to perceive the right. What guides him in this process? It may be laid down as the *notio communis* that the height of the punishment must correspond to the stubbornness of the criminal will (gradually rise from *culpa* to *dolus*, from *dolus indeterminatus* to *dolus determinatus*). It is tacitly implied that this is the opinion of the law-giver himself, or, in other words, that the judge interprets the law-giver's intention in a supplementary way. The law-giver intended to have decreed the just and proper punishment; but a contradiction is still possible between the verdict of the judge and the law-giver's intention. Nevertheless, the judge's verdict remains valid, even if it should be contrary to the law-giver's intention. The modern theory of the state pays special regard to the *independence* of the judicial from the legislative, as well as from the executive power. It is, therefore, conceivable that only the judge, within the latitude allowed to him, is bent on the *right* penalty, and that the legislator's views vary widely from those of the judge's.

II. Justice, as a fact, will not be claimed in the same sense from the law-giver as from the judge. The law-giver—or what is equivalent to it, the state—is the representative of the collective body, and is regarded as threatened and injured by crime. As public prosecutor, the state wants to be partial, as between itself and the accused person, but as judge it wants to be impartial. What does the state represent in the person of the law-giver? I hold it for certain that in this capacity the state stands *historically* nearer to the judge than to the public prosecutor. The state, according to the conception

underlying it, aims, like the ideal judge, both at proportioning the punishment to the guilt of the criminal, and at deterring and combating the criminal and making him harmless, which should be the aim of the public prosecutor. But the judge, considered as a supreme law-giving power, is older than the state, and before the state existed he was considered as bound, on the whole, by positive law. Yet all positive law derives its life and authority from custom and the faith of the people. The state only assumes the formal representation of this law, which is considered unchangeable in its essence. But the criminal law is not only exposed to being put into writing and codified, but also to being consciously changed. It is looked upon as *jus publicum*, and as such, according to the classical saying, *ad statum rei romanæ spectat*. The state, by means of the public law, governs its own affairs. The written form, which otherwise only serves to help the memory, becomes a declaration. Here, too, there is consequently a transition which passes through many phases. A code, like that of the celebrated "Carolina," is, according to its contents, mainly a law of usage. Though it be specifically civic according to its form, its object is to serve as a guide to the tribunals (its title is "Special Tribunal Regulation)," and hardly to constitute a warning to evil-doers. With modern legislation, undertaken gradually and systematically in most European countries, since the second half of the eighteenth century, the idea of *threat* of punishment comes into the foreground. It is one of the conditions of a rational state contract, and, therefore, one of the most important rights of the citizen, that he should know beforehand to what penalty he is liable if he wilfully transgresses the law. *Nulla pœna sine lege*. And hence arises the law-giver's duty to make threats as efficacious as possible. This, again, may collide with the other duty, which aims at fixing the right penalty for every offence, for these two seem inseparable from each other. The *quia peccatum* is the fundamental thought underlying all punishment; the *ne peccetur* is the necessary conception of the threat of punishment. To this antithesis corresponds the antithesis of the so-called absolute and relative theories of penal legislation.

They are met with, in an easily-explained connection, in the doctrine of the freedom of the will, and its negation, the doctrine of determinism. The older doctrine asserts itself here also as the moral one in the traditional sense; for the common view makes the conception of responsibility depend on the freedom of the will. He who is forced to do a thing, so runs the reasoning, cannot be held responsible; and, in the same way, he is irresponsible who was not master of his will on account of not having had any knowledge of the criminality of his action. On the contrary, an action *willed freely*, when good, should be recompensed, and when evil, punished. The state fulfils at least the second half of this moral demand.

III. Determinism may undertake to save the meaning of punishment in two ways. First, in the direction already referred to, by declaring the threat as the essential feature. The value of this reasoning is more evident if the action of the individual is deduced from his constitution and the motives actuating him; for the evil he may incur serves then as a counter-motive. If the threat was inefficacious in one case, the punishment must be inflicted to keep it operative in other cases and to serve as a deterrent in the future. This has been the opinion of determinists, as formulated most vigorously by Hobbes, and by Schopenhauer who followed his footsteps. Feuerbach and Bentham, among the specialists, have perfected this doctrine. The threat of punishment is, in any case, judicious,—indeed, necessary. It fulfils its aim, in spite of numerous cases in which it is inefficacious, as long as it is reasonably supposed that without it crimes would occur in far greater number. The prevention of crime fulfils the purpose of the threat and the purpose of punishment as its corollary. The celebrated proposition should rather read,—*pœnæ constituendæ sunt ne peccetur*. The theory in itself is, without doubt, free from contradiction; but it cannot be denied that it presents the infliction of suffering on the individual only as a *means* for furthering the common weal,—in Bentham's words, as an "indispensable sacrifice."

Determinism may attempt, in the second place, to defend the justice of punishment, even as regards the involuntary

actor. It may contend that the value of the difference between men who cannot be made responsible, on account of their mental condition, and the normal man whom we do make responsible, is independent of the disputed point. The normal man is aware of what he does, and knows the penalty as a probable, and,—if its aim alone be considered,—a certain consequence of his action. When he resolves to do a punishable act, he takes into account the risk of the penalty, as well as the good he expects to derive from it. He hopes to escape the penalty, just as every one tries to reach the favorable and escape the unfavorable results of the natural consequences of his actions. When he is punished, he could no more complain of injustice than he could say that his money had been taken from him unjustly when he risked it in a lottery and lost. This line of argument is fortified by the reflection that every member of the state is himself a subject of the state, and has, therefore, transferred the right of punishment to the government. He is punished with his own consent; no injustice is done to him.

The following criticism may be made of this line of reasoning:

a. It is true that the conception of the priority of thought, and the act of the will as conditioned by thought, has a limited and relative validity. The will here is probably considered as wholly conditioned, but the involuntariness of thought is not taken account of. It appears to follow its own laws and to be conditioned by itself. And though it be admitted that back of thought lie perceptions, which in their turn rest on the impressions of objects, yet, according to this conception, men are regarded as essentially *alike*, each one striving after happiness and choosing in his own mind the means for its attainment, each one being *equally* master of his will. This theory of the intellect, though it denies metaphysical freedom, restores empirical liberty. The conception implies nothing beyond the ruling of the intellect, and the likeness of men in this respect. Both the psychology of the will and that of the intellect admit this conception as an applicable idea within certain limits; but in the investigation of the reality of this conception psychology meets with a highly multifarious

inequality of man in this as well as in every other respect. It does not find an uncaused will; it rather finds that the significance of the will (the resolution, the determination, etc.) as a cause has been exaggerated in an extraordinary manner. On the other hand, as a normal phenomenon, it does not meet with an abstract, calculating, balancing man; but with a concrete, illogical, idiosyncratic personality, with his likes and dislikes, passions, habits, whims, and associated ideas, his faith and superstition, his manifold and confused thoughts, which often approach closer to insanity than to a logical order. It restores the significance of individuality as an important cause of human activity, but only to show that individuality *is* necessarily what it has come to be. The facts of heredity come to light, and these indicate a much deeper, one is tempted to say a much coarser, causality of the will than the power of perceptions and thoughts, and yet these facts are much more mysterious. "L'hérédité," says Ribot, "*c'est à dire, le déterminisme, nous envahit de toute part,—par le dehors, par le dedans.*" And further: "*Nous la retrouvons dans ce germe même qui est en nous ce qu'il y a de plus intime, de plus essentiel, de plus personnel.*"* The faculty of self-restraint, of self-determination, of the clear and distinct weighing of the consequences of our resolutions, is also an inherited aptitude, conditioned in its development and relative power by education, surroundings, fortunate and unfortunate accidents, health and illness. For the imperfection of these faculties a man cannot be made responsible. They *constitute* the man.

b. So far, however, as that conception is valid, what can be deduced from it? One thing, of course,—namely, that the penalty cannot be called unjust in the juristical sense. The philosophy of the last century—now too little known or honored—made special endeavors to separate entirely the sphere of natural right from that of ethics. Thomasius, Gundling, Kant, and Feuerbach, among the Germans, brought their penetration to the discussion of the problem. The theory, as sometimes happens, has been rejected, while the practice has

* "L'hérédité psychologique," 3me edition, p. 322.

continued to progress in that direction. To-day we understand more clearly than ever how something may be judicially quite unassailable—and this whether recognized or not in positive law—and yet present itself to the moral feelings and our moral perception as in the highest degree unjust, revolting, and wicked. And thus the moral justification of punishment is not saved by basing it on natural right. In view of the total dependence in which we find the human being, with his desires and capacities, the question must be raised anew, Is it right and proper to requite with pain and suffering the wickedness (which we admit to be altogether a misfortune) of the unfortunate man, who, born perhaps with a weak understanding and coarse feelings, grown up in want and misery, surrounded by vice, dragged lower down by his every-day companions, has sinned against the life and property of his fellow-man? Is it right and proper to treat him thus when we admit unhesitatingly that the evil deed was the necessary result of all his antecedents?

IV. The more he who punishes gains an insight into the causes, and the higher, consequently, the level from which he views the doings by which he, as the representative of the whole, is to feel himself injured and provoked, the less will he experience a desire for retribution, and the more will he, as an impartial spectator, be moved by a feeling of *pity*, and wish to help the erring one and to heal him.

Now the theory of reformation—elaborated as far back as Plato, prominent in Grotius, Montesquieu, Beccaria, and other celebrated writers, and in accord with Christian as well as modern philosophic ethics—answers such a tendency, independent of strict determinism. One of the ablest representatives of the reformation theory among the moderns expressly rejects the theory of threat of punishment “because logically it would have to consider the punished individual as a mere *means* to the welfare of society,” and goes so far as to regard reformation as the pedagogical theory of punishment. “The state, by punishment, vouchsafes a *good* to the individual.”*

* Höffding, “Ethik,” Germ. transl., pp. 442 and 445.

So long as capital and corporal punishments for all heavy offences preponderated, this theory, of course, could not come into vogue. But the aim of reforming the criminal has entered into our present system of punishment, where deprivation of liberty occupies the foremost place, in consequence of the humane direction connected with the name of Beccaria, and the improvement of prisons connected with the name of Howard. "As far as I am acquainted with the German criminal law, it is built on the principles of the Criminological Association. . . . According to these principles, punishment is an act of justice, and the essence of punishment is retribution. From their stand-point satisfaction is the primary object of punishment, and the other objects include reformation and deterrence." * *Syncretism* is the characteristic mark of the mode of thought of the nineteenth century, and, more especially, of its European codes of law and constitutions. In the twentieth century we shall have to eliminate many of the component parts so as to attain to clearer thoughts and purer actions.

Now some people may think that the deprivation of liberty should improve the criminal under all circumstances. Facts, nevertheless, go to show that the result depends mainly on the manner of the execution of the punishment. There is a belief abroad that the obligation to work, which is almost everywhere coupled with imprisonment, combined with the constraint to order, cleanliness, obedience, and decency, have an educating influence. Efforts are made in the prison to make up for the neglected and forgotten school education. By divine services and religious exhortation we endeavor to purify and elevate the heart of the prisoner. He gets permission, indeed, is encouraged, to keep up his relations with his family by receiving visits, by being in communication with them, and by helping them with the surplus of his earnings. And, lastly, when he is dismissed, efforts are made to improve his chances in life, either by good advice or, as sometimes, by

* Dr. Wirth, governor of the prison of Plötzensee, speaking at the first general assembly of the International Criminological Association in Germany ("Report," p. 27).

active help. Along with these attentions to the prisoner sufficient care must be expended on his bodily well-being. When all is said, there remains the fact that the measure of humane treatment is in a high degree dependent on the personality of the prison officials and especially the jailers; for between principles and their performance—between what is called theory and practice—there is, indeed, often a yawning gulf, which under unfavorable circumstances continually widens. An important factor is the superior insight of the superintendent of a prison, who may cause a deep reaction in favor of humanity and justice. It is a sad state of affairs, which it is our duty to denounce, when governments, partly from financial reasons and partly from a blunted sense of all moral motives, so frequent in governments, display very little appreciation of the responsibility and dignity of such a position. But the more the government and its executive officers approach the ideal which we have before us, the more may be expected in the way of reformation, though a value must be assigned to the former which is independent of the latter.

V. It is evident that the humane treatment—which is desirable in itself—and more especially the aiming at reformation, tend to lighten prison penalties. And it will be evident, also, that a more humane execution of punishment will somewhat weaken the effect of threats. If the punishment, then, is both to deter and to reform, it may happen easily enough that these two aims come into conflict. It is true that prolonged terms of imprisonment are accompanied by a feeling of disgrace,—a result that varies greatly with individuals, and is wholly absent in entire classes of society. This disgrace did not lay in the intention of the law-giver, the judge, or the administration, but is rather a necessary consequence of the opinion of the different strata of society, for whom a good reputation is of some importance. This secondary result, though it may serve as a deterrent, easily nullifies the criminal's desire to reform. If it is the object of material and moral reform to facilitate a lawful course of life and counteract fresh temptations, it will yet be very hard for it to battle successfully against the pressure of social disgrace which tends,

with other circumstances, to force the individual back to a criminal career.

The reformatory treatment may perhaps be the primary cause of arousing in the prisoner a heart-felt conviction of the infamy of crime, and of his own crime in particular, and of helping him to overcome his moral disgrace by inward repentance; the social disgrace of punishment it cannot remove. And when the punished criminal returns to the circle where crime and punishment are looked upon rather as an honor than otherwise, the inner reformation itself will most likely prove illusory. The idea of reformation, the significance and the necessity of which we cannot but highly esteem, will, like so many other ideas, be able to accomplish little in the actual world. Its resources are too insignificant, the obstacles too great, and the task too hard. The great number of offences against the law are of a light nature, and the consequent punishments are of short duration; but even if the terms of imprisonment were to be doubled, it would yet be unreasonable to expect, merely as a result of the manner of treatment, a true change of character and a steeling of the will against the numberless unbending influences of life. If many of those thus punished do not return to prison, or return to it only after a long period of absence, we are not justified to conclude that they have not been transgressing the law since their dismissal, for many offences never come to the knowledge of the authorities. We must also bear in mind that a course of life that is not illegal is far from being necessarily, therefore, not immoral, much less moral in conduct. There are many tolerated yet abominable professions open to unsteady and dissolute men, especially in the great cities; and, besides, it is precisely the intellectual originators of crime who know best how to keep at arm's length from the authorities. Under present circumstances it remains very doubtful whether a progressive legislation that looks upon a criminal deed as a sharply-defined fact could succeed in making "responsible" those secret sowers of evil. But granted that a purely legal attitude were reformatory in its effects, this *post* would by no means make probable a *propter*. For, apart from the fact that

it is, for instance, more convenient to gain one's livelihood as a *souteneur* than to procure it by burglary, it is also true that the legal proceedings and subsequent convictions, though they offer little that is terrible, yet are sufficiently objectionable; and it can hardly be contended that the more artful person who circumvents these dangers owes his dexterity to the preachers and teachers in the penal establishment, even if these latter, as is often the case, have not been more ardent than their duties compelled them to be. Finally, even in the most favorable case, when the non-punishable conduct is not grossly immoral, when it means, perhaps, a return to an honest livelihood, the former prisoner may, it is true, gratefully remember the kind person who stood by him in his misfortune and express himself accordingly, and this not seldom happens. The psychologist, nevertheless, will be bound to ascribe by far the greatest part of the cause of such a result to other outer and inner factors; though, most assuredly, there are some extraordinary instances in which the humanity and energy of a single man, especially when it extends itself beyond the term of imprisonment, give a decisive turn to the whole life of a "prodigal son."

If these extraordinary cases, which are the only ones that fulfil the reform purpose, were somewhat more frequent, or what is more, were normal, the threat of punishment would turn into an invitation to punishment. The law-giver would have to say, "Ye who dwell in slums, who earn your money perhaps honestly, perhaps dishonestly, only to squander it; ye in whom a vulgar life deadens any finer feelings you may have possessed, only commit a theft or a fraud—it will not weigh heavily on your consciences—and I, the state, will have the opportunity to reform you by punishment and open a new course of life to you."

VI. The facts stand rather as follows: It is true that a great many of those who are punished with imprisonment for venial offences* (how large a number is here of no impor-

* The convictions for begging, theft, etc., do not concern us here. In Germany these trespasses are not counted as transgressions against the imperial

tance) do not relapse. Still, no specialist believes this to be the work of reformation. There is almost unanimity on the point that short terms of confinement are really *deteriorating*. The most prominent representative of the reform of the criminal class in Germany, one of the founders of the International Association, Herr Franz von Liszt, has collected a goodly number of testimonies of specialists from various countries,—a number which could be easily augmented and which embrace our whole century,*—that may be summed up in a sentence: “*A punishment which furthers crime,—that is the latest and ripest fruit of ‘avenging justice.’*” † “*La prison corrompt,*” says Lacassagne, the professor of medicinal law. Many think that the real cause of this shocking result lies rather in the fact that the “art of prison management” has not yet had the help of governments to carry out its methods in the prisons, and in other establishments where culprits are sent for short terms of imprisonment. The isolation, so necessary especially for younger criminals and first offenders, is, we are told, yet far from being a rule, and would necessitate, of course, a great deal of expense. But in Belgium, where no expense has been grudged, and where the prisons are model establishments, people think differently. It was in that country that people first thought of abolishing by law short terms of imprisonment! And even those who believe in the relative utility of such prison reforms—which we may gladly give our assent to—only think of staying the recognized process of deterioration. Hardly any one believes in refor-

laws. When punishing these classes of culprits no one thinks of reformation. Deterrence and retribution alone determine the punishment. The thing combated is something which the mass of the people consider morally justifiable, and one is satisfied if but a minority of the actual culprits fall into the hands of “justice.”

* Indeed, instances that go further back may be easily gathered, though the use of imprisonment was very limited in the last century. I read in Hanmel,* one of the most zealous champions of reform at that time, that “the prison reforms nobody, and the bad company found there corrupts. The thief is hardly set at liberty, and lo! he robs again.”

† Zeitschrift für die gesammte Strafrechtswissenschaft, ix. pp. 743–754.

* In his translation of Beccaria, p. 510.

mation during a few weeks' or months' stay in a model prison.

How now about imprisonment with hard labor and *long* terms of confinement? The demands of prison reformers are often in some measure realized in this department of punishment, though the methods vary still widely in different countries. The general plan is, by a rigid discipline, hard work, and deep humiliation (in Germany the criminal is addressed by the humiliating "*du*," and in all countries the beard and hair are cut off), to make the prison system, which takes the place of the former corporal and capital punishments, as painful and humiliating as possible. The recreant must suffer because he has caused suffering. It can be said with justice that the aim at reformation is *theoretically* reconcilable with such treatment. The secondary purpose, humanity, does not modify the main purpose, which is the infliction of suffering. And as for the success of this method of treatment, Dr. Paul Aubrey* tells us that here, too, "reformation is a fiction." If the longer terms of imprisonment and similar favorable conditions are advantageous to efforts at reform, yet the material to be improved is much more incapable of improvement. Every contemplation of the inmates of a penitentiary teaches this: The great majority have been frequently punished; they belong to the criminal class; they are thieves, cheats, and receivers of stolen goods by profession. They cannot and will not change. The more accustomed they are to the prison, the more indifferent they become to what is done there. Teaching, preaching, reading, kindly words, may inspire them with half-hearted intentions,—often not even with these,—and with these "intentions" we know "the way to hell is paved." But here, too, despair is not always in the right place. Some individuals, who as dissipating youths fall into bad company, and who are led to steal because they cannot find employment to meet their needs, will receive a healthy shock from prolonged imprisonment, which may be made still more beneficial by moral and material help. If the circumstances are favor-

* *La Contagion du Meurtre*, quoted by Ellis, "The Criminal," p. 250.

able, and the *squalor carceris* does not cling to them, they may yet become honorable men and honest workmen; some are helped by the trade they learn in prison. So far as the great majority of this numerous class of criminals are concerned, they are lost beyond saving, and we find, nearly always, that they are characterized as such, partly by their social antecedents and partly by their moral nature, but oftenest by both. The moral nature manifests itself in marks which can be outwardly presented and even measured; this is the meaning of all criminal anthropology, which requires much critical acumen, and, rightly understood, is of great significance. But, likewise, "born" or "instinctive" criminals are found also in all other classes,—among murderers and assassins, among perjurers and incendiaries, and especially among transgressors of private morals. Even when among these, some do not fall back. The reason is partly because after long punishment they have left the prison broken down in body, grown old, without sufficient energy left to commit new crimes; in part, the opportunity is lacking, as in the case of perjurers, who are not again allowed to appear as judicial witnesses; and also in the case of incendiaries, who do not again acquire property on the insurance of which they can speculate; or their new deeds are not discovered; or, finally, they are in a position to buy off witnesses, which those experienced will understand how to do better than the novices. If, in cases of extreme criminality, punishment as a means of reform is almost entirely a failure, it acts as an evil (even on the supposition that a more humane treatment will equally benefit all) in a manner which stands in proper relationship, neither to the end of retaliation or prevention. For example, the disgrace, as well as the punishment itself, and especially the same length of punishment, is felt in very different ways by different individuals. What may act as a physical blessing for the vagabond is for the man who leaves a comfortable home (as happens not seldom in the case of special criminals) almost fatal. This is seen most clearly in respect to the quality of nourishment, but it holds good of the whole prison life.

But the professional thief or forger looks upon the discom-

fort of incarceration for a number of years as a danger which is attached to his otherwise agreeable trade. He reconciles himself to the rotation of two years of free and even luxurious living, and two years in prison, as a form of existence which is more to his taste than the monotony of a laborious and virtuous career. But, as to the length of the term, not only is the effect of all long imprisonments very different, according to health, temperament, and outward condition of the individual, but it is generally true that the severity with which the punishment is felt increases out of all proportion to the increase in the length of the term. According to a law of the sensibilities, a pressure, which at first is scarcely perceptible, will gradually become irksome, and finally become a pain of unendurable violence; just as in respect to the physical effect, energy and vitality will return after an imprisonment of one or two years, or perhaps after one of five or six, but will be broken by eight or ten years of such a life. An imprisonment which exceeds ten years is, indeed, for most criminals, equivalent to not only a slow moral but also a slow physical decay. That this annihilating of a man is more humane than the former chopping off of a hand, or cutting off of a nose and ear, no one dare maintain. The effect is often no better even from an æsthetic point of view.

VII. If one renounces the soothing thought that this is, under the circumstances, a just punishment for the bad conduct of the man, then one will find one's self ever anew thrown back upon the final aim of law and order which makes such sad and hateful means necessary. If the threat of punishment, just as little as the execution of it, is able to hold certain individuals back from a repetition of their crimes, it nevertheless acts upon others in this way, and so much the more, the more terrible a long term is, in its consequences, and the more frightful it is to the mind. It protects the life, property, and honor of all against all, and prevents countless crimes. In proportion as an unconditional worth is assigned to this end, every means is allowable and must appear good; and, consequently, severer and even more cruel punishments could be threatened, and a corresponding execution of them should follow in those cases

where the threat showed itself to be inadequate. Justice is limited to its formal meaning; accordingly, the form of the process is the protection of the suspected person, and also of the guilty one, against unjust punishment. In fact, modern penal codes show their preventive tendency very clearly, in the more severe punishments with which repetitions of crime are threatened. While it is the general supposition that all are equally inclined to commit crimes and need the same check upon their passions, a stronger impulse on the part of those who have already been punished is taken for granted, and should be met by a stronger threat. For, evidently, the wrong to be atoned for is not greater when it is committed by a person who has already been punished. The retaliation theory, of course, affirms a greater guilt, because a person already acquainted with the legal consequences of such a deed (the conception is generally limited to like or similar deeds) should have been so much the more careful,—as if he should be less expected to commit the deed than any one else. And this is at least rightly *thought*, provided a clear consciousness of deserving-to-be-punished is held to be the special ground of culpability, and that all other circumstances which might deter from crime are to be ignored. But this basis presents itself here in all its absurdity. For, in fact, the perpetuation of the same deed is *much more probable* among those who have already suffered punishment than among criminals as a class; (yet they argue: in itself *less probable*, because there is more than general knowledge of the liability of being punished; in individual cases, nevertheless, the crime is committed again; this proves an unusually bad character, which, even through such knowledge, would not allow itself to be checked.) Such a variety of causes force just these unhappy persons into crime, that the experience of being punished at the best can exercise only a very slight counter-force. The end of deterring through fear is shown to be still stronger and more effectual in the best penal codes,—the *military*,—which, against many by no means improbable, and under some circumstances (in spite of the oath) morally justifiable, violations of obedience, proclaims such hard punish-

ments that they need almost never be applied. A milder analogy is found in the special punishments for crime with which officers are threatened. Here no special justice is practised towards some particularly violent wrong done (especially in cases of *delicta mixta*, where the holding of office occasions a higher punishment for common transgressions); but a kind of wrong which is especially dangerous is to be prevented by these means. The real standard of culpability is the damage, not of the separate deed, but of the human character as a cause of it and of similar deeds.

VIII. Now when we speak of *combating* crime as a social phenomenon, we ought to specify the exact object more closely. We have in mind crime as a phenomenon appearing among masses of people, as a kind of activity towards which the characters of certain groups of men or of individual men are directed permanently, or at least with a tendency that often reappears. This is especially expressed in the second paragraph of the programme of the Criminological Association: "The results of anthropological and sociological investigations are *therefore* . . . to be taken into account." The meaning is not that penal law is to be given up in respect to all or in respect to officers; but, on the other hand, that penal law should be raised into a higher significance in respect to men *known* to be criminals. They, without doubt, betray their criminal nature by other signs to the anthropological and sociological investigator. By the legislator and the judge they are recognized, in the first place, only by their repetition of crime and by their falling back into it. The more, however, these "results of anthropological and sociological investigations are taken into account," so much the more will even a single deed be enough for recognition. Only under that forced restriction is it allowable for the fourth paragraph in the programme of the International Association to read: "The distinction between occasional criminals and habitual criminals is of fundamental importance in theoretical and practical relations; it must, therefore, serve as a basis for fixing penal legislation." Punishment, as one of the most effectual means of "combating," applies itself expressly to the habitual criminal. Accordingly,

the ninth and last paragraph returns to the subject again, with a qualification. It reads: "Penal legislation, even when it is a matter of the frequent repetition of petty transgressions, must render habitual criminals of the *incorrigible* class harmless for as long a period as possible." This is evidently a very daring innovation. Here for the first time the thought comes forward boldly that the criminal is to be met with "punishment" no longer, even in form, on account of his deed, but on account of his mental constitution. A thought, which was contained already in the severer threat against falling back into crime, now throws off the last vestige of apparent justice. The deed is no longer regarded as a cause, which must have the punishment as an effect, but only as a means of knowing the criminal and as an occasion for setting the will of the state in motion (in order to render the incorrigible habitual criminal harmless). One may say that the notion of punishment must itself hereby be transformed into a higher conception,—that of a *judicious treatment of the criminal*. Even capital punishment, with which ancient laws (as the Carolina) threaten the *fur famosus*, who is known as such through the *furtum tertium*, is a case of rendering harmless and ought to be so. But it is still everywhere regarded as a punishment; it lay at the basis of the popular notion that the stubborn villain has forfeited his life. When we speak to-day of incorrigible-habitual criminals, no one of any insight thinks any more of an incomprehensible and arbitrary wickedness of character as the single cause of the repeated crimes. We know that we have to do with a pathological phenomenon in the anthropological and sociological sense, now more in the one, now more in the other sense. The question has already become the subject of discussion in the Second Congress of the Criminological Association (Bern, 1890), from which, indeed, very little has resulted. But the basis of it was an excellent report by Professor von Lilienthal of Marburg ("Reports," ii. p. 64), the first section of which closes with the following definition: "We must regard as incorrigible, persons who repeatedly fall back and whose crime appears as the outcome, first, of an inherited or acquired degeneracy; second, of a professional life of

crime. (Here "first" signifies the anthropological, "second" the sociological cause of the crime, but both stand in continual interaction and community.) But if the second section begins, "Against incorrigible transgressors only the permanent rendering of the person harmless can come into consideration as a means of punishment," it is the jurist who is speaking and is operating with his customary conceptions. For it would have been more philosophical, and would have been enough to say: "The presupposition of a judicious treatment of incorrigibles must be the permanent rendering of them harmless." The punishment would here evidently not be put upon the once occurring, and perhaps "slight transgression," but (1) upon the degeneracy; (so far as this (*a*) rests upon heredity, it is, in the judicial sense, absurd, to make the person answerable for it; so far as it is (*b*) acquired, the person's "own fault" may surely be said to lie at the basis of it. This may be said, in the moral sense, to be "imputable;" it is in the judicial sense as incomprehensible as any youth's folly, which brings life-long illness upon him; besides this (*b*) is very often a consequence of (*a*); or (2) the professional criminal career is to be punished. This has certainly a judicial sense, as laws already threaten a single crime more severely when it is professional. But, in fact, just here, with no close connection with (1) (degeneracy), the oppressive weight of circumstances is so clear and evident that as a social inheritance it stands wholly on the same footing with psychological inheritance, not only as an inheritance of poverty but of aggravating conditions of life in general; to which there are added punishments as a sad and fatal acquisition.

IX. The proposal, cited above, for treating incorrigibles is evidently the complement of the reform theory. But while the latter holds fast to *punishment as an evil*, which it would transform into a good; with the former the purpose of inflicting pain is quite unessential. There, as a rule, it retains its necessity, in order that fear may remain; it fulfils the threat. Here, where the threat can be applied only to a narrowly limited circle of individuals, it loses its worth; the degenerate person will not be frightened by it; or, if it presents a great

evil as the effect of a petty as well as of a great deed, it is in danger of inciting to the greater deed; it ought, therefore, rather to be avoided or made less frightful. And a criminal career is not begun with a conscious resolution; it grows out of its conditions, and spins about its subject a net which he cannot break through. But for the purpose of rendering criminals harmless, not only is the intention to inflict pain not essential, but it is even an obstacle. When we are ready to give up the notion of punishment as an equivalent of the guilt, or of the deed, it is not discernible why we ought to allow the person with a criminal nature to suffer any more than the person with a natural tendency to insanity; why we should inflict pain upon the man who leads a criminal career (so far as this does not consist in separate provable and punishable deeds) any more than upon the man who leads a dissolute life. These are all injurious or dangerous; we wish to make them harmless. This is a task for the state only in so far as the criminal is concerned. The psychological *physician* pronounces judgment as to the necessity of bringing an insane man under suitable treatment, but, as a rule, only at the solicitation of the family of the invalid. The judge ought to decide as to the necessity of caring for the criminal; but it would only be fair and would secure safety against an arbitrary decision, if, instead of or together with the charge, a well-founded petition should be required from the residents of the community to which the criminal belongs. We might add, it ought also be possible to give an authoritative judgment concerning the suitable treatment of the dissolute man, which would be the function of the moralist—until now called the priest—and which would have, as its pre-supposition, a request of those most concerned, namely, the moral-religious fellowship, without the boundaries of which no one would be permitted to live. In all these cases we have to do with men whom we dare no longer leave to themselves, but who must be given over to the care, direction, yes, the control of others. But this special control ought to resort to force only when all other means are denied; the no-restraint system of caring for lunatics must be recognized as in general

the best. Unhappily, even in the most civilized lands, the treatment of the insane is not sufficiently regulated and secured. But the principle, nevertheless, holds good, that the uncured ought to be brought into the institutions and kept there, and that the incurables ought always to be kept there. From analogy, it is thought desirable to make the retention of criminals dependent upon "the results of the execution of the punishment." This has been, indeed, accepted as one of the principles of the Criminological Association (§ 8). The thought is right, although one ceases to regard the treatment as punishment. Only one ought not to regard "reformation" as the equivalent of "cure." On the contrary, it would be possible to bring many individuals into the relations of free society, in which one may expect to find their nature—after it has been thoroughly understood—better developed. But it will be indispensable to keep in hand a lever for their material interests. No one, that is, no habitual criminal, should be released until he has earned a considerable sum, the control of which should remain with the institution. As soon as well-founded complaints against him amount to a certain magnitude, or he falls again into crime, this property should be forfeited. The existing Houses of Correction and similar penal institutions must above all (the Criminological Association should make this its most emphatic demand) be relieved of all the insane, who are everywhere numerous. Special places for keeping insane criminals, such as here and there already exist, must be established everywhere. The danger that deception will in this way be increased can of course be met by careful attention. But next, a *change in the work pursued* must be demanded, at least on the continent,—since in England a better system is already followed. As the existing punishments now are, they have—together with all that is rightly blamed in them—at least one good point, namely, that the culprits during this period are "harmless,"—that is, incapable of perpetrating new crimes,—whether this ought to be regarded as the end of punishment or not. But against these advantages a considerable disadvantage of an economical kind must be considered. Their powers of labor are farmed

out; manufacturers make use of the opportunity to gain cheap labor, with the products of which they can underbid competitors who pay higher wages; the public is served with goods which for the most part—from causes easily discerned—are still worse than the ordinary ones, and which satisfy their producer as little as their consumer. But cheapness constrains the buyers. And hereby the state is relieved of a part of its cost to the hurt of the community; not to its own honor, but as an illustration of its (especially in military states) notorious fiscal avarice, which is, from every higher political point of view, the merest folly. For the economic good of the community, and, therefore, finally, for that of the state, it would surely be more advantageous if all culprits were occupied in an unproductive manner. But this is by no means necessary. We should be satisfied with the principle that no business profit should be made out of these labor forces. For many kinds of work are necessary for the institution itself and could be considerably multiplied. For instance, I found that a shrewd director, who was not satisfied with his baker, established with good success his own bakery according to the newest system. And further, it will be met with no objection if articles for use also in other public institutions should be prepared.

Finally, industrial articles could be ordered by officials, for the purposes of the care of the poor, at cost price. No one would suffer, for instance, if poor widows who are unable to buy articles at the market price were assisted with household goods and clothes for themselves and children, to lift them out of extreme misery. And to what end could the compulsory labor (which costs nothing from a political, economical point of view,—since clothing and nourishment must in any case be given to the prisoners) be better applied than to this? But agricultural labor is especially capable of a wide extension through penal institutions. There are many kinds of cultivation which are not commercially profitable, but at the same time are highly useful, indeed, necessary. Vagabonds, partly under compulsion, partly in a state of partial freedom, have with great success been applied to such work in

several districts in Germany. A great part of the culprits could without danger be occupied in the same way. These workers would be under military supervision. Those attempting to escape would be exposed to instant death, or, at least, to chains, and perhaps to branding. It might be recommended that, as a rule, every one should work chained for a short time in order to make him more sensitive to the benefit of free motion. With a right choice of individuals, the hygienic effect, together with the advantage obtained, might be very great. And in such a reform the judges could without harm increase the average length of the shorter periods of punishment (let us say up to three and five years) by thirty per cent. to fifty per cent., whereby public security would be gained. (A side consequence of this rendering of the criminal harmless, although only temporarily, would be that he would be hindered during this time from having children.) Furthermore, the term of punishment should be so arranged that no one who has been appointed to common labor shall be dismissed at a time of year when such labor is, even for free laborers, not to be obtained at all, or with difficulty. This point of view is much more important for a just measurement than the attempted and proposed plan to make the term equal to the guilt, concerning which it often requires self-control not to indulge in satire. I regard the most pressing reforms of the severe and long terms of imprisonment as a necessary condition in order to deal with the problem of rendering permanently harmless certain classes of so-called incorrigible cases. For, without these, the judicious treatment would retain a certain coloring of administrative justice, from which the idea itself ought to be freed with all earnestness. The object should be, not the destruction of justice, but the restoration of a higher justice. We wish to be just to the natures and circumstances of unhappy and dangerous men, and, for their own sake and for the good of all, separate them, kindly and with tenderness, like men who have contagious diseases, from the places where they would only sink the deeper in filth and draw others down.

X. Thus far the treatment of the lighter forms of delin-

quency have occupied the foreground of our thought; or, in the words of the seventh paragraph of the criminological programme, the "substitution of short terms of imprisonment." The greatest attention, much support and much opposition, have been bestowed upon the suggestion to leave to the will of the judge a suspension of the execution,—which might have as a consequence the annulment of the punishment: the so-called conditional condemnation (*condamnation conditionnelle*), which in Belgium* has been made a law. I regard the idea, although it is supported by pre-eminent authorities, to be a desperate means of remedy against the evils which confessedly attach to the short terms of imprisonment in a higher degree than to the long and severe. I also regard it as certain that the dangers of infection through the prison have been rated too high. We ought not to compare them with the effects which an honest society could have upon the same individual. An individual of this kind is, even in freedom, exposed to the greatest dangers. In most cases—and especially in those which most commonly terminate with a relapse—the deed itself is a proof that the person was already accustomed to criminal companionship, and did not need to become acquainted with it. Whoever was born in a purer sphere and returns to it will easily shake off from his feet even the dust of the prison. Nevertheless, there is contained in the complaint—that the punishment is often the school of crime—a terrible truth. The conditional condemnation conceived as a final, emphatic and individual warning would offer protection to some. Still, if a sharp police supervision did not follow it up (which would be worse than the punishment), the premium upon innocent conduct in the days of grace would succumb to all the objections which we have put forward against presumptive reformation. We shall look to the interesting experiment with attentive expectation, even though a discriminating knowledge of the actual result may disclose great difficulties.

XI. There has also been felt a doubt as to another substi-

* Recently (March 26, 1891), also in France.

tute for the customary punishments. While I am writing, the German Convention of the International Association in Halle is considering this subject. The suggestion that those punishments should be made more terrible by increased severity, and that, indeed, something like corporal chastisement should be set up in their place, has, to our delight, been met with animated opposition. On the other hand, the right thought is contained in the proposal that there be a wider and more rational application of a system of *fnēs*. These would necessarily be measured according to the property and outward circumstances of the offender; for making them effectual when necessary (as in most cases it would be) compulsory labor (but as a rule without imprisonment) would be of service. At the same time (in the writings of the Association) the plan has been brought up, more than formerly, to consider *the interests of the injured party* in penal legislation. I believe that here, more than elsewhere, a point of contact is possible. All smaller thefts, embezzlements, frauds, and other, at least lighter, crimes against property, which come to the knowledge of the judge, should have as a consequence a *duty* for the perpetrators,—the duty of compensation and indemnity. The rational meaning of such a rule throws direct light on the subject. The rational meaning of punishment—to make the man *suffer* at public expense—is by no means of any help.

It will be objected, that this means a return to a private treatment of crime, which predominated so strongly among the Romans and in all ancient codes. Now what if this step backward were to prove a return to a healthy and wise apprehension? What if the whole penal law in its present form should represent an (historically indeed justifiable) amalgamation of morals and law? What if first, through a pure stripping of the real law, that is, of private law, and the reduction of the public law to a private *obligatio ex delicto* against the *state*,—if first, thus, the moral could attain to a strong and independent validity? As it is, penal law in all countries is on the verge of a collapse. For the purpose of acting as an evil, the punishments are not great enough in comparison with the attractions of the smaller transgressions; besides, their power

of deterring through fear varies too much according to all the relations of the individual. Their evils certainly do not act as spurs to reform. Almost no one believes any longer in their justice. We ought to decide to drop entirely the aim of inflicting evil, and that is the essence of punishment. Justice will demand that whoever has committed injury should make compensation for the injury, and, perhaps, still more than that. Denial of liberty for a time should have its meaning only as a condition for the discharge of these duties, where it cannot also serve as an education (and this may be limited to persons under age, otherwise it might require the assent of the subject). This hard duty will have more force as a deterrent than threatened punishment. In this way it may come about in practice, that the criminals by nature and profession would be placed in lasting confinement as the condition suited to them. Whoever forces himself to that, because it is more attractive to him than repellent, gives evidence in that very preference that his moral or social condition is diseased. But all these reforms will at the same time tend towards a research for other means of preventing crime than can be found in the threatened or real consequences of what he has done.

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THE ETHICAL TEACHING OF SOPHOKLES.

“SOPHOKLES paints men as they ought to be, I paint them as they are,” is said to have been the remark of his younger rival and contemporary. Sophokles was more an artist than Æschylos; but the moral world remained for him, as for the older poet, the sphere of tragedy; his works are dramas, but the motives they use and the interest they excite and the high purposes of their author are all drawn from the moral relations of men. In examining the ethical teaching of Sophokles, therefore, our work is not simply that of literary criticism, but rather it is a study of the moral sentiments of