PART I

THE PREVENTION

OF

REPEATED CRIME
Chapter I

The Purposes of Treatment

I. Retaliation

Historically the treatment of known criminals has always been predominantly punitive. But one cannot say with equal assurance that the purpose of punishment has always been crime prevention. On the contrary, the asserted motivation of punishment and its philosophic justification have at times been wholly retrospective. For a while it was thought of not at all as a preventive procedure, but merely as a means of exacting expiatory suffering. Its purpose as then conceived is expressed in the simplicity of childish rhyme more clearly than in much of more mature philosophical disquisition:

"Tit for tat; tit for tat.
Kill my dog, I'll kill your cat."

The reason why society itself, in its group organization, took over the function of thus exacting retribution, instead of leaving that task to the individual who had been injured, is far from clear. The desire by an individual that retribution be suffered for injury done is comprehensible. But insistence by the whole social organization that it be suffered must spring from other motivations than those which influence the individual. Just what the group motivations may have been is probably matter for ex post facto rationalization, rather than any real knowledge. Various explanations have been put forth. As one writer expresses it:

"The demand that a crime be atoned for is a reaction against the pressure of our own impulses coming from within, while revenge is a reaction against the assailant from without;
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we thus can distinguish two fundamental sources for the origin of the institution of punishment; the inner demand that a violation of law be atoned for, and the tendencies of revenge.

Both voices, that of expiation and that of retaliation, are identical psychological processes, but they differ in the accentuation of direction. The voice of expiation is addressed more directly to our own instinctual drives; that of retaliation is directed against the offender himself.

"From the standpoint of the psycho-economics of our life, the institution has yet another meaning; it presents a socially acceptable outlet for our own aggressions, the asocial nature of which prevents them, as a rule, from being lived out freely; normally they remain repressed. Hence, the institution of punishments represents a compensation, as it were, for the restrictions one puts on one's own sadism, and the identification of the righteous member of the community, with the latter's punishing functions, helps him to live out his own aggressions in an acceptable fashion."

This sounds rather more learned than convincing. Sir James Stephen says the same thing more simply, and perhaps more convincingly—"The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."

Other astute writers have suggested that organized society itself took over the function of imposing retribution simply because it recognized that retribution was demanded by its component individuals and felt that it could satisfy that demand by its own action, with less ultimate disorder than if satisfaction were left to individual effort. Certainly the theory that state imposed punishment tends to prevent individual disorder is now a commonplace justification for the continued

1 Franz Alexander and Hugo Staub, *The Criminal, the Judge, and the Public*, translated from the German by Gregory Zilboorg (1931) pp. 220, 221.


3 Oliver Wendell Holmes, Jr., *The Common Law* (1881) p. 41: "If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."
use of punishment. In all probability, however, the system of imposing punishment through governmental activity, instead of leaving it to individual effort, sprang from factors and motivations too complex and too subtle in their effects for accurate determination.

Whatever the explanation, the fact nevertheless remains that the traditional treatment by society of known criminals has been, as it still is, punishment. Moreover, for a considerable period of time and in widely prevalent philosophy, the purpose of socially imposed punishment was assumed to be retributive. Its fundamental justification was retrospective, not prospective. It was thought of as a method of imposing retribution and not as a means of preventing repeated crime. This retributory theory was not even then the only philosophy of punishment, of course, but it was sufficiently dominant to have left its mark upon the conventional thought of the present. Because it does still affect both present thought and present practices, the differentiation between punishment as a process of compelled expiation and punishment as a preventive of future crime is important enough to warrant some elaboration. To that end a quotation which epitomizes the philosophy of the retributive theory is illuminating:

“Man is an entity which has its own intrinsic value; (and quoting Immanuel Kant)4 'one man ought never to be dealt with merely as a means subservient to the purpose of another.' This principle served not only as a basis for his humanitarian philosophy, but also as the point of departure for his penal

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4 See Immanuel Kant, The Philosophy of Law, translated from the German by W. Hastie, Edinburgh (1887) pp. 195, 198. "Judicial Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society... Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice."
theory which is utterly devoid of humanitarian considerations. Since Kant assumes that man should not be used as a mere means, he maintains that even when being punished man should not be used as a means to an end, neither to the end of reforming society nor even to the end of reforming the criminal himself. Punishment, then, finds its justification only in the principle of justice, which requires that a person who has committed a crime shall be punished. In other words, punishment has its \textit{raison d'être} not in any future effect upon which it may be directed, but only in the criminal act by which it is preceded.

"Partly in harmony with Kant's views is the penal theory of another great German philosopher, Georg Wilhelm Friedrich Hegel (1770–1831). He, too, advocates an absolute theory, in that he justifies punishment not as a means to influence either society or the criminal, but as an act of retribution. However, the reasoning on which this thesis is based is quite different from Kant's.

"In the first place, if punishment were an attempt at exercising influence on people, either on the criminal or on others, it would be based on the assumption that man is not free. This, Hegel objects, would violate the principle that right and justice must have their seat in the free will, not in a restriction of the will. To use punishment as a threat by which to enforce law would be much the same as to raise a cane against a dog. Man, however, must not be treated as dog, but with due accordance to his dignity and honor.

"According to absolute theories as they are exemplified in Kant's and Hegel's views, punishment looks back to the past, so to speak, being a reaction of society to an occurrence that has taken place in the past."

Heinrich Oppenheimer, in discussing these various philosophies of punishment as an objective in itself, rather than as a means to an end, finds that they set up five different justifications:

"I. It is in the fulfilment of its divine mission that the state dispenses punitive justice. To punish criminals is a re-

\textsuperscript{5} Werner S. Landecker, "Criminology in Germany," 31 J. Crim. L. 551 ff. (1941)."
religious duty. This is the \textit{theological} view of punishment, of which the most uncompromising advocate is Joseph de Maistre.

\textit{2.} The stain of guilt must be washed away by suffering in fulfilment of one of those metaphysical laws the meaning of which man, as a finite being, cannot comprehend, but to which he must yet conform, since his own infinite nature makes him part of the order of the universe of which that law is an expression. This is the \textit{expiatory} theory of punishment according to the version of Joseph Kohler.

\textit{3.} The moral law, which is binding on all rational beings, prescribes that crime shall be visited with punishment. The conception of punishment as a \textit{moral} necessity has found in Kant its classical interpreter.

\textit{4.} Crime postulates punishment as its necessary \textit{logical} complement. This is the root-idea of Hegel's theory of punishment.

\textit{5.} A misdeed displeases and continues to offend our sense of harmony as long as it remains unrequited. It is the function of punishment to resolve the discord and so to satisfy an urgent want arising within our \textit{aesthetic} consciousness.

This notion that the proper method of treatment of a known offender is punishment, and that the primary reason for punishing is the infliction of deserved retribution, or the exaction of due expiation, is not confined to the writings of philosophers. It is found pervasively in the written opinions of judicial decision and in the statutory enactments of legislatures. Thus, we find the supreme court of West Virginia stating: "Defendant was found guilty of murder in the first degree and adjudged to be hung \textit{in expiation} of the crime." 7 Again, in a New Jersey case, we find a court denying the right of the New Jersey court to impose punishment for a murder when the blow had been struck in New York, although the

\[\text{6 Heinrich Oppenheimer, \textit{The Rationale of Punishment}, London (1913) p. 182.}\]

\[\text{7 State v. Angelina, 73 W. Va. 146, 80 S. E. 141 (1913); present author's italics.}\]
death had occurred in New Jersey, on the argument that "If she (New York) does not choose to avenge it, it is not for us to step in and do it for them." 8

That certain modern statutes providing for the treatment of known offenders are predicated, partly at least, upon the theory of retaliation for injury accomplished as distinct from a theory of prevention, is indicated by the Michigan law concerning punishment for attempted crime. This statute reads as follows:

"Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows: 1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison for not more than ten years; . . . 3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than five years . . . the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than two years or in any county jail not more than one year . . .; but in no case shall the imprisonment exceed one-half of the greatest punishment which might have been inflicted if the offense so attempted had been committed." 9

Obviously this apportionment of punishment can be explained only by an assumption that to some extent it is designed for retribution. If the law's purpose were merely preventive, it would apply to the act done the same consequence, regardless of whether the act were successful or unsuccessful,

8 State v. Carter, 27 N. J. L. 499 (1859); present author's italics.
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since its objective would be the prevention of acts likely to result in harm. The fact that the punishment for success is twice as severe as the punishment for an unsuccessful attempt must mean that the additional suffering consequent upon success is a matter of expiation or retribution because of that success.

A clear realization of the early dominance of these retaliatory, retributive, retrospective notions of punishment is imperative, because their persistence still markedly affects both the actual practices and the philosophy of contemporary treatment of convicted wrongdoers. 10

2. PREVENTION

Despite this hardy persistence of the retrospective purpose in the treatment of discovered criminals, some notion of a prospective function eventually gained a measure of acceptance. Punishment was still assumed to be the proper method of treatment, but the philosophy of the punishment, the theory by which its utilization was justified, altered. The merely retributory theory weakened; a preventive purpose gained acceptance.

One would like to believe that the change sprang from the practicality of social wisdom. Perhaps it did. But there is also probability in Clarence Darrow’s insistence that it was mere sentimental change of alleged justification, without real alteration in objective. His cynical suggestion is that:

“Most people are now ashamed to admit that punishment is based on vengeance and, for that reason, various excuses and apologies have been offered for the cruelty that goes with it. Some of the more humane, or ‘squeamish,’ who still believe in punishment, contend that the object of this infliction is the

10 For an excellent discussion of the various utilitarian motivations which have affected the manner of retaliation at different periods, see Georg Rusche and Otto Kirchheimer, Punishment and Social Structure (1939).
reformation of the victim. . . . A much larger class of people offers the excuse that punishment deters from crime. In fact, this idea is so well rooted that few think of questioning it. . . . (But) punishment means that the suffering by the victim is the end, and it does not mean that any good will grow out of the suffering." 11

Nevertheless, for whatever reason, the philosophy behind the conventional treatment of known criminals has markedly changed. The treatment is still punishment, but the punishment is justified on a theory that somehow or other further crime can thereby be prevented. Its motivation, or alleged motivation, has become at least partly prospective. This, to be sure, is the revival of an older philosophy, not the origin of a new one. Lucius Annaeus Seneca wrote as early as the first century:—"We will not punish a man because he hath offended, but that he may offend no more; nor does punishment ever look to the past, but to the future; for it is not the result of passion, but that the same thing may be guarded against in time to come." 12 But at least the reviving notion of prevention as the purpose of punishment was a change from the retributive philosophy which it was supplanting.

3. THE OBJECTIVE OF PREVENTION

However, despite this recrudescence of the notion that punishment as a consequent of crime ought to be used as a preventive measure, not merely as a retributive one, the precise objective of the preventive activity remained what Max

12 Nor was the thought original even then. Plato, some 400 years before, has Protagoras comment: "No one punishes a wrongdoer from the mere contemplation or on account of his wrongdoing, unless one takes unreasoning vengeance like a wild beast. But he who undertakes to punish with reason does not avenge himself for the past offense, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again."
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Beerbohm might have described as inenubilous. The desired end was conceded to be reduction in the amount of crime, that was well enough agreed; but whether it was primarily reduction of further crime by the person punished, or primarily reduction of possible crime by persons who witnessed the suffering of the person punished, was by no means precisely conceded. As a matter of fact, this duplicity of objective appears not ever to have been precisely discussed to any great extent. It must have been realized, but it has been seldom considered.

Yet, obviously, punishments designed for the one purpose may not be well suited to the other. Excision of an offender by death would, of course, serve both; it would effectively preclude repetition by its victim and it might more or less effectively deter others from similar conduct. But other, less drastic types of punishment are not so well adapted to attainment of both objectives. On the contrary, a particular penalty—the amputation of a hand, for example—well calculated to inspire a preventive fear in others, far from preventing repetition of crime by its victim, might effectively force him into further crime as the only practicable means of existence. And from the opposite point of view, a peculiarly mild penalty, or the abstention from any penalty, whereby the particular criminal could be encouraged and aided to refrain from crime, might be suspect as an encouragement to others, who observed that leniency, to risk the commission of crime.

When the philosophy of punishment was wholly retrospective, and its purpose was no more socially directed than the infliction of deserved retribution, the selection of proper punishment was relatively easy and uncomplicated. The punitive authorities had only to determine how much suffering the particular wrongdoing, or the particular wrongdoer, deserved. There was a problem whether punishment was to be apportioned in relation to the offensiveness of the act, or in relation
to the wickedness of the actor. But the choice of determinants in that respect had little theoretical connection with the public safety. In that sense, it was a somewhat academic problem.

But the later assumption that punishment was prospectively purposed, and should be designed for the prevention of further crime, immediately brought out from the ivory tower into the realm of practicalities the problem of what should be its character. The new philosophy brought the problem into the field of practical public policy, but the exponents of that philosophy did not solve the problem. Indeed, they rarely even postulated the problem in clear perspective. The retributive notion, which was still by no means a wholly obsolete philosophy, kept intruding itself upon the preventive notion. Discussion of wrongs which ought to be made punishable for the sake of prevention was confused with ideas concerning wrongs which ought to be punished because they called for expiation. Thus the question of what type of activity ought to be punished was itself confused. And when it was conceded that a particular type of act should be punished, the quantum of punishment was disputed without specific definition of the purpose of the penalty as retribution or prevention. Even when punishment was thought of as a merely preventive measure, conflict arose over its use as a horrendous example to others or as an effective control directed at the conduct of the punishee himself. Thus the whole matter of punishment was—as, indeed, it still is—twice confused.

Nevertheless, out of this welter of conflicting ideas and confused expression there did come into more general acceptance the revived philosophy that punishment ought to be for the purpose of preventing further crime by either the person punished or the persons who learned of it.

As early as 1763 Beccaria set up his thesis that “every punishment which does not arise from absolute necessity . . . is tyrannical. . . . It is upon this, then, that the sover-
eign’s right to punish for crime is founded; that is, upon the necessity of defending the public liberty, entrusted to his care, from the usurpation of individuals; and punishments are just in proportion as the liberty, preserved by the sovereign, is sacred and valuable.” Jeremy Bentham, too, declared it to be axiomatic that punishment be used as a means of preventing crime; hence, that the endeavor of the legislator should be to ascertain what acts would be more hurtful to the common good than beneficial and to devise for those particular activities a form of punishment necessary to deter their commission.

In more modern verbiage, von Hentig repeats the proposition, saying:

“Flight from a destructive stimulus is one of the most decisive reactions of living matter, in so far as it has developed stimulus-conveying organs and mechanisms of movement. In sudden withdrawal from the destructive sphere, the sensory touch of many animals offers a preliminary and abbreviated act of flight. The far-reaching senses of smell, hearing, and sight apprehended the threatening stimulus, while it is still in the neighbourhood of the body, thus allowing of a timely parrying movement. Again, there are deposited in the brain countless condensed experiences of situations which threaten life; thus the conception of danger sets the adequate reaction in motion long before its actual approach. This is the strongest tendency of all life, and with it the social contrivance of punishment reckons.

“Punishment means the establishment of artificial danger. Punishment is organized hurt, an impairment of life organized in the form of laws, which society consciously uses to train humanity to avoid certain possible courses of action potentially injurious or hostile to itself. Punishment is imitation of precedents which in real life are hourly repeated: here lurks the injurious agent, and there, guarded by man’s living senses, wait the motor functions, and over both mechanisms is their great co-ordinator, the Brain.”

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Perhaps the simplest expression of the whole idea is the straightforward declaration in the Constitution of Pennsylvania of 1776, section 39, that “To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary punishments less necessary; houses ought to be provided for punishing by hard labour, those who shall be convicted of crimes not capital; wherein the criminals shall be employed for the benefit of the public, or for the reparation of injuries done to private persons. And all persons at proper times shall be admitted to see the prisoners at their labor.”

14 Though the progress of enlightened thought has thus tended toward predication of the use of punishment upon the pragmatic justification of prevention of crime, a definite reversion to the older notion of punishment as an end in itself, under the nomenclature of retribution or expiation, is apparent in the philosophy of some recent German pronouncements.

According to Landecker, “With the advent of Hitlerism, German penal theory and practice have returned to the idea of punishment as retribution. This trend has found its legal expression in an act in which penal servitude is called a means to make the offender atone for the wrong he has committed. Accordingly, in an official publication of the National Socialist Party, punishment is defined as ‘retribution for the offense by an injury imposed upon the offender.’

“How can we account for this revival of the dark ages in German penology? By writers who can be considered thoroughly permeated with current trends of thought in Germany we are told that the idea of retribution is an essential element of German culture. The demand for atonement, it is stated, is as old as the German people; this demand will prevail as long as the German people will exist. Says the writer, Under-secretary of State in the German Department of Justice: ‘Maybe the desire to have the offender atone for his deed cannot be based on logical or philosophical grounds, but it lives in us, and that is enough.’ He finds the justification of punishment in what he calls ‘a refined urge for vengeance.’ Similarly, in a publication of the official ‘Academy of German Law’ it is pointed out that the legal penalty which is rooted in German legal ‘feeling’ is retributive in nature. In typical Nazi phraseology, the idea of retribution is called ‘one of the deepest world wisdoms, an immortal principle of justice, springing forth from the elementary depths of the uncrippled German folk-spirit.’

“What appears thus in the guise of a flowery romanticism is in reality a methodical attempt to popularize Nazi penal methods and the Nazi system in general by an appeal to the most crude and cruel impulses of man. This political ‘philosophy’ has found its most cynical expression in a discussion of capital punishment, written by the Under-secretary of State in the Department of Justice, Mr. Freisler. After having discarded other techniques of execution, the writer finally arrives at the alternative of the guillotine or the axe. Which deserves preference? Freisler decides for the axe because, as he
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But though the notion of crime prevention thus supplanted the philosophy of retribution for wrong committed, it is noteworthy that the concept was almost invariably that of preventing crime by those who witnessed the punishment, with little thought for the repetition of crime by the person punished.

4. THEORIES OF HOW PUNITIVE TREATMENT OPERATES TO PREVENT

The simple notion that punishment can be effective as a preventive of crime by making the evil of unpleasant physical consequences outweigh the hope of possible gain, is not without its overlay of more elaborate theory. One proposition, for example, predicates the deterrent effect of punishment not upon fear of physical suffering so much as upon unwillingness to incur the reprobation and contumely of one's fellow human beings—consequences which are both created and connoted by the infliction of punishment. The force of public opinion, rather than the fear of pain, is thus postulated as the true preventive factor. It is interesting to note that the Soviet criminal law so far gives recognition to this theory as to provide that the punishment for certain offenses may be in the form of a "public rebuke." 15

Still another theory predicates much of the crime-preventive force of punishment not at all upon fear as such, neither fear of physical suffering nor fear of public opinion, but upon the creation of subconscious motivations which perhaps cannot be precisely characterized. It recognizes that a large part of conduct is not a calculated response to the gain or profit of particular conduct, but is rather a habit of conformance to established notions of moral conduct. Punishment is not the factor which compels conformance with those ideas of proper says, 'decapitation by axe better suits the German spirit.'" Werner S. Landecker, "Criminology in Germany," 31 J. Crim. L. 551, 557 (1941).

conduct, according to this theory, but it is one of the numerous factors by which the ideas themselves are created and defined. Just why individuals do conform to these established notions of proper conduct, the theory perhaps does not make clear. But it assumes existence of the tendency toward conformity, and postulates the preventive effect of punishment upon its operation in giving form and clarity to the conduct with which conformity is desirable. We find the thought thus expressed, for instance, by Sir James Stephen:

"Bentham . . . says that if a fine of a shilling was as efficient in preventing murder as the punishment of death, a fine of one shilling would be the proper punishment for murder, and anything further would be unjustifiable cruelty. "It is possible that by giving an unnaturally wide meaning to common words this statement might be so explained that most people would agree with it. If, for instance, a fine of a shilling were, for some reason, generally recognised as embodying the common feeling of hatred against assassins, and moral indignation at assassination, as fully as the infliction of a shameful death, Bentham's statement might be true; but to discuss so unnatural a supposition would be a waste of time. Probably, however, Bentham's meaning was that if murderers in general feared a fine as much as death, they ought, upon conviction, to be fined instead of being put to death, although putting them to death would be more in accordance with the moral sentiments of the community at large than fining them. "If this was his meaning I dissent from it, being of opinion that if in all cases criminal law were regarded only as a direct appeal to the fears of persons likely to commit crimes, it would be deprived of a large part of its efficiency, for it operates not only on the fears of criminals, but upon the habitual sentiments of those who are not criminals. Great part of the general detestation of crime which happily prevails amongst the decent part of the community in all civilized countries arises from the fact that the commission of offences is associated in all such communities with the solemn and deliberate infliction of punishment wherever crime is proved. . . . The sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts
into a permanent final judgment what might otherwise be a transient sentiment. . . . In short, the infliction of punishment by law gives definite expression and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.

"I think that whatever effect the administration of criminal justice has in preventing the commission of crimes is due as much to this circumstance as to any definite fear entertained by offenders of undergoing a specific punishment." 16

The same notion is expressed perhaps even more definitely by Aschaffenburg, who says:

"The theory that considers a penalty necessary only 'Quia peccatum est,' is based on wrong assumptions. . . . The deterrent effect of punishment should be active in two directions. It must impress itself on the consciousness of the people at large, and thus act as a preventive, and, through the punishment, it must be a warning to the individual and must thus restrict him from further evil deeds. . . . Greater, however, than the value of the threat of punishment in the individual case is its educational value for the whole view of life held by the people.

"The stamping of an act as an offense the commission of which the State will prosecute with unrelenting severity, immediately arouses the feeling that the act is unsuitable, inadmissible, disreputable, contrary to duty. . . .

"Thus, general prevention operates rather quietly, slowly, and penetratingly, making the consciousness of right sharper, intensifying the general feeling for right and wrong, and is thus rather educative than directly deterrent." 17