CHAPTER IV.

THE ADMINISTRATION OF JUSTICE.

§ 18. Necessity of the Administration of Justice.

"A herd of wolves," it has been said,[1] "is quieter and more at one than so many men, unless they had all one reason in them, or have all one power over them." Unfortunately they have not one reason in them, each being moved by his own interests and passions; therefore the other alternative is the sole resource. For the cynical emphasis with which he insists upon this truth, the name and reputation of the philosopher Hobbes have suffered much. Yet his doctrine, however hyperbolically expressed, is true in substance. Man is by nature a fighting animal, and force is the *ultima ratio*, not of kings alone, but of all mankind. Without "a common power to keep them all in awe," it is impossible for men to cohere in any but the most primitive forms of society. Without it, civilisation is unattainable, injustice is unchecked and triumphant, and the life of man is, as the author of *Leviathan* tells us, "solitary, poor, nasty, brutish, and short."[2] However orderly a society may be, and to whatever extent men may

appear to obey the law of reason rather than that of force, and to be bound together by the bonds of sympathy rather than by those of physical constraint, the element of force is none the less present and operative. It has become partly or wholly latent, but it still exists. A society in which the power of the state is never called into actual exercise marks, not the disappearance of governmental control, but the final triumph and supremacy of it.

It has been thought and said by men of optimistic temper, that force as an instrument for the coercion of mankind is merely a temporary and provisional incident in the development of a perfect civilisation. We may well believe, indeed, that with the progress of civilisation we shall see the gradual cessation of the actual exercise of physical force, whether by way of the administration of justice or by way of war. To a large extent already, in all orderly societies, the element of force in the administration of justice has become merely latent; it is now for the most part sufficient for the state to declare the rights and duties of its subjects, without going beyond declaration to enforcement. In

[redacted] The overwhelming power of the state or of the international society of states may be such as to render its mere existence a sufficient substitute for its exercise. But this, as already said, would be the perfection, not the disappearance, of the rule of force. The administration of justice by the state must be regarded as a permanent and essential element of civilisation. It is a device that admits of no substitute. Men being what they are,

opinion of his friends and immediate associates, than for that of all the world besides. The censure of ten thousand may be outweighed by the approval of ten. The honour of thieves finds its sanction and support in a law of professional opinion, which is opposed to, and prevails over, that of national opinion. The social sanction, therefore, is an efficient instrument only so far as it is associated with, and supplemented by the concentrated and irresistible force of the incorporate community. Men being what they are—each keen to see his own interest and passionate to follow it—society can exist only under the shelter of the state, and the law and justice of the state is a permanent and necessary condition of peace, order, and civilisation.

§ 19 Origin of the Administration of Justice.

The administration of justice is the modern and civilised substitute for the primitive practices of private vengeance and violent self-help. In the beginning a man redressed his wrongs and avenged himself upon his enemies by his own hand, aided, if need be, by the hands of his friends and kinsmen ; but at the present day he is defended by the sword of the state. For the expression of this and other elements involved in the establishment of political government, we may make use of the contrast, familiar to the philosophy of the seventeenth and eighteenth centuries, between the civil state and the state of nature. This state of nature is now commonly rejected as one of the fictions which flourished in the era of the social contract, but such treatment is needlessly severe. The term certainly became associated with much false or exaggerated doctrine touching the golden age on the one hand and the

bellum omnium contra omnes of Hobbes on the other, but in itself it nevertheless affords a convenient mode for the expression of an undoubted truth. As long as there have been men, there has probably been some form of human society. The state of nature, therefore, is not the absence of society, but the absence of a society so organised on the basis of physical force, as to constitute a state. Though human society is coeval with mankind, the rise of political society, properly so called, is an event in human history.

One of the most important elements, then, in the transition from the natural to the civil state is the substitution of the force of the incorporate community for the force of individuals, as the instrument of the redress and punishment of injuries. Private vengeance is transmuted into the administration of criminal justice; while civil justice takes the place of violent self-help. As Locke says,[1] in the state of nature the law of nature is alone in force, and every man is in his own case charged with the execution of it. In the civil state, on the other hand, the law of nature is supplemented by the civil law, and the maintenance of the latter by the force of the organized community renders unnecessary and unpermissible the maintenance of the former by the forces of private men. The evils of the earlier system were too great and obvious to escape recognition even from the most primitive communities. Every man was constituted by it a judge in his own cause, and might was made the sole measure of right. Nevertheless the substitution was effected only with difficulty and by slow degrees. The turbulent spirits of early society did not readily abandon the liberty of fighting out their

1. Treatise on Government II. Ch. 2.

quarrels, or submit with good grace to the arbitrament of the tribunals of the state. There is much evidence that the administration of justice was in the earlier stages of its development merely a choice of peaceable arbitration, offered for the voluntary acceptance of the parties, rather than a compulsory substitute for self-help and private war. Only later, with the gradual growth of the power of government, did the state venture to suppress with the strong hand the ancient and barbarous system, and to lay down the peremptory principle that all quarrels shall be brought for settlement to the courts of law.

All early codes show us traces of the hesitating and gradual method in which the voice and force of the state became the exclusive instruments of the declaration and enforcement of justice. Trial by battle, which endured in the law of England until the beginning of the nineteenth century,[1] is doubtless a relic of the days when fighting was the approved method of settling a dispute, and the right and power of the state went merely to the regulation, not to the suppression, of this right and duty of every man to help and guard himself by his own hand. In later theory, indeed, this mode of trial was classed with the ordeal as *judicium Dei*—the judgment of Heaven as to the merits of the case, made manifest by the victory of the right. But this explanation was an afterthought. It was applied to public war, as the litigation of nations, no less than to the judicial duel, and it is not the root of either practice. Among the

laws of the Saxon kings we find no absolute prohibition of private vengeance, but merely its regulation and restriction.[2] In due measure and in fitting manner it was the right of every man to do for himself that which in modern times is done for him by the state. As royal justice grows in strength, however, the law begins to speak in another tone, and we see the establishment of the modern theory of the exclusive administration of justice by the tribunals of the state.[3]

justice by the tribunals of the state.

§ 20. Civil and Criminal Justice.

The administration of justice has been already defined as the maintenance of right within a political community by means of the physical force of the state. It is the application by the state of the sanction of force to the rule of right. We have now to notice that it is

divisible into two parts, which are distinguished as the administration of civil and that of criminal justice. In applying the sanction of physical force to the rules of right, the tribunals of the state may act in one or other of two different ways. They may either enforce rights, or punish wrongs. In other words, they may either compel a man to perform the duty which he owes, or they may punish him for having failed to perform it. Hence the distinction between civil and criminal justice. The former consists in the enforcement of rights, the latter in the punishment of wrongs. In a civil proceeding the plaintiff claims a right, and the court secures it for him by putting pressure upon the defendant to that end; as when one claims a debt that is due to him, or the restoration of property wrongfully detained from him, or damages payable to him by way of compensation for wrongful harm, or the prevention of a threatened injury by way of injunction. In a criminal proceeding, on the other hand, the prosecutor claims no right, but accuses the defendant of a wrong. He is not a claimant but an accuser. The court makes no attempt to constrain the defendant to perform any duty, or to respect any right. It visits him, instead, with a penalty for the duty already disregarded and for the right already violated; as where he is hanged for murder, or imprisoned for theft.

Both in civil and in criminal proceedings there is a *wrong* (actual or threatened) complained of. For the law will not enforce a right except as against a person who has already violated it, or who has, at the least, already shown an intention of doing so. Justice is administered only against wrongdoers, in act or in intent. Yet the complaint is of an essentially different

character in civil and in criminal cases. In civil justice it amounts to a claim of right ; in criminal justice it amounts merely to an accusation of wrong. Civil justice is concerned primarily with the plaintiff and his rights ; criminal justice with the defendant and his offences. The former gives to the plaintiff, the latter to the defendant, that which he deserves.

A wrong regarded as the subject-matter of civil proceedings is called a civil wrong ; one regarded as the subject-matter of criminal proceedings is termed a criminal wrong or a crime. The position of a person who has, by actual or threatened wrongdoing, exposed himself to legal proceedings, is termed liability or responsibility, and it is either civil or criminal according to the nature of the proceedings to which the wrongdoer is exposed.

The same act may be both a civil injury and a crime, both forms of legal remedy being available. Reason demands that in general these two remedies shall be concurrent, and not merely alternative. If possible, the law should not only compel men to perform their disregarded duties, but should by means of punishment guard against the repetition of such wrongdoing in the future. The thief should not only be compelled to restore his plunder, but should also be imprisoned for having taken it, lest he and others steal again. To this duplication of remedies, however, there are important and numerous exceptions. Punishment is the sole resource in cases where enforcement is from the nature of things impossible, and enforcement is the sole remedy in those cases in which it is itself a sufficient precautionary measure for the future. Not to speak of the defendant's liability for the costs of the proceedings,

the civil remedy of enforcement very commonly contains, as we shall see later, a penal element which is sufficient to render unnecessary or unjustifiable any cumulative criminal responsibility.

§ 21. The Purposes of Criminal Justice; Deterrent Punishment.

The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him. Offences are committed by reason of a conflict between the interests (real or apparent, permanent or temporary) of the wrongdoer, and those of society at large. Punishment prevents offences by destroying this conflict of interests to which they owe their origin—by making all deeds which are injurious to others injurious also to the doers of them—by making every offence, in the words of Locke, "an ill bargain to the offender." Men do injustice because they have no sufficient motive to seek justice, which is the good of others rather than that of the doer of it. The purpose of the criminal law is to supply by art the motives which are thus wanting in the nature of things.

wherever possible and expedient, to prevent a repetition of wrongdoing by the disablement of the offender. We hang murderers, not merely that we may put into the hearts of others like them the fear of a like fate, but for the same reason for which we kill snakes, namely because it is better for us that they should be out of the world than in it. A similar secondary purpose exists in such penalties as imprisonment, exile, and forfeiture of office.

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§ 23. Reformative Punishment.

Punishment is in the third place reformative. Offences are committed through the influence of motives upon character, and may be prevented either by a change of motives or by a change of character. Punishment as deterrent acts in the former method; punishment as reformative in the latter. This curative or medicinal function is practically limited to a particular species of penalty, namely imprisonment, and even in this case pertains to the ideal rather than to the actual. It would seem, however, that this aspect of the criminal law is destined to increasing prominence. The new science of criminal anthropology would fain identify crime with disease, and would willingly deliver the criminal out of the hands of the men of law into those of the men of medicine. The feud between the two professions touching the question of insanity threatens to extend itself throughout the whole domain of crime.

It is plain that there is a necessary conflict between the deterrent and the reformative theories of punishment, and that the system of criminal justice will vary in important respects according as the former or the latter principle prevails in it. The purely reformative

theory admits only such forms of punishment as are subservient to the education and discipline of the criminal, and rejects all those which are profitable only as deterrent or disabling. Death is in this view no fitting penalty; we must cure our criminals, not kill them. Flogging and other corporal inflictions are condemned as relics of barbarism by the advocates of the new doctrine; such penalties are said to be degrading and brutalizing both to those who suffer and to those who inflict them, and so fail in the central purpose of criminal justice. Imprisonment, indeed, as already indicated, is the only important instrument available for the purpose of a purely reformative system. Even this, however, to be fitted for such purposes, requires alleviation to a degree quite inadmissible in the alternative system. If criminals are sent to prison in order to be there transformed into good citizens by physical, intellectual, and moral training, prisons must be turned into dwelling-places far too comfortable to serve as any effectual deterrent to those classes from which criminals are chiefly drawn. A further illustration of the divergence between the deterrent and the reformative theories is supplied by the case of incorrigible offenders. The most sanguine advocate of the curative treatment of criminals must admit that there are in the world men who are incurably bad, men who by some vice of nature are even in their youth beyond the reach of reformative influences, and with whom crime is not so much a bad habit as an ineradicable instinct. What shall be done with these? The only logical inference from the reformative theory is that they should be abandoned in despair as no fit subjects for penal discipline. The deterrent and disabling theories, on the

other hand, regard such offenders as being pre-eminently those with whom the criminal law is called upon to deal. That they may be precluded from further mischief, and at the same time serve as a warning to others, they are justly deprived of their liberty and in extreme cases of life itself.

The application of the purely reformative theory, therefore, would lead to astonishing and inadmissible results. The perfect system of criminal justice is based on neither the reformative nor the deterrent principle exclusively, but is the result of a compromise between them. In this compromise it is the deterrent principle which possesses predominant influence, and its advocates who have the last word. This is the primary and essential end of punishment. All others are merely secondary and accidental. The present tendency to attribute exaggerated importance to the reformative element is a reaction against the former tendency to neglect it altogether, and like most reactions it falls into the falsehood of extremes. It is an important truth, unduly neglected in times past, that to a very large extent criminals are not normal and healthy human beings, and that crime is in great measure the product of physical and mental abnormality and degeneracy. It has been too much the practice to deal with offenders on the assumption that they are ordinary types of humanity. Too much attention has been paid to the crime, and too little to the criminal. Yet we must be careful not to fall into the opposite extreme. If crime has become the monopoly of the abnormal and the degenerate or even the mentally unsound, the fact must be ascribed to the selective influence of a system of criminal justice based

on a sterner principle than that of reformation. The more efficient the coercive action of the state becomes, the more successful it is in restraining all normal human beings from the dangerous paths of crime, and the higher becomes the proportion of degeneracy among those who break the law. Even with our present imperfect methods, the proportion of insane persons among murderers is very high ; but if the state could succeed in making it impossible to commit murder in a sound mind without being indubitably hanged for it afterwards, murder would become, with scarcely an exception, limited to the insane.

If, after this consummation had been reached, certain theorists were to urge that inasmuch as all murderers are insane, murder is not a crime which needs to be suppressed by the strong arm of the penal law, and pertains to the sphere of medicine rather than to that of jurisprudence, the fallacy of the argument would be obvious. Were the state to act on any such principle, the proposition that all murderers are insane would very rapidly cease to be true. The same fallacy, though in a less obvious form, is present in the more general argument that, since the proportion of disease and degeneracy among criminals is so great, the reformative function of punishment should prevail over, and in great measure exclude, its deterrent and coercive functions. For it is chiefly through the permanent influence and operation of these latter functions, partly direct in producing a fear of evildoing, partly indirect in establishing and maintaining those moral habits and sentiments which are possible only under the shelter of coercive law, that crime has become limited, in such measure as it has, to the degenerate, the abnormal, and

the insane. Given an efficient penal system, crime is too poor a bargain to commend itself, save in exceptional circumstances, to any except those who lack the self-control, the intelligence, the prudence, or the moral sentiments of the normal man. But apart from criminal law in its sterner aspects, and apart from that positive morality which is largely the product of it, crime is a profitable industry, which will flourish exceedingly, and be by no means left as a monopoly to the feebler and less efficient members of society.

Although the general substitution of the reformative for the deterrent principle would lead to disaster, it may be argued that the substitution is possible and desirable in the special case of the abnormal and degenerate. Purely reformative treatment is now limited to the insane and the very young; should it not be extended to include all those who fall into crime through their failure to attain to the standard of normal humanity? No such scheme is practicable. In the first place, it is not possible to draw any sharp line of distinction between the normal and the degenerate human being. It is difficult enough in the only case of degeneracy now recognised by the law, namely insanity; but the difficulty would be a thousandfold increased had we to take account of every lapse from the average type. The law is necessarily a rough and ready instrument, and men must be content in general to be judged and dealt with by it on the basis of their common humanity, not on that of their special idiosyncrasies. In the second place, even in the case of those who are distinctly abnormal, it does not appear, except in the special instance of mental unsoundness, that the purely deterrent influences of

punishment are not effective and urgently required. If a man is destitute of the affections and social instincts of humauity, the judgment of common sense upon him is not that he should be treated more leniently than the normal evildoer—not that society should cherish him in hope of making him a good citizen—but that by the rigour of penal discipline his fate should be made a terror and a warning to himself and others. And in this matter sound science approves the judgment of common sense. Even in the case of the abnormal it is easier and more profitable to prevent crime by the fear of punishment, than to procure by reformative treatment the repentance and amendment of the criminal.

It is needful, then, in view of modern theories and tendencies, to insist on the primary importance of the deterrent element in criminal justice. The reformative element must not be overlooked, but neither must it be allowed to assume undue prominence. To what extent it may be permitted in particular instances to overrule the requirements of a strictly deterrent theory, is a question of time, place, and circumstance. In the case of youthful criminals the chances of effective reformation are greater than in that of adults, and the rightful importance of the reformative principle is therefore greater also. In orderly and law-abiding communities concessions may be safely made in the interests of reformation, which in more turbulent societies would be fatal to the public welfare.

mative. We have now to deal with it under its fourth and last aspect as retributive. Retributive punishment, in the only sense in which it is admissible in any rational system of administering justice, is that which serves for the satisfaction of that emotion of retributive indignation which in all healthy communities is stirred up by injustice. It gratifies the instinct of revenge or retaliation, which exists not merely in the individual wronged, but also by way of sympathetic extension in the society at large. Although the system of private revenge has been suppressed, the emotions and instincts that lay at the root of it are still extant in human nature, and it is a distinct, though subordinate function of criminal justice to afford them their legitimate satisfaction. For although in their lawless and unregulated exercise and expression they are full of evil, there is in them none the less some soul of goodness. The emotion of retributive indignation, both in

ness. The emotion of retributive indignation, both in its self-regarding and its sympathetic forms, is even yet the mainspring of the criminal law. It is to the fact that the punishment of the wrongdoer is at the same time the vengeance of the wronged, that the administration of justice owes a great part of its strength and effectiveness. Did we punish criminals merely from an intellectual appreciation of the expediency of so doing, and not because their crimes arouse in us the emotion of anger and the instinct of retribution, the criminal law would be but a feeble instrument. Indignation against injustice is, moreover, one of the chief constituents of the moral sense of the community, and positive morality is no less dependent on it than is the law itself. It is good, therefore, that such instincts and emotions should be encouraged and

societies this satisfaction is possible in any adequate degree only through the criminal justice of the state. There can be little question that at the present day the sentiment of retributive indignation is deficient rather than excessive, and requires stimulation rather than restraint. Unquestionable as have been the benefits of that development of altruistic sentiment which characterizes modern society, it cannot be denied that in some respects it has taken a perverted course, and has interfered unduly with the sterner virtues. A morbid sentimentality has made of the criminal an object of sympathetic interest, rather than of healthy indignation ; and Cain occupies in our regards a place that is better deserved by Abel. We have too much forgotten that the mental attitude which best becomes us, when fitting justice is done upon the evildoer, is not pity, but solemn exultation.[1]

The foregoing explanation of retributive punishment as essentially an instrument of vindictive satisfaction is by no means that which receives universal acceptance. It is a very widely held opinion that retribution is in itself, apart altogether from any deterrent or reformative influences exercised by it, a right and reasonable thing, and the just reward of iniquity. According to this view, it is right and proper,

as so regarded is no longer a mere instrument for the attainment of the public welfare, but has become an end in itself. The purpose of vindictive satisfaction has been eliminated without any substitute having been provided. Those who accept this view commonly advance retribution to the first place among the various aspects of punishment, the others being relegated to subordinate positions.

This conception of retributive justice still retains a prominent place in popular thought. It flourishes also in the writings of theologians and of those imbued with theological modes of thought, and even among the philosophers it does not lack advocates. Kant, for example, expresses the opinion that punishment can not rightly be inflicted for the sake of any benefit to be derived from it either by the criminal himself or by society, and that the sole and sufficient reason and justification of it lies in the fact that evil has been done by him who suffers it.[2] Consistently with this view, he derives the measure of punishment, not from any elaborate considerations as to the amount needed for the repression of crime, but from the simple principle of the *lex talionis* : "Thine eye shall not pity ; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot."[3] No such principle, indeed is capable of literal interpretation. Subject, however, to metaphorical and symbolical applications, it is in Kant's view the guiding rule of the ideal scheme of criminal justice.

It is scarcely needful to observe that from the utilitarian point of view hitherto taken up by us such a conception of retributive punishment is totally inadmissible. Punishment is in itself an evil, and can be justified only as the means of attaining a greater good. Retribution is in itself not a remedy for the mischief of the offence, but an aggravation of it. The opposite opinion may be regarded as a product of the incomplete transmutation of the conception of revenge into that of punishment. It results from a failure to appreciate the rational basis of the instinct of retribution—a failure to refer the emotion of retributive indignation to the true source of its rational justification—the consequence of such failure being that retaliation is deemed an end in itself, and is regarded as the essential element in the conception of penal justice.

A more definite form of the idea of purely retributive punishment is that of expiation. In this view, crime is done away with, cancelled, blotted out, or expiated, by the suffering of its appointed penalty. To suffer punishment is to pay a debt due to the law that has been violated. Guilt *plus* punishment is equal to innocence. "The wrong," it has been said, "whereby he has transgressed the law of right, has incurred a debt. Justice requires that the debt be paid, that the wrong be expiated. . . . This is the object of punishment—to make . . . This is the law."

person. The penalty of wrongdoing is a debt which the offender owes to his victim, and when the punishment has been endured the debt is paid, the liability is extinguished, innocence is substituted for guilt, and the *vinculum juris* forged by crime is dissolved. The object of true redress is to restore the position demanded by the rule of right, to substitute justice for injustice, to compel the wrongdoer to restore to the injured person that which is his own. A like purpose is assigned to punishment, so long as it is imperfectly differentiated from that retributive vengeance which is in some sort a reparation for wrongdoing. The fact that in the expiatory theory satisfaction is conceived as due rather to the outraged majesty of the law, than to the victim of the offence, merely marks a further stage in the refinement and purification of the primitive conception.