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THE PRESENT PENAL DILEMMA

HARRY HOLBERT TURNEY-HIGH*

The writer had planned to survey briefly the entire field of criminology when this paper was first proposed. Such an ambition was soon dispelled by the magnitude of the problem. In considering what to present, then, it was thought that the most pressing and most baffling portion of the study should be presented, that of the disposal of the convicted offender. The practical motive has been to reveal our present day quandary, to widen the discussion so that a larger proportion of public spirited and well-informed people will lend their hands to its solution. That this paper was written on the campus of the University of South Carolina, which was once trod by the coiner of the word "penology", Professor Francis Lieber, was not a factor suggesting that the present writing be confined to the subject of punishment but it is a matter of pride to be able to continue Lieber's discussion.

The central theme of criminology, the search for the cause or causes of crime, is furthermore one which the writer would at present like to avoid. After about a century's serious if not always well-directed effort, the professional criminologists have concluded that they have not discovered true causality in the field of crime and delinquency. By a cause one means, of course, that if phenomenon B invariably occurs after phenomenon A, there is considerable reason to think that A is the cause of B. Such inevitable relationships have not been discovered in the subject area. This does not mean that the criminologist is either ignorant or incapable of offering practical advice to the legislator, prosecutor, and administrator. What it does mean is that he no longer talks in terms of If we have *so much* of this, we will have *so much* of that. Hence, what were called causes two decades ago are now referred to as "accompanying circumstances", and constitute useful data.

Again, it would have been pleasant to have discussed that branch of the study wherein the writer has not only been es-

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pecially trained but where he has had the most of his actual field experience, notably in the area of detection and apprehension. Suffice it to say here that the police arts are to all intents and purposes perfected arts today. It is not true, as the radio often and pompously proclaims, that crime does not pay. It is paying thousands of persons vast amounts which they collect with comparative immunity right at this moment. This need not be true, however, as the doctrine that there is no such thing as an undetectable crime, but merely incompetent or insufficient police, has been well established. If the public prefers untrained or partly trained police, or worse, that is very definitely their business, since they are the ones who are being robbed, mulcted, assaulted, and slain.

The methods of prosecution and conviction are affairs of the legal profession in which the writer is strictly amateur and has no valid comment to make.

The problem of what to do with the convicted offender concerns every citizen, however, and there is no present apology for asking the reader to examine the record. The writer does not expect or wish every thing he says here to be accepted as fact. Indeed, he would rather have his words met with intelligent scepticism. Intelligent scepticism, of course, implies that the doubter will make his own investigation, will look into the facts, will survey the unbiased literature. The writer is confident that such study will suggest that the reader adopt views similar to those herein expressed, even the less pleasant ones, for there is very little original in this paper. It represents, rather, the consensus of the present day specialists in the field of punishment.

One of the best ways to gain perspective regarding any social institution is to examine its history, hence a brief summary of the history of punishment in western civilization is a chore which cannot be avoided. Even though the picture of western man running around the squirrel wheel of his penal philosophy is unattractive, this story of frustration and exasperation must be recounted because it is so rarely available in small space. In summary, one sees that good intentions and piecemeal thinking by sound persons on the one hand, or particularist, theoretically biased persons on the other have proven tragically inadequate.

Our curtain rises with Europe recovering from the dark age which marked the collapse of Roman administration.

The succeeding medieval picture was by no means as dark as its successful ideological enemies have painted it, but its penal system was gothic enough. All that was left of the spirit of Rome, to be blended with the genius of the Germanic and Celtic tribes was a belief in corporal punishment. No layman conceived of anything better. No penal institutions existed, and none were desired. True, the criminal was no longer considered an offender against the person, family, or clan of his victim and hence turned over to their vengeance, as in the old tribal days. He was thought to be an offender against the person who held the medieval sovereignty, or of society as represented by whomsoever held manorial rights over him under feudalism. In any event, the theory of deterrence was applied promptly and savagely. Punishment was inflicted upon, and only upon the persons of the offenders. Capital punishment was meted out for offenses hardly called misdemeanors today, but the illiterate masses, without our modern commercial entertainment, were grateful to their lords for providing them with gory spectacles. Furthermore, the medieval lack of squeamishness did not balk from permanently eliminating the offender from society. Lesser crimes were punished by non-lethal techniques, branding, cutting off ears, slitting noses, flogging, often with considerable poetic imagination in chopping off the part of the human body which symbolized the offense. Dungeons did indeed exist under the principal fortification of the castle, but imprisonment therein was brief for those awaiting trial or the execution of sentence. The long-term prisoners were the military, dynastic, and otherwise, personal foes of the prince or baron, his competitors, that is, rather than criminals. The medieval doctrine of bodily pain or extermination actually worked after a clumsy fashion. The post-renaissance detractors of the medieval system enjoy pointing out that that period from the Tenth to the Thirteenth Century was a period of stagnation, of no social and economic change. This point has long been disproven, but social change was so slow and gradual that the population could adjust to it. Hence, in contrast to our own situation, medieval penal practice could very leisurely adjust to the load it had to bear.

One light glimmered very feebly through all this bloody medieval haze. Despite the essential coarseness of the Teutonic barbarians, the modern arguments *ad hominem* against

certain unworthy prelates, despite many a false trail followed by medieval theologians, the Middle Age was dominated by the Church, and the Church was essentially Christian. Several aspects of medieval theology and even canon law gave promise for the future, some of which are even now just coming into fulfillment. The basic rationale of ecclesiastical punishment was the reconciliation of the sinner to God, the salvation of his soul by even drastic and cruel methods, in other words, the rehabilitation and reformation of the offender. The lay courts never saw this point, and many do not to this day. Punishments, then, should be meted out according to the needs of the criminal, and not to fit the crime. The ecclesiastical judges had great leeway in fixing the sentence. This was converted into the grossest kind of tyranny in later and decadent days, but the motive of fitting the punishment to the offender, not to the offense, was always there. In other words, the Church saw each man as a specific, individual soul, a unique phenomenon as the New Testament teaches. Hence, it avoided the fallacy that crime is a mass phenomena to be corrected by mass methods, a doctrine still held today except by a few experts. While the Church often applied the doctrine of spare the rod and spoil the child, its attitude towards the offender was that of a father, under the New Testament God, and not the savage seeker of vengeance, after the Old Dispensation. While the term has achieved a well-deserved historical odium because of heresy trials, an ecclesiastical court was an *inquisition* into the facts of what actually happened, and why, and what should be done in the best interests of all concerned. A modern juvenile court is essentially this, is it not? Such chancery ideas were historically direct borrowings from the Church courts. Again, the parental idea of locking up the offender until the spirit should move him to penitence was a canon law idea which has borne poor fruit today. Last, when we shudder at the cruelty of the inquisitional courts, we should ask ourselves why everyone who could claim benefit of clergy, and hence seek the jurisdiction of the canon law courts, did so if the ecclesiastical courts were so much more severe than the secular ones.

It is nevertheless impossible to soften the fact that whatever the theoretical ideas, or lack of them, which characterized the medieval period, its simple penal system was fraught with death and torture. Crime was conceptualized as a simple

phenomenon, and simple and gory corrections were applied. The world was moving towards the so-called renaissance, however, and the secular intellectual was beginning to raise a very loud if not particularly accurate or unbiased tongue. The renaissance, from our standpoint, has little to do with the rise of art forms. From the standpoint of everyday life, it was an economic and hence political revolution accompanied by philosophical rationalizations of these facts or expressions of horror at their worst features. It was the period of the rise of the business man to the disadvantage of the feudal noble, of extension of the markets, of improvements in farming to the point of becoming a business rather than a way of life. Politically, it was the destruction of local autonomy, the rise of absolutist monarchy, and a rise of nationalism which spelt an increase in the number and severity of wars. Humanism, as the intellectual expression of the times was called, has been rather over-praised. It is hard to see why the re-discovery of Greek grammar, the turning of the back of both Protestant and Catholic philosopher on the then modern times to search for the truth in those Greco-Latin writers, who offered small comfort and direction for their own times centuries, should be called "human". Why all of this is "humanist" is hard to see. It meant the fracture of the unity of western Christianity into mutually hateful groups, and the laying of the egg of irresponsible war, which bird of prey feeds on us yet. Ideologically, it meant the denying of a God-centered universe for a man-centered one.

From a penal viewpoint, it cannot be said that the renaissance philosophers, theologians, and jurists thought of a single new or effective thing. Indeed, if the medieval period was bloody, the renaissance was unspeakable. The social and economic changes uprooted thousands of persons per year and sent them forth into a world without the means of their support. Untold numbers of peasants over these centuries were removed from their manorial duties *and* rights by big business farming. With the improvements in commerce inherent in large scale production and distribution; the invention of the corporation; the extension of the market to include the world; the hardships of the nascent renaissance capitalism lay heavily upon the multitudes and the benefits were reaped but by few. The spread of capitalism's productive

benefits to everyone was a thing for the future. As it was, the peasant was turned off his ancestral acres, the guild craftsman, journeyman, and apprentice transformed into a wage earner or thrown out of work entirely. The trained fighting man of the feudal retinues likewise suffered technological unemployment caused by the centralizing of military strength into the hands of the absolutist monarchies. All these persons were uprooted and cast on the highways to become "sturdy beggars", or robbers or, as was most common, both. This situation is well-portrayed for the Tudor period in Mark Twain's *Prince and the Pauper*. To meet this increasingly grave situation, the humanistic philosophers, theologians, and jurists could not rise above the principle of if one bitter pill is good, two are better. If corporal and capital punishment be the solution, let there be more and bitterer corporal and capital punishment. Crimes were steadily removed from the misdemeanor category to felonies in England, and all felonies were punishable by death. The result was the greatest blood bath Europe was to know from the decline of Roman administration to the rise of that of Hitlerism and Stalinism-Leninism. Over 240 crimes were made punishable by death by the time of the later English Stuarts, and western civilization was ripe for a change, but towards what?

One idea of humanism proved permanent, the doctrine of the man-centered universe. From that time until this, the comfort and well-being of mankind here and now became the chief goal of civilization. The seed has been planted that man as man is the most important phenomenon in the universe, so that as the renaissance spirit declined and the Eighteenth Century approached, most thinking people found the bloodiness of the then current capital and corporal punishment personally repulsive, vicious with regard to the offender, degrading to the courts, and demoralizing to the people. It was rather well-understood even by then that severity of punishment was not deterrent. The more the rope, ax, and brand were applied, the more candidates these weapons had. Thus, while the treat-them-soft school has never appealed to but a few sentimental persons, the treat-them-rough school of penology was the first to be found to rest on the fallacy that criminals are causes rather than results. The treat-them-intelligently school is just being born.

The discovery of the New World gave a temporary solution to the problem the theorists sought. Hence, from James I until George III, England swept the products of her gaols onto the American shore, mostly on that of what is now southeastern United States. At least, membership in an old southern family is not always a source of justifiable pride. Penal transportation is an often forgotten factor in American history, and it is only in New Orleans that one recalls the theme of the opera *Manon*, and laughingly notes that everybody today is descended from the *filles de casquette*, the *filles de correction* all having died without issue.

Transportation of convicts was originally a Roman idea, and the Eighteenth Century was devoted to all things classical. Russia, tsarist or soviet, is the only nation at present using the device. There can be no doubt that many English and French felons, finding new changes in America, reorganized their lives successfully. It is also true that the harshness of the law of the times declared many persons transportable felons who would scarcely be bothered today. It is likewise a fact that many so-called criminals were merely political dissidents. Transportation reduced the number of executions of capital and corporal sentences in the England of the times, but it obviously did the country no permanent good. The social disorganization of these centuries produced felons faster than courts and ships could eliminate them. The idea of imprisonment for punishment was being toyed with, and a few half-hearted experiments were being tried, but this device was the child of the United States, not Eighteenth Century Europe. In the meantime, the Anglo-French wars stripped France of her American Empire, and the American Revolution deprived Britain of her convict dumping-bin.

England's makeshift during this interim was one of her most dismal failures as was apparent even to novelists, for Dickens described it in *Great Expectations*. The Crown had many superannuated wooden warships anchored in lonely coves and marshes, or actually aground in tidal swamps. She also had thousands of convicted humans who were also nuisances, but she had progressed too far to hang them. It was a simple case of putting two and two together, but the sum was indescribable. Imprisonment in the hulks barely kept the felons alive, made no provision for training or rehabili-

tation, had no real discipline in spite of plenty of cruelty, no separation of the young from the old, the vicious and case-hardened from the relatively uncontaminated, no proper work. The hulks were obviously an unproductive makeshift, and one must observe that the French and Spanish got some value out of their un-executed felons by making them row galleys.

To retrace our steps a moment, one notes that even before the American Revolution was complete, Lieutenant (called Captain) Cook left England on his voyage of discovery into the South Seas. The American government, considering his frigate a scientific ship, ordered its cruisers not to molest her. The discovery of Australia and the revival of transportation were almost foregone conclusions, England being desperate with too many unhanged felons and the new colony needing population. The Australian experiment began with the harshest and most stupid cruelty. Transportation, for example, was provided by such ships as the *Success*, built in the first decade of the Eighteenth Century and still sailing the seas as a museum. Bluff-bowed, such old Indiamen took months to make the voyage. Their convict passengers, meanwhile, were confined in cells wherein a grown man could neither lie down full length nor stand up. Their inadequate officers and crews, in no small danger of their lives, applied the lash hourly, and keel-hauling was a commonplace. Many brutalized men who did not die on the voyage escaped to join the gangs of bushrangers, those unspeakably cruel bandits who did so much to bring transportation into disrepute, and who led to the founding of Australia's fine mounted rural police.

The administration of Australia's penal colonies steadily improved, however, and the experiment cannot be called a complete failure. The men were at least kept out of doors at wholesome labor. They were allowed to work for their freedom under the ticket-of-leave system (parent of modern parole), and many ticket-of-leave men founded new and often financially successful lives. But the danger from the unruly escapees, the economic competition which enraged free labor, the stigma attached to the free settlers as being citizens of a convict colony, all brought political pressure to bear on the Parliament to abolish transportation forever. The opening of World War II saw just a few remnants of the system left,

but some of these were the worst known: The French colony popularly called Devil's Island for its administrative headquarters, although actually most of the convicts lived on the mainland of Guiana, certain French colonies in North Africa, the French colony of the New Hebrides in Melanesia, the little known British penal colony for Indian Army military cases on the Andaman Islands off Ceylon, being typical. Mussolini's admiration for all things Roman repopulated the island camps of Tiberius and, of course, one notes the Soviet Union's faithful adherence to tsarist tradition in more than one way but particularly regarding transportation to Siberia. Penal transportation is now dead.

England would have been in a quandary had not her former colony thought of something new. While it is an oft-repeated claim, the United States actually did not invent imprisonment for punishment. In all probability, however, the first actually functioning penitentiary was the Walnut Street Jail in Philadelphia. Hence a new turn in the squirrel cage was ready. The hopeful joy with which it was welcomed as the penal cure-all even exceeded its known and dismal failure in the mid-Twentieth Century.

The idea of imprisonment for felony had been fermenting for some time in Europe. The workhouse and jail, to be mentioned later, had already suggested the idea to the English. Pope Clement XI had already established St. Michael's Hospital in 1705 to house profligate boys in cells and to impose hard work upon them. The Oratorian Fathers had begun this sort of work on a semi-voluntary basis in Florence as early as 1650. The French Benedictine Mabillon, inspired by the Oratorian effort, thought that felons should live like Carthusian monks, immured in cells where they could contemplate both their wickedness and a better life. He published his work just at the beginning of the Eighteenth Century. The ever-increasing social disruption caused by the breakup of the feudal system, flooding England with sturdy beggars and raffish dissolute of both sexes had caused the English to invent the workhouse for minor offenders as early as 1553 when Edward VI turned over the tumbledown royal palace of the Bridewell for a municipal house of correction. The pretence of hard work was introduced, but in effect the Bridewells were, and in those American cities which still have them, still are, merely pens where the dregs of society may

be housed temporarily and forgotten. Collapsing feudalism had produced similar results on the continent, so that in 1771, the Deputies of Flanders besought one nobleman named Vilain to build a workhouse for both misdemeanants and felons at Ghent (now in Belgium), which he did with the blessing of the Empress Maria Theresa. Vilain attempted to separate the hardened felon from the chance misdemeanant, expected hard work, and was motivated by the hope of reformation. The Quaker John Howard had been belaboring such great judges as Blackstone for some time to favor the penitentiary idea and, indeed, Parliament did pass the Penitentiary Act of 1779. Nothing came of this law. The idea was afloat in Europe, however, and Jeremy Bentham, a very self important little man, actually built a penitentiary out of his own funds and worried the rest of his life out because George III refused to buy and operate it.

Some attention should be paid to the neglected historical fact that the penitentiary idea, the housing of felons into small cubicles called cells, the hope that contemplation of the evils of mankind would lead to reformation, the great conventional cure-all of hard manual labor, are merely projections of the basic ideas of monasticism. That the Quaker reformers were Protestants is of less importance than the obvious relationship of the religious ideas of the Society of Friends with those of the more austere monastic orders. The conclusion here is that the penitential life of a Benedictine, Carthusian, Cistercian, Trappist, or practicing primitive Quaker is a reverend and wonderful way of life, for those to whom the divine spirit has called into voluntary renunciation of this naughty world. The imposing of such discipline on involuntary subjects to the extent that they will learn to like it and thereby reform their lives is something else.

The final strand needed in this web was that of a legal theory, a rationalization which should make it seem right, just, and inevitable. This doctrine was stated by an Italian named Cesare Bonesana, Marquis of Beccaria (1783-1794). Beccarianism, or the Classical School of punishment, was in effect the *sine qua non* theory on which the penitentiary system has always operated. This system is possible only insofar as the Classical doctrine states the true nature of a human being and is an accurate statement of man's legal relations to man.

Beccaria was a devoted public servant, a professor of the new political economy from which his penal system was largely drawn, and a practical magistrate. That a Jewish intellectual was given a title of nobility in an Italy which was watching the last gasp of the Inquisition testifies to his blameless and noble life. Like most penal theorists, Beccaria had the best of intentions. It was likewise true that Italian jurisprudence was so ripe for a change that anything new and different was likely to be better than what existed. The courts had become so venal that the bench had lost all public respect. The paternal idea of the court's power to adjust the punishment to fit the criminal's needs had so far departed from its Christian origin as to become the power of tyrannical and corrupt judges arbitrarily to increase the severity of punishment. Thus, the publication of Beccaria's *Trattato dei delitti e delle pene* (*Essay Concerning Crimes and Penalties*) in 1764 seemed like a breath of fresh air. There was nothing really new in it. It was merely a summary of the Eighteenth Century revolutionary philosophy, but Beccaria stated such principles better than anyone else.

The Beccarian principles are easily stated. First, men are born equal and with equal powers of decision between good and evil. Therefore, men committing the same crime should receive the same punishment. This is making the punishment fit the crime, not the criminal, at which even Gilbert and Sullivan poked sly fun. Second, the legislature should be the judges of the punishment, not the magistrate. We all know legislators, are related to them, and are their friends, and know that they are no better nor worse than the constituency which elects them. We also know that they are far from being specialists, are amenable to public opinion even when mistaken, and are sensitive to pressure groups who claim they know the answers. Thus, the fact of guilt having been established, the court could easily look up in the statute and see exactly what punishment should be applied, just like a puritan merchant examining his accounts. Second, prevention should be the dominating motive in applying the law (which was immediately forgotten), and prevention is best obtained by the deterrent effect of public or widely publicized punishment, which has been enthusiastically remembered. He believed that capital punishment had proven a failure and that imprisonment should be substituted. Beccaria

made some excellent suggestions, such as the abolition of secret testimony and that extracted by torture, but he will always be remembered for his essential fallacy, which was that of his times. This error was, in the words of Professor Gillin, that "all men are digits". In light of the discoveries of modern psychology regarding the individual nature of each person's childhood conditioning and hence personality, of anthropology's discoveries as to how cultural groups work, and criminology's catalog of the accompanying circumstances, or partial causes of individual delinquent behavior, this doctrine is not a ridiculous misconception of the nature of man but a tragic penal failure from which legislatures and courts consciously or unconsciously have been backing away throughout the Twentieth Century. Beccaria's book became the basis of the French Code of 1791 and such English judges as Blackstone and Romilly gladly admitted their debt to the great Italian. In any event, it made the operation of the penitentiary for roughly a century seem so right that many well-read people think that both the fact of the prison and its legal rationalization have existed from the beginning of civilized history.

The United States, or rather the State of Pennsylvania, with but little doubt opened the first penitentiary as a place to punish felons by an act of 1790. At that, this experiment was merely tacked on to existent Walnut Street Jail in Philadelphia. The Pennsylvania type prison was invented in this casual way. Other buildings were tried, but the system reached its fruition in the building of the Eastern Pennsylvania Penitentiary in 1829. The essence of the Pennsylvania system was absolute solitary confinement for the length of the sentence, including life sentences. It was contended that such separation prevented the relatively innocent from being contaminated by the vicious, that prisoners could not blackmail each other upon release but, most important to the Quaker way of thinking, in such solitude the Spirit could operate upon the felon and lead him to an awareness of the error of his ways and into the paths of improvement.

The enemies of this philosophy were numerous and bitter. They claimed that the prisoners became "insane", which claim was countered by the contention that prisoners were mentally "weak" anyhow. It is indeed true that absolute solitary confinement is today's harshest type of prison discipline,

and that strong men are cracked by it. This republic was considered a social experiment in those days, and our shores were flooded by Europeans who, after a brief tour of inspection, returned home to report on, "conditions". That is still going on, and we have returned such visits with interest, but visiting Europeans reported a marvelous success for the Pennsylvania system which it never deserved, with the result that up until very recently, all European countries followed the Pennsylvania plan at least in part. No other American state, however, adopted this system. What actually killed it was the rise of the factory system, and hand labor without machines performed by the solitary worker was and is uneconomical.

All other states, including the Federal government, have followed the rival Auburn system. This system was invented at and for the prison built at Auburn, New York, in 1816 to relieve the congestion of the Newgate Prison in New York City. Its original warden was the contractor who built it. Its second warden, one Captain Elam Lynds, whose professional training was confined to learning the hatters' trade and trouble with the army for cruelty to soldiers during the War of 1812.

The Auburn, or congregate system revolves around hard work in common during the day whereat absolute silence is, or rather was maintained by severe discipline. The prisoners do, or rather did before overcrowding did away with that idea, live in separate cells at night.

The actual reason for the success of the Auburn system is that it did fit into the rising factory system. The whole arrangement was ideal for a factory, and in the early part of the writer's adult life, many well-conducted prisons actually showed a handsome profit in making hosiery, overalls, and such items, for sale on the open market either under state supervision or that of a corporation which contracted with the state for the prisoners' work. The economic profitability of the Auburn system has become a thing of the past, and the words of the judge's sentence to so many years at "hard labor" is a sorry mockery. The typical prisoner today sits in almost complete idleness, and often what little work remains is allotted as a reward for good behavior, not as punishment. Urged by pressure groups of both free capital and free labor, the Federal government has effectively de-

stroyed prison labor by three acts, the Hawes-Cooper Act of 1929, the Ashurst-Summers Act of 1935, and a third act passed in October of 1940. The profitable labor phase of prison administration, at least, is of historical interest only.

The penitentiary, then, stands at the bar of judgment in the mid-Twentieth Century, and it stands condemned as a failure. It persists because western man has not been able to think of a replacement. Its bitterest critics are not academic criminologists, either, but the most successful prison administrators the nation has known. No one acknowledged its failure more than the distinguished Warden Lawes of Sing Sing. No one's attack is more telling than that of the Department of Justice's most able Chief of the Bureau of Prisons, Mr. Sanford Bates. The bench apparently is aware of this failure, for if possible a convict is kept out of the walls by a use of probation which is often too liberal, while parole is often a device for emptying cells to accommodate newcomers. The result of these latter two devices has been a gradual lowering of the quality of prisoners still behind walls to a raffish group for which no one can do much and against whom no state dares risk the obvious unconstitutionality of unlimited indeterminate sentence.

If the reader still believes in the penitentiary as a penal device, let him ask himself this question. As we know that 97 percent of all convicted felons will be released or, if one will, foisted on law-abiding society, is the penitentiary a successful device for reconditioning the felon for life in normal society? Is it not a rather vain hope that by applying the most unnatural social system imaginable we can expect to convert a person whose behavior is already so aberrant that we dare not give him his liberty into one who will function in the normal social system? Can we correct the misfit by increasing the misfittedness?

The above Federal statistics for all purposes do away with the practical value of capital punishment. If less than 3 percent of all convicted felons die in confinement, whether from sickness, fatal accident, old age, and at the hand of the public executioner, the deterrent terror of noose, chair, gas, or firing squad cannot be very great. For such reasons this paper has not seriously discussed capital punishment, for the statutes have to all intents and purposes been nullified. We must, rather, ask about the penal methods actually in use,

namely, jail, penitentiary, reformatory, probation, and parole, and the penitentiary for felons must receive our first consideration.

The prison system was invented at a time when we knew little of psychology, sociology, and anthropology. The niceties of the problems of human behavior are far from solved to our satisfaction, but in the period of intellectual history under discussion, they were left entirely to philosophers of strictly the arm-chair classification. That these men were propagandists for, or rationalizers of the French and allied revolutions is well-known, but the injustice of asking these thinkers to solve our penal problems apparently is not. If the prison is a failure, and if we wish to protect ourselves better from its alumni, it is high time to reevaluate this philosophy.

There is no present wish to recount the worst features of poorly organized and administered penitentiaries. Such literature is easy enough to find. Our immediate task is to ask why our best ones fail, those intelligently constructed and administered by able and devoted public servants.

The first and obvious fallacy of the penitentiary system is that it is a mass treatment institution. Whatever is lacking in our modern knowledge, we know that men cannot be re-conditioned in the mass. As a university professor of several decades experience, I can report that mass teaching succeeds often with the superior students because they are so motivated that they want to learn and need only a minimum of direction in their process of self-education. The weak ones require individual attention. If this is true of fine, wholesome young people, how much more so is it of our most pressing problem people? True, every university eventually "passes" most everybody because it fears the public scandal which telling the truth would draw down on it. Besides, such diplomas are innocent myths. The marginal graduates will do no harm and schooling might have done them some good. But what of convicts released untrained, unrepentant, and all too often undeterred? Psychology has surely demonstrated that none of us is in his present position in life for one cause alone, and that each of us is unlike his fellow, that every personality is a bundle of motives and not one. So much for the law-abiding. Research criminology has time and time again established that each delinquent's problem differs from the other, that no one offense has simple motivation, that no habitual

or professional criminal's pattern of delinquency stems from one cause and one alone. Yet we persist in treating the overt illegal act for which conviction was obtained, and giving burglars and sex deviates virtually the same punishment.

The fallacy of committing an already demoralized personality and, against his will, limiting his contacts for years to those as disorganized and disintegrated as his own should be apparent. Every prison is a repressive institution, for it can be nothing else. Because a convict could not comply with the relatively simple rules required to keep him from a felony charge, he is admitted into an institution with a multiplicity of rules and regulations which stagger the imagination, ordered by a usually intelligent and able warden whom society appoints and then forgets, administered by a corps of guards who, except for Federal prisons, are no more intelligent, educated, or trained than their charges, and hardly less prisoners. Even if a custodial officer should wish to do something rehabilitative for a convict or show some human friendship, he knows that he forthwith brands that man as a stool pigeon and subjects him to the frightful discipline of his fellow prisoners. We know that prisoners are often kind to each other, but such friendships are under suspicion of homosexuality, which no administrator has begun to stamp out, and few claim that they can even control. Overcrowding long ago destroyed the Auburn ideal of solitary confinement out of working hours. The question is, Can we expect rehabilitation out of such an atmosphere of demoralization? The writer well remembers a late-into-the-morning friendly debate with the late Warden Lawes wherein the latter was asked if, in his long and successful career, he could mention one single case of a bad man made better by his Sing Sing experience. Mr. Lawes, a man of scrupulous integrity, eventually admitted that he could not name a single case. This question should really be asked the taxpayer who supports, condones, or even insists on this penal situation.

The answers to these stern questions are not easy. We know that probation is not the complete answer. There are offenders who need institutional treatment. There are many others who must be confined because they are so dangerous that they are really candidates for some kind of permanent elimination. But Federal statistics show that life sentences are not ordinarily life sentences, that executions are a rarity, and

that 97 convicted felons out of every hundred will be returned to free society whether they are improved or not. We know that the "good prisoner" is not necessarily a good parole risk. He might easily be an old hand who knows the ropes well enough to keep out of trouble. My own researches in Wisconsin suggested more than suspicion that the longer a prisoner is kept within the walls, the poorer parole risk he becomes. The more the man becomes adapted to prison life, and hence becomes a good internal disciplinary case, the less he is adapted for life in competitive, free society.

So what are we to do with the prison? This question will be answered by a wiser man than the writer. It is obvious that we will have to retain it until we can think of something better. In the meantime, we can parole men who show the best promise of success instead of simply clearing the cell block for new guests ordered by the courts. We could have the moral courage to consider all sentences life sentences, that is, absolute indeterminate sentences, releasing convicts only after a board of such experts as we have can venture a good guess that they will succeed, and keeping them out of our hair until then, or at least until the offender has reached middle age. Government figures show that persons over forty-five rarely commit serious crimes, even if they have had a long record in the past. A mild and permanent parole supervision would care for most of them. We also know that we will not adopt any of these expedients, for the Beccarian book-keeping philosophy is so ingrained into our people that it amounts to a paramount moral principle. No one wants to return to medievalism. The public would not permit reversion to the regime of rope, ax, and faggot, for it will not tolerate enforcement of our present capital punishment laws. The medieval blood bath was at least eliminative if not deterrent. The modern prison is not eliminative and, according to our best records on repeaters, far from deterrent.

Let us not, however, deceive ourselves. The penitentiary is not the typical place of punishment for offenders, and the felon is not the typical convict. Our felons in state and Federal prisons average about 150,000 at any time, while county jails house a minimum of 750,000 at the same time. This is a mere estimate, for no power exists to compel the county administrators to report their populations to the Federal authorities who keep these statistics. The proportion of con-

victs in penitentiaries to those known to be in jail is about one to seven, but it is very likely that at least 3,000,000 Americans pass through our jails and houses of detention every year, many of them time and time again. And what is being done about that?

There has always been some type of house of detention for those awaiting trial and punishment, but the jail as we know it was invented by King Henry II at the Assize of Clarendon in 1166. Although we have discovered much during the past 785 years, the county jail would probably be our one institution which Henry would find perfectly familiar. Only one thing has been added. The Angevin king never meant the institution to be the typical instrument of punishment. It was a place to hold material witnesses, those indicted of crime until trial, and convicted persons until their bodily sentences could be executed, so let us not condemn medieval ignorance. Henry knew no better, and we do, for there has been no voice raised in defense of jail punishment in the Twentieth Century. Every investigator has inveighed against it, the Federal probation service being the most vocal, and yet the jail has improved far less than the prison, and the spirit of the people is far more in favor of reforming the penitentiary than it is of the jail. We know what to do with the jail. Abolish it today. England, who made us a gift of this device began eliminating her jails at the close of World War I, and not one exists in the mother country today. The Americans, however, have remained more British than the English in spite of 1776, and show no signs of improving. The reason for this is not hard to seek. The jail is entrenched in county politics. It is the vested interest of the small-time party worker who needs the miserable income. Surely there is another way of rewarding the deserving than this.

Let us take a look at the jail and, frankly, the reader ought to take one in his own county. Ask the U. S. District Attorney if the inspectors of the Bureau of Prisoners consider his local jail sufficiently fit for detention of humans awaiting trial by Federal courts. He may receive a disagreeable if well-deserved shock.

First, despite the fact that the jail is the typical place of punishment in this nation (charity forbids our use of the word reformation), it is the penal device used by the least competent courts whose typical magistrates are not even

graduate lawyers. The requirements of the English feudal system at least guaranteed that the "squire" be an educated gentleman. It is presided over by a sheriff who ordinarily appoints a jailer who is certainly not more informed than the sheriff whose dependent he is. The county is such a small political unit that it could not afford to hire a staff trained in rehabilitative techniques, even if it so desired. Furthermore, the population of the typical county jail is so small that such an expenditure would be folly. Far too many jails are as filthy as those of Henry II, and their odor is a breath from a less delicate past. There is no separation of the hardened from the relatively innocent. We have just succeeded in separating the sexes, and this is an ideal rather than a fact. Theoretically, we have removed children from the jail, and this is not always the case, while adolescents are rather typically kept in more than a few hundred jails until the authorities can think of what to do with them. Prisoners are not kept in cells during the day to prevent contamination but are allowed in a common "bull pen" with no Auburn rule of silence, with no work, with little disciplinary supervision except that which the prisoners themselves apply through their kangaroo courts. Even though our legal philosophy claims that a man is innocent until proven guilty, those waiting trial on their guilt are kept in the same pen with the convicted misdemeanants and given the identical treatment. Even though we claim that we have abolished imprisonment for debt, we confine hundreds who cannot pay their fines, or debt to the state. While we claim that we punish in accord to the danger to the society, we persist in the medieval superstition that a persistent habitual petty thief costs society less than the felon who accidentally stole enough to put his offense in the grand larceny category. In the meantime, hundreds of thousands of drunks, vagrants, perverts, unsuccessful prostitutes, chicken thieves, petty chisellers, and those other personality problem cases who form the real dregs of society, and who need social work, medical, or psychiatric treatment rather than punishment in an institution which does not even punish, float in and out, and in again and out once more because no county will take responsibility for them. Apparently the belief in magic will not die, otherwise legislators would discover that extremely short sentences for such people are neither rehabilitative, deterrent, nor puni-

tive. The jail is not even cheap. Quite aside from the harm done to the inmates, it has been estimated that the 3,000 existing county jails cost the taxpayers over \$35,000,000 per annum to maintain. This is a sizeable bill for a universally recognized failure.

The felon prison has admittedly taxed our intelligence, but any state could abolish its jail system with success and little effort. First, decent if plain quarters could be supplied for material witnesses and persons awaiting trial without bail or bond. Certainly such persons should be separated from convicted offenders. Second, convicted misdemeanants imprisoned for non-payment of fines could pay their due in small amounts while at outside work. The nation which has invented and pushed installment buying of everything else should consider this system no revolution. Third, a more liberal use of probation would keep thousands out of the jail. If it be argued that counties have no probation systems, and that the state staffs are already too hard pressed to take over supervision of misdemeanants, one might observe that every county in the nation must have a Department of Public Welfare in order to receive certain Federal funds, and that these persons are trained or partly trained social workers who could give a certain amount of supervision. The business men's service clubs have shown a fine spirit of service to the unfortunate. They constitute an untapped reservoir of volunteer workers. Such men, of course, would be untrained, but an offender who needs the services of a trained probation officer has no business in the county jail in any event. The petty offenders visualized by this article are more in need of friendly, firm advice than skilled treatment.

It is obvious that some misdemeanants need institutional confinement. Centralized state penal farms do much more for these people than the understaffed local jail. Indeed, it could so set them to work that the cost of the farm would be liquidated and an annual profit expectable, as Indiana's experience has shown. Such would not constitute cure-alls. It would be seen that the same faces show up time and again, those personality disorder cases, those personally maladjusted who constitute our misdemeanor habitual offender class. It is rather sure that the penal farm would cure but few of them, but it is equally sure that they would be better off there at useful labor than lying in idleness swapping stories

of personal perversion in the county jail bull pen. It is often argued, of course, that sending convicted misdemeanants with short sentences from the local county to the centralized state institution would constitute an uneconomical expenditure of travel funds. Yet who expects the short sentence, ten days or a few weeks, to change any life for the better, or even adequately to punish anyone? The persons who merit light treatment could be better accommodated by methods mentioned above. In any event, the county jail is no inexpensive institution, as we have seen. It only seems so because its budget is covered over such a wide range. In any event, the legal profession, which so largely constitutes our legislatures, should re-think the whole distinction between felony and misdemeanor.

Yet black as the jail's record is, there is little if any public spirit to change it. Despite a half century's attack by informed persons and not one voice raised in its defense by its friends, the institution has not improved in the least and the number of them which have been closed in the Twentieth Century could be counted on the fingers of one hand. It is unfortunately obvious that our constitution, our economic system, the family, and the church are under criticism by enemies domestic as well as foreign, but the county jail remains secure, unchallenged, unimproved, and unrepentant since the days of the founding fathers. One cannot avoid the conclusion that it might be America's most sacred institution. If so, it is hard to avoid the Spanish criminologist's bitter thesis that every society deserves the criminals it has.

One ought not leave this discussion without pointing out that substitutes or equivalents for the penitentiary and the jail have been discovered and tried, sometime with considerable success, sometimes with abject failure. A discussion of these, however, would increase this paper to book length, and it was thought best to center the attention on the sorest spots. The reformatory was one of the first of these. Shocked by the penitentiary almost before the mortar in the oldest ones was dry, public spirited legislators and judges began considering a substitute for the younger and less corrupt offenders. One of the ablest administrators during the Australian experiment in transportation was one Captain Macconochie who in effect, virtually invented the grading system which permitted a prisoner to work up through a system of

merits towards conditional release called parole, who foresaw the need for academic education and industrial training, and the need for the indeterminate sentence. Eventually his ideas were adopted in Ireland under the supervision of Sir Walter Crofton. Hence, the reformatory system is often called the Irish system, or the Crofton system. This was a new broom which swept clean for a while. Actually, the writer is aware of no state penitentiary which does not practice these principles at least in part, so in effect the penitentiary has become a reformatory in the Crofton sense, while the juvenile reformatory has become a children's prison by the same process, a mere preparatory school for its adult counterpart. Modern reformatories are in effect prisons, even the good ones—and many are excellently conducted—and they have failed for the same reasons that the penitentiary has failed. They are mass treatment institutions relying on compulsion and repression. The reformatory for young adults has always been reserved for first offenders. This requirement has proven to be farcical. The typical inmate of the adult reformatory has been proven to be a first time loser, not a first offender, which is quite something else. Our modern system of fingerprint identification has also shown that many of them are even repeated convicts. Elsie and Sheldon Glueck have shown, too, that the reformatory has about as black a record of producing repeaters as the prison, so the name reformatory should be dropped, for that is one function which it does not perform.

Probation and parole are excellent instruments for readjusting the lives of a large number of offenders if the cases are chosen well by the bench and governing boards, if the probation and parole officers are carefully selected and adequately trained in case work methods, and if they are not given impossible case loads. Neither device has proven perfect, nor do we any longer expect perfection. But it is difficult to overestimate the good which would follow if each state would bring its probation and parole service up to the quality of that of the U. S. Department of Justice.

As we are about to close this brief resume of a past without much pride, and a future which so far has not promised a great deal, we cannot forbear to remark that it is about time that American people cease leaving the criminal problem to the newspapers and moving picture screen and devote its

best intelligence to this internal enemy. There can be small doubt but that the daily and consistent attack on life and property is costing well into the billions of dollars per year, a sum comparable to the military effort. It is admitted that the best informed know far less about the situation and its cure than they should. It is likewise admitted that the annual amount of money spent on serious research regarding this internal enemy is a pitiful and infinitesimal percent of that expended on discovering new weapons. The hardest truth of all, perhaps, is that it is apparently impossible to interest the great intelligence and good will of our learned bench and bar, of school and college, of church and state, into doing any more than occasionally holding up their hands in temporary horror. This commendable gesture has not paid off very well. The question is that western civilization has again reached a low rung in its squirrel wheel war against crime, right when the problem has increased. It always has during times of rapid social and cultural change when good, sound answers are necessary. We are convinced that we have not found the "causes" of crime, as such. Our alleged preventive measures, therefore, have not inspired confidence. The actual, practical failure of our present penal methods and substantiating philosophy has robbed us of confidence in them. While we have a larger number of able people working for solutions than ever before in world history, the apathetic public shows no willingness to abandon that which has failed and to try newer methods which, though offering limited hope, are not demonstrated failures. The fact that we are at a penal impasse is apparent even in the lay press, and that our best collective intelligence is needed to discover a way out is hardly less so.