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## Christian and the Penal Law

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# The Christian and the Penal Law

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As American society has become more divorced from its Judeo-Christian origins and roots, that is to say, more and more secularized, so it has come to question the nature of crime, its causes and its cure. There is today profound disagreement amongst lawyers, psychologists, and sociologists about what constitutes a crime and how criminals should be dealt with. The theories of crime causation and of crime control have grown more complex and have fallen into inter-disciplinary clashes. Amongst secular criminologists, the effect of punishment for good or bad is no longer taken as self-evident. The labeling of an individual as a recidivist or as a criminal is seen by many social scientists as a process wherein prophecy may influence reality. The only point about which there is any agreement is that our present methods of dealing with criminals in our society do very little to improve their characters or to reduce

the crime rates.

It is true, of course, that social policy has come a long way from the savage retaliation that used to be society's answer to crime. We no longer chain prisoners to the floor, impose starvation diets as a commonplace, or inflict the refined tortures of prolonged solitary confinement in the name of spiritual reform, as in the Pennsylvania Prison system in the last century.<sup>1</sup> We do not exhibit the bodies of executed felons in iron cages or flog the confirmed offender or hang children of eight years. Yet despite the progress that has been made, it is still clear that we have not really begun to put into practice the measures that offer some hope of reducing the amount of crime and of restoring criminals to a useful life in society. In this paper we shall discuss the reasons for this inability to cope with the crime problem and suggest a Biblical-Christian alternative to present penal policies.

## The Contradictions of Present Penal Law and Practice

### (a) The Punitive and Deterrent Ideology

At the root of the present failure of our penal law and practice lie the inherent contradictions in the aims being pursued. As Elmer H. Johnson points out in Crime, Correction, and Society,

One of the sources of the inconsistencies and administrative problems that plague police departments, courts, and correctional agencies has been identified as the preservation in the system of criminal justice of irreconcilable perspectives derived from the classical and positive schools.<sup>2</sup>

The punitive and deterrent ideology views the penal system as existing to punish criminals and to deter others who might follow their example.

According to this school of thought, punishment is justified as retributive justice. Instead of allowing the victim or his family to avenge the wrong done to him, society takes action upon his behalf. The criminal law originated in an attempt to supersede individual vengeance or family vendetta by a societal system of retributive justice through which a society punishes the perpetrator of the wrong. Criminal law from this perspective developed in an effort to redefine a wrong done to an individual (a tort) into a wrong done to the society (a crime). The criminal deserves to be punished simply because he has committed the crime; by committing the crime he has given members of society the right to inflict retributive punishment. Johnson explains the punitive ideology as follows:

Associating the offender with unmitigated evil, incorrigibility, and intractable hostility to "good society," the punitive ideology focuses attention on the threat his behavior poses to

his victim and to society. The major objective is protection of society. The orientation is toward the past in that the offender is judged largely in terms of what he did, rather than in terms of his capacity for improved behavior in the future. The techniques employed center around the infliction of pain and restrictions upon the offender through coercion....

The conception that crime is caused simply by "bad" criminals is central to the "hard line" approach to crime control—an extreme position held by some advocates of the punitive ideology.... The "hard line" prescription is massive citizen support of the policeman "when he is doing his job properly," drastic curtailment of the "contrived rights" of criminal suspects...and public accountability for sentencing practices which release a "potentially dangerous felon" into the community.<sup>3</sup>

The classical school justified punishment upon grounds of deterrence. Here the aim is to clamp down on the activities either of the criminal or the would-be criminal or both. As a judge once said, "You are not punished for stealing sheep but in order that sheep may not be stolen." The objective of the founders of this school was to provide advance notice that crime would swiftly and inevitably have punishment as its consequence. It was presupposed that all criminal behavior is deliberate, purposive, and intentional and therefore the prospect of certain punishment would deter most normal and "rational" members of society from committing crime.

Critics of the punitive and deterrent ideology have pointed out that the hostility toward criminals implicit if not explicit in retributive punishment of criminals cannot be reconciled with the principle of

reforming them. The aims of punishment and the eradication of the causes of crime seem to be mutually exclusive. In George Mead's terms in his paper on "The Psychology of Punitive Justice":

As long as the social organization is dominated by the attitude of hostility the individuals or groups who are the objects of this organization will remain enemies. It is quite impossible psychologically to hate the sin and love the sinner."<sup>4</sup>

Mead called into question the logic of the current attempts of the American penal system to combine punishment with techniques for reforming criminals. There is an irreconcilable conflict between punishment and treatment.

In Social Science and Social Pathology, Lady Barbara Wootton points out that there is a similar antinomy between the dual objectives of prevention and cure towards which the treatment of offenders is directed. She writes:

In practice the purpose of this treatment is not only to discourage one who has transgressed once from doing so again; it is also to prevent other people from following his example. The deterrent theory of punishment ...light-heartedly assumes that these two objectives can be simultaneously pursued.... In fact, however, there is no evidence at all that the treatment which is most effective for the one purpose is also the most effective for the other. On the contrary there is some reason to fear that this is not so. Whereas lenient and sympathetic handling may be most efficacious in bringing an offender to see the error of his ways, the effect of this upon other people may well be to foster the belief that they "can get away with it".... It is futile to uproot one blade of

grass by methods which encourage the proliferation of others.<sup>5a</sup>

#### (b) The Therapeutic Ideology of Treatment

While the advocates of the punitive ideology tend to find the causes of crime in the criminal's own nature and behavior, the advocates of the therapeutic ideology tend to seek for causes of crime in the criminal's heredity acting upon his environment. This school of thought sees the criminal as being sick rather than sinful and so in need of medical rather than penal treatment. It holds a deterministic view of man seeing him as only a product of natural and social conditions. Crime and deviance are unintentional, being due either to ignorance, sickness of mind, or bad social conditions. It therefore advocates education and treatment rather than punishment as its policy for handling criminals. It calls for treating each offender upon an individual basis. The basic idea is that there is an entire set of circumstances of the offense and the entire character of the offender which must be taken into account when deciding the form of treatment to be given to the criminal.

Our only concern, say the advocates of this therapeutic ideology, when we have an offender to deal with, is with the future and with the rational aims of the prevention of further crime, the protection of society and, if possible, the cure of the offender. This revolutionary doctrine has been most powerfully advocated by Lady Barbara Wootton in two main works: Social Science and Social Pathology and Crime and The Criminal Law. Lady Wootton argues that, if the aim of the law is the prevention of socially damaging actions, the traditional punitive doctrine which looks to the offender's culpability puts his guilty mind (*mens rea*) "in the wrong place."<sup>5b</sup> His state of mind should be considered not before but after conviction. One reason for this is that the line between conviction and acquittal must remain clear-cut, while the attempt to draw

such a line between the normal and the abnormal is bound to fail. Another reason is that the traditional doctrine smacks too much of the retributive theory of punishment, a theory which Lady Wootton, being a determinist, finds barbarous and irrational. The third reason she gives is that, since we can never know what goes on in someone else's mind in any case, we have no possible way of discovering whether the element of "mental guilt" was present or not. In short, Lady Wootton wants us to abolish the doctrines of retribution, deterrence, and individual responsibility for wrongdoing and to replace these with one of treatment and cure. Punishment becomes therapeutic, since the criminal is now viewed as only sick not wicked or evil, and so not responsible.

### The Biblical-reformatory Approach

When Christians are faced by dilemmas of the sort reflected in the punitive and therapeutic doctrines of crime, they will, if they are wise, seek for guidance in the Bible. Only the Holy Scriptures can provide us with the valid premises for both natural and social science, being the key to human knowledge.<sup>6</sup>

In the Biblical view of man in society proper, account must be given to both individual and social responsibility for crime and wrongdoing. The Bible teaches that both the individual and his society have fallen short of God's norms for human behavior (Romans 5:12-20). God's Word also teaches a doctrine of expiation and restitution for wrongdoing.

#### (a) The Biblical Doctrine of Responsibility

Let us deal first with the Biblical doctrine of responsibility. The Bible plainly teaches that man's "heart is deceitful above all things, and desperately wicked" (Jeremiah 17:9). As a consequence of what Adam did, all men are, by nature, as The Westminster Confession of Faith puts it: "wholly defiled in all the faculties

and parts of soul and body." Man's nature has become ethically perverted so as to become wholly contrary to God's law for him. This fall into sinfulness as a way of life has affected society as well as individuals. In Adam, we all sinned and fell, becoming totally depraved. Thus we are born in sin (Psalm 51:5), and are evil from our youth up (Genesis 8:21). It is this original sinfulness that the advocates of the punitive ideology prefer to ignore. They refuse to admit the responsibility of society for the criminals it produces.

Yet who is the guilty person when a crime has been committed? In the whole causal series of the events leading up to a particular crime, we choose for reasons of convenience to hold the last link in the chain guilty, the "agent" of the criminal act in his obvious act. It is this which makes the punitive doctrine of individual criminal responsibility untenable from a Biblical-reformatory point of view. In the Biblical view in every crime the first and foremost criminal is the apostate and godless society itself. For this reason the writer agrees with Donald R. Taft and R. W. England in Criminology that society today gets "the criminals it deserves."<sup>7</sup> They stress the existence of "crimonogenic influences" in the American emphasis upon material success, the destruction of primary group ties, rapid social changes generating confusing definitions of morality, the gulf which exists between precept and practice that permits large-scale swindles on the Stock Exchange and in Big Business to go unpunished, while the small time crook "gets it in the neck." Such a culture, they claim, is bound to generate criminality, though its impact will vary between different segments of society and account for the specific form of criminal response. This explains, they say, the excess of male crime, since females are relatively protected from the excesses of competition. Moreover, families which provide love and security for their members give more protection for their members from our "crimono-

genic culture."<sup>8</sup>

The Biblical-Christian way of stating society's responsibility is in terms of the doctrine of both original and actual sinfulness. Herbert Farmer points out in God and Men that

Sin being a perversion of personal relations, the consequences of it are bound to permeate into the lives of all.... No man can be judged wholly responsible for the darkness, perversity and discord of his own being, for he could be wholly responsible for it only by being an isolated person, that is by ceasing to be a person at all. On the other hand, no man can be judged wholly without responsibility for it, for in that case he would not be a person. In some deep way we are all corrupted by the general sinful state of humanity into which we are born, and yet we make the corruption our own, and make it still more deeply part of us, by our own choice and decision, by putting our own causality as persons into it. We are not wholly responsible and yet we are not wholly without responsibility.... The truth of the doctrine of "original sin"...is that the whole close-knit, human personal order into which we are born, if we are to come into existence as persons at all, is in fact...a disorder, and its disorder instantly becomes part and parcel of our own personal existence, even before we become conscious of ourselves as persons.... Sin thus meets and conditions us at the very point of our origin. It is original sin.<sup>9</sup>

To a very large extent we all carry some share of blame for the wrongful acts of others. Obviously, each person is individually accountable for his or her

own conduct, but there is a very real sense in which we share responsibility for the sins and crimes that other persons commit. This has been true from the beginning. Adam and Eve started a chain reaction called original sinfulness, which has been going on ever since. Thus the irresponsible behavior of parents has helped to turn children into dangerous criminals. Thus society breeds crime by the brutality of its economic order, by its degrading emphasis upon materialism and sexuality, by the paucity of its provision for those who grow up in morally impossible conditions, by the harshness with which it throws upon the street all those who are less talented, competitive, and successful in life, by its Godless system of "public" education, and by the lovelessness with which it meets those who are less educated and adapted to its self-seeking requirements. Such a society has no moral right to become indignant over the individual criminal, but it should be as horrified at his crime as at its own. Christians who take seriously the doctrine of original sin every time they hear that a crime has been committed will feel, "I have only God's grace to thank that I have not become this criminal." Whoever thinks like this will have lost all desire to demand retribution (in the traditional understanding which has been given to that term) by "socking it to" the convicted criminal.

#### (b) The Biblical Doctrine of Expiation and Restitution for Wrongdoing

If the advocates of the punitive ideology tend to ignore society's share of responsibility for crime, the advocates of the therapeutic school have forgotten the individual criminal's need to make expiation for his wrongdoing. The idea of punishment as expiation for wrongdoing is rejected by most penologists today as barbarous and irrational. Behind this rejection of expiation and restitution there lies mostly either a positivistic, utilitarian point of view, or an Idealism which has

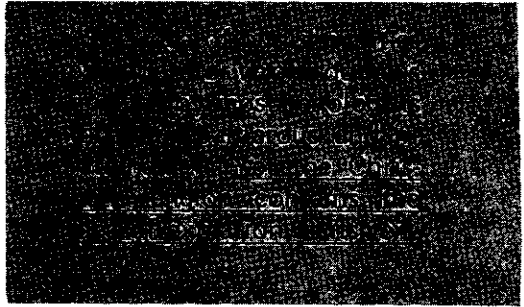
no understanding of the Biblical doctrine of expiation. Yet the Christian religion contains the idea of expiation at its very heart. Our Lord died upon the Cross as man's sinbearer (II Cor. 5:21). It is therefore incumbent upon Christians to show the superficiality of the secular humanist arguments on which its rejection of expiation is based.

First, we admit that in the desire of many people for expiation and retribution for wrongdoing there often lurks a great deal of primitive desire for revenge, a great amount of Pharisaism, as well as frequently hidden sadistic tendencies. But even after due allowance has been made for these unchristian factors, there still remains a remnant which can only be ignored by legal and penological thought at its peril. The most convincing proof of this traditional element in punishment is the criminal's own sense of the need for expiation. Any man who is not utterly without all moral sense desires in some way to "expiate" the wrong he has done, once he sees that it is wrong. Even if only in some vicarious way, he wants to make amends for his crime. No modern thinker understood this need of the criminal to expiate his crime better than the Russian writer Dostoevsky.

Dostoevsky's novels and diary are full of criminal reports, a strange interest which is accounted for by his refusal to explain crime by reference to social environment, an explanation which entails a denial of the legitimacy of punishment. He never alluded to this humanitarian-positivist theory except with vehement dislike: it seemed to him a denial of man's freedom and the responsibility that goes with it. If man is nothing but a passive reflection of his social surroundings, an irresponsible creature, then there is no such thing as human personality—nor is there God, freedom, evil, or good. Dostoevsky was ready to defend the severest penalties for crime on the ground that they are the more fitting to free and responsible beings. Evil resides in the

depth of human nature, in its fall into sin, and those who favor heavy sentences may have a more exact view of what crime is and of human nature in general than those who deny evil on humanitarian grounds.

Dostoevsky maintained the need for every crime's being met by a punishment that has its sanction in man's free conscience rather than in exterior law; and he affirmed this in the name of the dignity and freedom of man, who cannot agree to brand himself as irresponsible for evil and wrongdoing as a mere passive victim of his environment. If there be such



a thing as a man, if there be human personality, then evil has an inward origin, and it befits the dignity of man and his divine origin that he should recognize that suffering redeems wrongdoing. Evil is expiated in the inevitable consequences that it carries with it and not only by any external chastisement. The torments of a man's conscience are more frightening than the severities of the penal code, and the criminal looks upon his legal punishment as a relief from his moral torture. The human soul itself seeks the sword of justice that the State wields, and invites its punitive stroke; punishment is a step on the road to restoration.<sup>10</sup>

This need of the criminal to make amends for his crime may not be the basis for a Christian theory of expiation in criminal jurisprudence, but it does point towards such a theory. The basis of such a theory is not psychological but religious in nature. It is connected with the Biblical

correlation of obedience to God's law for man and the blessing which results from such obedience. The true conception appears in the Biblical idea that it is God Himself who "judges" that in the divine judgment every one will receive reward or penalty "according to his deeds done in the body" (II Cor. 5:10), an idea which is represented in every part of the Scriptures and which is also the presupposition of the revelation that the Lord Jesus Christ has borne the punishment for us. If the idea of reward and penalty for wrongdoing were not thus connected with good and evil, God's demand for our obedience to His holy and righteous Moral Law would lose its divine urgency. Because God is sovereign, not one of us can escape retribution for our wrongdoing, both here on earth and after death at the great Judgment seat itself.<sup>11</sup>

#### **The State's Duty to Uphold Justice and Expiation for Wrongdoing**

The question now arises whether the earthly penal law of the State is intended to uphold God's moral law upon earth and to punish those found guilty of breaking it? The answer must be in the affirmative since the Scriptures teach that God Himself has ordained "the powers that be" upon earth as His ministers, "a revenger to execute wrath upon him that doeth evil." (Romans 13:4).

Man has been called, in so far as possible, to reflect God's justice upon earth. John Calvin said of the function of the civil governor or magistrate that

The Lord has not only testified that the function of magistrates has His approbation and acceptance, but has eminently commended it to us, by dignifying it with the most honorable titles.... Wherefore no doubt ought now to be entertained by any person that civil magistracy is a calling not only holy and legitimate, but far the

most sacred and honorable in human life.<sup>12</sup>

Our sense of justice and our understanding of God's judgments upon crime and sinfulness would be dulled—as experience shows us even now—if the penal law of the State refuses to uphold God's justice and require expiation for wrongdoing. The penal law loses its sacredness when it becomes a purely secular affair. Thus legal and penal theorists injure the majesty of the law when they consider criminal jurisprudence only from a purely pragmatic and utilitarian point of view of the security of the state, the deterrence of others, and the reformation of the criminal himself. Regarded from this point of view, the criminal and penal law of the State loses its religious basis and sanction when it refuses to require that the convicted criminal make expiation for his wrongdoing not only to the State but to the victim of the crime. The penal law then becomes merely a means of "social engineering" and labeling of persons as criminals. Such a secular reduction of the majesty of the penal law inevitably invites the Lord's judgments upon apostate governments, ending in their citizens' loss of respect for law enforcement and ultimate revolution and anarchy. The criminal and penal law of the state loses its legitimacy and the right to its citizens' obedience. Unfortunately, this is precisely what seems to have happened to our federal and state governments and judiciaries. By refusing to protect the lives of unborn babies in its decision allowing abortion before the fetus becomes "viable," the Supreme Court of the United States has lost the respect of all God-fearing men and women.

#### **The Biblical Solution to the Secular Dilemma of Punishment or Treatment**

If neither the punitive nor the therapeutic ideologies can provide us with a valid basis for public policy in regard to the handling of criminals, it seems we are left with only the Biblical-reformatory approach. How can both requirements be



combined so that both the individual criminal and his society each make expiation and restitution for the crime committed? The Biblical-reformational answer is by arranging that, in the method of punishing the criminal, society also helps to expiate the wrong done and to admit its own share of responsibility. The idea of both expiation and responsibility must be cultivated afresh so that every member of society recovers a sense of his or her own personal responsibility for the original sinfulness of society, the sinfulness of the criminal, and his or her need to make expiation for the wrong done. But this must be done in such a way that it does not foster a spirit of self-righteousness, nor a sadistic enjoyment of cruel punishment, but that in the sacrifice of time and money which the punishment imposes upon society as well as upon the criminal, society will be reminded of its own guilt. This means that in practice the Christian will agree with those modern penologists who press for the individualizing and humanizing of the administration of criminal justice and the penal law, while in theory he will support the adherents of the theory of expiation and just retribution for wrongdoing. The guilty person must expiate his crime; in practice, this means that all who are guilty must offer expiation—society as a whole and the convicted criminal.

### **A Proposed Christian Penal Law Policy and Program**

As a possible policy and program for the United States federal and state legislatures and law-enforcement bodies to follow, we suggest the following principles:

#### **(a) Creative Restitution**

Society must expiate its share for the crime and especially for its numerous sins of omission by arranging for the financial compensation of any innocent victim of crime or of his relatives if he has been murdered. Up till now, the

punishment of crime has been regarded as of concern only to the state; the damage to the victim has been regarded almost as a private matter. Yet most crimes involve injury of one individual by another or the loss of property by one individual to another. The state, however, prohibits the victim from taking the law into his own hands to exact recompense for any injuries suffered. Although these crimes also upset the balance in justice between criminal and victim, as well as between criminal and society, the state's concern has been limited largely to restoring the latter balance, and the victim has been referred to civil law for damages.

Under our proposed principle of creative restitution, the state would shoulder its share of the costs involved in any crime to the victim. Our courts of justice must make it obligatory to provide adequate restitution directly to the victim out of public tax funds levied upon the community and the state in which the crime took place or wherever the criminal made his home. This would remind the home community of the criminal of its share of responsibility. Perhaps the community should be assessed fifty percent and the offender 25% and the state another 25% of the restitution involved. Only by such a method of restitution would society be made to realize its share of responsibility and its guilt. At present, society gets off scot-free as far as any compensation to victims is concerned. In Britain a law has already been passed along these lines and it is time a similar law was enacted at the federal and state levels of our own nation.<sup>13</sup>

In addition, the convicted criminal must also be made to help make reparation and restitution. This can best be done by providing the offender with an opportunity to earn money, preferably on probation rather than in prison. Probation has the great advantage that the probationer, being at liberty, has a better opportunity to make payments toward the support of his own family and toward making restitution to his victim. In 1955, 84,100

probationers in California paid, through their probation officers, \$2,747,000 toward the support of their families and \$902,000 in reparation to their victims.<sup>14</sup>

#### (b) Much Greater Use of Probation

For many offenders, probation is likely to be at least as effective in preventing recidivism (repeat of crime) as an institutional sentence. L. T. Wilkins found no significant difference in the reconviction rates in a three year follow-up study of a group of 31 offenders placed on probation in an English higher court, and a group of 31 individually matched controls, most of whom received institutional sentences.<sup>15</sup> Babst and Mannering followed up 5,274 adult male offenders in Wisconsin, and compared the reconviction rates in a two-year period, of those placed on probation, with those put in prison or paroled. When type of offence, criminal record, and marital status were held constant, it was found that the success rate of probation was about the same as that of imprisonment for recidivists, and was significantly better for first offenders.<sup>16</sup> According to Martin, a similar result was found in a demonstration project carried out in Saginaw, Michigan.<sup>17</sup> The general conclusion that probation is at least as effective in preventing recidivism as imprisonment is also supported by two recent studies in California penal institutions.<sup>18</sup>

The present system of putting first and young offenders into the same type of prison as hardened offenders, which still prevails in most of the United States, only serves to turn such young people into professional criminals. The criminal subculture of the prison tends to reinforce the worst characteristics of the young offender. Under parole or probation, the young offender can be re-integrated into sets of social relationships in which criminality as a way of life is truly taboo. It is here that local churches can make a tremendous contribution towards reducing crime in America. Let every congregation of Jesus Christ in the United States vol-

unteer to take one or two young offenders under its wing, providing them with Christian primary and peer groups in which they can be helped to overcome the temptation to commit acts of crime.

#### (c) Much Greater Use of Fines

Christians should also campaign for a much greater use of fines, instead of imprisonment. Hammond's study in England found that fines and discharges are much more effective than either probation or imprisonment for first offenders and recidivists of all age groups.<sup>19</sup> Fines are most likely to be imposed for embezzlement, fraud, larceny, lottery (and other gambling violations), loitering, and disorderly conduct. Providing he has the means to pay, the fine affords to the person convicted the opportunity to choose the nature of the impact of the penalty upon his life. In Penal Reform, Max Gruhut suggests that in the case of poor offenders fines be assessed according to the offender's resources, rather than the gravity of the offence, and that installment payments be permitted.<sup>20</sup>

It is not generally realized that prisons appear in Biblical law only as places of custody, pending trial, and never as places for permanent confinement. R. J. Rushdoony points out in The Institutes of Biblical Law that the methods of dealing with criminals in Old Testament society were threefold. He writes as follows:

First, capital punishment was required for capital offenses, and for incorrigible criminals. Second, for all other offenses; restitution was the law; where an order of law had been violated, restoration was the basic function of the courts. Emphatically, in Biblical law the goal is not punishment but restoration, not the infliction of certain penalties on criminals but the restoration of godly order.... Third, where criminals were unable to make restitution, bond-service

was mandatory in order to work out the required restitution....

Western civilization began as an unhappy compromise between the Biblical standard of restitution and a Graeco-Roman and pagan criminology...which leaned heavily towards punishment. The prison thus had a place in Christendom, as an ugly, bastard compromise. It was not only a place of custody, but also a place for torture and punishment; a place to hold men for ransom or for elimination from a threatening position in the state. The prison was an accepted but illegitimate part of the social order.<sup>21</sup>

The idea of incarcerating men and women in prison for ten to twenty years as a method of "reforming" them would never have occurred to the men of the Bible. They did not have to worry about imprisoning murderers, as these were executed as soon as their guilt had been established.<sup>22</sup> By abolishing God's penalty for murder secular humanists have brought upon themselves the problem of imprisonment.

#### (d) Restoring a Hierarchy of Penalties

In the light of the Biblical doctrine of expiation for wrongdoing, the penalties for crime must bear some relationship to the degree of seriousness of the crime committed. The principle of expiation prevents excessive severity on the one hand, and extreme leniency on the other in the administration of criminal justice. If deterrence becomes the sole guiding rule in this matter, then great injustices may result, since any punishment can be imposed for any crime committed, provided it is calculated to deter others. Or judges being guided merely by their emotions will impose too light punishments for really serious crimes, such as murders, and the majesty of the law will be brought into disrepute.

In The Idea of Punishment, Lord Longford, an English Roman Catholic layman, points out that retribution can be justified as a necessary element in deterrence and reform, but that neither will work effectively unless the punishments are felt to be deserved. He also argues that the person who has committed a greater crime and been found guilty of more wickedness should pay a heavier penalty than the smaller or less-wicked offender and that this idea rests on the concept of merit or demerit.<sup>23</sup>

The recent decision of the Supreme Court of the United States to abolish the death penalty for murder on the grounds that it is "cruel and unusual punishment" has created grave anomalies in our system of criminal justice. In some cases, convicted murderers spend less time in prison than persons guilty of far less serious offenses. In others, convicted murderers have escaped from prison and committed second murders, either of prison guards or other persons outside. In a Christian penal system, such anomalies would not exist, since murderers found guilty of premeditated killing of another human would be executed.

Today, most nations go to one of two extremes in the matter of the death penalty. Some have refused to carry out the God-ordained penalty for first-degree murder or they bring justice into disrepute by interminable judicial delays. Other nations use the death penalty to remove those who refuse to bow down to the state as in Soviet Russia and Red China. Both extremes lead to disastrous consequences--an explosive crime rate on the one hand, or a police state on the other.

To be effective, capital punishment must be administered impartially and swiftly, as soon as possible after the criminal has been apprehended and duly convicted of the crime.

If these Biblical principles were followed, the crime rate would be greatly reduced and the nation saved the great expense of maintaining maximum security prisons for murderers given life sentences.

The Word of God makes it clear that there are certain crimes where no other penalty but death is suitable. In the case of professional gangsters and those who will not repent of their criminal activities, no other penalty will solve the problem. Experience has shown that upon release such criminals will return to crime and murder and rape again. Such hardened criminals deserve the death penalty.

For those guilty of crimes of passion and who show signs of repentance, society may rightly exercise mercy.

#### (e) Exercising Justice With Mercy

The advocates of therapy and treatment for criminals justify their policy upon so-called humanitarian grounds and condemn the Biblical principles we have advocated as "barbarous" and "unscientific," if not "irrational." However, as C. S. Lewis has pointed out, the so-called humanitarian theory of punishment is neither merciful nor just. He writes thus in Essays on the Death Penalty:

The essential act of mercy was to pardon; and pardon in its very essence involves the recognition of guilt and ill-desert in the recipient. If crime is only a disease which needs cure, it cannot be pardoned. How can you pardon a man for having a gumboil or a club foot?

The humanitarian theory wants simply to abolish justice and substitute mercy for it. This means you start being "kind" to people before you have considered their rights, and then force upon them supposed kindnesses which they in fact had a right to refuse, and finally kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties. You have overshot the mark. Mercy detached from justice grows unmerciful.

That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that mercy will flower only when it grows in the crannies of the rock of justice. Transplanted to the marshlands of mere humanitarianism, it becomes a man-eating weed, all the more dangerous because it is still called by the same name as the mountain variety.<sup>24</sup>

By trying to explain criminality in terms of environmental factors, the liberal humanitarians in effect reduce the criminal to a passive object of his surroundings. By abolishing the ideas of individual responsibility and just expiation for wrongdoing, such advocates of treatment rather than punishment of the criminal are in effect reducing him to a function of his biotic, sociological, and psychic aspects. In effect they would lift the criminal code out of the realm of legality altogether and place it in the psychological, biotic, and social worlds. But crime cannot thus be reduced to psychic or social phenomena without grave injustice being done.

While psychology and sociology may well have their proper function to perform in criminology and penology, they are violating their sphere sovereignty when they seek to abolish the criminal and penal law altogether and reduce the criminal to an object for scientific manipulation in medical centers. Enough research has now been done on the present method of "treatment" of criminals to suggest that it has failed in its objective to reform the criminals upon whom it has been used. Thus Erving Goffman concludes his famous essay on "The Characteristics of Total Institutions" by saying:

Total institutions frequently claim to be concerned with rehabilitation, that is, with resetting the inmate's self-regulatory mechanisms so that he will maintain the standards of the establishment of his own accord

after he leaves the setting. In fact, it seems this claim is seldom realized...neither the stripping processes (of total institutions) nor the reorganizing ones seem to have a lasting effect.<sup>25</sup>

Likewise Hans J. Eysenck concluded in his discussion of this subject that therapies based on traditional approaches to "behavioral extremism" are virtually ineffective. He ended his paper on "The Effects of Psychotherapy" by stating that

"psychoanalysis is no more successful than any other method, and that in fact all methods of psychotherapy fail to improve on the recovery rate obtained through ordinary life experiences and non-specific treatment."<sup>26</sup>

Thomas S. Szasz in Law, Liberty and Psychiatry has shown that not only does so-called psychological treatment of prisoners not work, but that when it has been tried, it has been also grossly unjust and unmerciful. In the preface to this book Szasz writes:

Most of the legal and social applications of psychiatry, undertaken in the name of psychiatric liberalism, are actually instances of despotism. To be sure, this type of despotism is based on health values, but it is despotism nonetheless. Why? Because the promoters of mental health do not eschew coercive methods but, on the contrary, eagerly embrace them. Just as in democracy there lurks the danger of tyranny by the majority, so in mental-health legislation there lurks the danger of tyranny by therapy.<sup>27</sup>

Thus has William Penn's prophecy again come true: "When men refuse to be governed by God, they condemn themselves to be governed by tyrants." No Christian thinker denies that psychiatry and sociology may well have a contribution to make in the judicial process and in the administration of the penal law. While

the judge may well make use of the insights of psychiatrists and social workers, he must nevertheless in the final analysis make a judicial decision in deciding what sentence to impose upon a convicted offender. The penal law must have its own definition of legal liability, accountability, and responsibility if it is to remain law and if it is to uphold the claims of justice. Such liability and responsibility cannot be defined by psychiatry or medicine. But the legal definition of crime and expiation for wrongdoing may take account of the psychological, social, and biological aspects of human behavior. Then, in the light of such knowledge and information, it can try to weigh the conflict between the interests of the accused, those of the victim, and those of society in the scales of justice and seek to impose a just sentence.

As we have seen, the abolition of the doctrines of individual responsibility and of just expiation and retribution for wrongdoing really amounts to the depersonalization of the criminal. For the contrast between intentional, rational, and deliberate actions, on the one hand, and such aberrations as accident, mistake, automatism, and insanity, on the other, lies at the very root of our concept of what it means to be a person rather than a mere object. Such a view of man as a person created in God's image has in fact been derived from the Biblical view of man, and it will be a tragic day for American and Canadian criminal jurisprudence and penal law when it is lost, for then justice as well as mercy will have perished from our societies.<sup>28</sup>

#### Footnotes

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22. Robert T. Ingram (editor), Essays on the Death Penalty, (St. Thomas Press, P.O. Box 35096, Houston, Texas, 1963)—See my two essays.—E. L. H. Taylor.
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25. Erving Goffman, "Characteristics of Total Institutions," Asylums (Doubleday Anchor, New York, 1961), p. 71. Cf. A. C. Clarke, S. Dinitz, and R. R. Dynes, Deviance, Studies in Definition, Management and Treatment, (Oxford University Press, New York, 1975).
26. Hans J. Eysenck, "The Effects of Psychotherapy," in G. P. Stone and H. A. Farberman's Social Psychology Through Symbolic Interaction, (Xerox College Pub. Co. Waltham, Mass., 1970), pp. 718-770.
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28. E. L. Hebden Taylor, The New Legality, (Craig Press, Nutley, N.J., 1967)—a further discussion of the issues raised in this paper. See also supporting evidence for my thesis by Martha K. Kwitny's articles in The Wall Street Journal: "Our Overcrowded Prisons" (Oct 1, 1975) and "Shackled Justice—Some Solutions" (Oct 8, 1975). Many of the reforms I have suggested in this article are being carried out in the central judicial district of Iowa with notable success, according to Thomas Higgins of the Iowa House Judicial Committee in a report issued on Oct. 14, 1975.