

Psychological Aspects of Our Penal System.¹

By Dr. JAMES DREVER.

THE root idea in punishment as ordinarily understood is the infliction of some kind of disagreeableness, pain, or loss on an individual, because he has been guilty of some misdeed. There are thus two aspects—on one hand the infliction of hurt, on the other hand the relation of this to some wrongdoing or crime. Originally any end to be gained by such infliction was scarcely conscious, if it existed at all—any end, that is to say, beyond the satisfaction of the anger evoked by the misdeed itself. The psychological source is to be found in the anger caused by the wrong. From this primitive source to the modern conception the evolution of theories of punishment, conscious or unconscious, may be said to have passed through four stages or phases. These may be designated the vindictive, the retributive, the protective or deterrent, and the reformatory or curative.

To begin with, an individual who has suffered injury by the wrongdoing of another responds to the injury with the emotion and impulse of anger. This is satisfied by the infliction of some hurt on the wrongdoer. At the simplest and crudest stage of development—the stage where we have to deal with the mere instinctive impulse of the brute or the savage—the hurt inflicted on the wrongdoer may have no direct relation, either in kind or in degree, to the injury done, but only to the intensity of the anger evoked. Of course this is not really punishment in any strict sense. Nevertheless it is unquestionably the psychological origin, and it therefore marks the first stage in the evolution of what became punishment in the strict sense. This is the vindictive stage or phase. In so far as punishment at any time reveals the same emotion and impulse it represents this primitive vindictive stage.

Even in a very primitive social life, however, some crude notion of justice must very early act as a determining influence on the hurt that may be inflicted on another for some injury done. So far as some notion of justice is a conscious determinant of the hurt inflicted on the wrongdoer by the injured individual, this hurt takes on the character of retribution, and punishment as such comes into being. This phase or stage in the evolution of punishment is the retributive phase or stage.

Another factor must have made its influence felt in a rudimentary way at a comparatively early stage. The notion of punishment must have involved a looking forward as well as backward, in the shape at least of a dim feeling that similar actions to that which has incurred it must be prevented in the future. There can be little doubt, that is to say, that at a comparatively early stage primitive society must have felt vaguely that punishment had a protective function, since by means of punishment of a culprit the individual and society were protecting themselves against the repetition of an injurious act.

The general line of evolution of our modern penal systems is thus clear. First of all we have purely vindictive action on the part of the injured individual. Then there is some sort of legalising—if we may use

that word—of retributive action on the part of the injured, so long as this retributive action does not go beyond the limits of 'justice,' this being regulated by social law. Finally, recognising that punishment has a protective function as far as social life is concerned, society itself takes over the infliction of punishment, and a penal system is inaugurated. This stage or phase is the protective or deterrent stage or phase.

EVOLUTION OF A PENAL SYSTEM.

To leave the matter thus, however, would be to obscure important aspects and phases of the actual course of events, and could not fail to produce a misleading impression of the facts. Stages in social evolution are never clear-cut. Thus the development of the retributive view of punishment by no means involved the discontinuance in practice of vindictive punishment. Still less did the realisation of protection as the primary social function of punishment alter the practice which had been founded on the older and more primitive conceptions. Practice lagged a long way behind theory in this, as in so many other cases.

The psychological explanation of the actual facts would appear to be that the crude emotion of anger remained the driving force behind punishment, though it was cloaked and obscured by other motives, and by various forms of rationalisation. After all, the reaction of anger is a natural reaction to an act which society agrees in reprobating. One leading authority on criminal law has indeed placed on record his conviction that it is "highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it." I am afraid the learned author's thoughts have become somewhat mixed up in the latter portion of this statement. It sounds as if his rationalisation were not very satisfactory, even to himself.

However that may be, it is certain that the realisation by society in theory that the function of punishment from the point of view of society was primarily protective did not prevent an almost religious sanction continuing to be attached to the *lex talionis*. This remained, in fact, an assumption at the base of all penal systems which no one seriously challenged; and it is equally certain that the protective function of punishment was frequently made the excuse, as in the writer just quoted, for continuing the practice of vindictive punishment—'for deterrent purposes' was the usual rationalisation—even when it was quite evident that the psychological situation thus produced was often inimical to the ends sought. One need only instance the brutalising influence of capital punishment on society at large, and its inevitable tendency to increase the frequency of the crime of murder, during the period when it was the punishment also for less serious crimes, to show the kind of psychological situation which was created. Curiously enough the more humane—and indeed saner—attitude and practice of modern times in civilised countries were

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due far less to recognition of the fact that vindictive punishment for deterrent purposes was frequently an entire failure, than to the fact that the infliction of pain and suffering on human beings became objectionable to the general sense of society.

The phase or stage of evolution at which we have now arrived is characterised, on one hand, by the discontinuance, or the radical limitation, of what was virtually the primitive vindictive punishment in disguise, and on the other hand by the recognition of social punishments as possibly possessing a reformatory or curative function. We may speak, therefore, of the present phase or stage as the reformatory phase or stage in the evolution of social punishment. The actual situation, however, is somewhat complex. Practically punishment still rests, in law and in popular thought, on the retributive basis—the *lex talionis*. Theoretically it is recognised that from the point of view of society punishment is protective, and this is its primary function, and also, I believe, that society is not directly concerned with the retributive aspect of punishment as such, but only indirectly because of the deterrent effect of retributive punishment. Moreover—and this is the mark of the phase of evolution at which we have arrived—it is realised that, so far as the individual is concerned, social punishment may be made reformatory, and that the reformatory function of punishment is worth keeping in view, if only because reformation of the individual means protection of society against the repetition of the injury so far as that individual is concerned, always provided that the attempt to reform the criminal does not involve the sacrifice of the primary aim.

PUNISHMENT OR REFORMATION ?

The psychological problems of social punishment fall into two groups: on one hand those involved in the effects of punishment on the individual who is punished, and on the other hand those connected with the effects of punishment on the community itself. Of course there is a repercussion on society of the effects on the individual, so that the problems of punishment are ultimately in every case social problems. Nevertheless, we shall find it convenient to consider the two groups of problems separately in the meantime.

Consider first the problems arising in connexion with the effects of punishment on the individual who is punished. So long as the retributive aspect of punishment is placed in the foreground, the only psychological problems of serious import are those involved in the question of the responsibility of the offender. This question of responsibility is one over which medical and legal minds have long been at loggerheads. The source of this age-old controversy between lawyer and medical man lies primarily in the fact that the two use the word 'responsibility' in entirely different senses. For the lawyer 'responsibility' is purely a legal term, and the question of responsibility is to be determined on the basis of evidence germane to its legal meaning. For the medical man 'responsibility' is an ethical term, and the question of responsibility therefore raises much wider issues.

The psychological problems involved in the legal definition of responsibility are, more especially in so far

as the question of control is raised, extremely difficult. I do not believe, however, that responsibility in this sense is a practical issue at all in connexion with any penal system. At least it does not arise in the form in which it is usually raised, or at the point at which it is usually raised, in a practical consideration of the problems of punishment as affecting the individual who has infringed social laws.

It is when we emphasise the protective and particularly the reformatory aspects of punishment that the vital psychological problems emerge. So far as we base our practice in social punishments upon these two functions, it is not too much to say that our whole practice must be guided primarily by the outcome of psychological inquiry. The two functions are not in conflict. We may aim at the protection of society by the reform of the delinquent. Treatment which is successful in eliminating a particular tendency to delinquency in an individual will *ipso facto* protect the community against the repetition of this delinquency by the same individual. Of course it will not necessarily protect society against the same form of delinquency in another individual. That is why we have to consider punishment, rather than reformation pure and simple, and that is why the silly and sickly sentimentality which regards the wrongdoer as a suffering victim rather than a criminal will always fail to appeal to any one, no matter how soft-hearted, who regards the whole situation frankly and sanely.

It is obvious also that the failure of reformatory measures must not be taken to imply the failure of society to protect itself. Other measures must be available, which are merely protective, and not at all, or only indirectly, reformatory. On the other hand, it is clear that reformation is, as a rule, the more economical way to secure protection for the community, provided there is reasonable hope of success, and so long as we restrict our attention to the individual delinquent. The reform of the delinquent is doubly a social gain. From being a minus quantity with respect to social efficiency he becomes a plus quantity. This point is especially important in the case of the juvenile delinquent.

Punishment exerts its influence through disagreeableness, or the fear of disagreeableness. The function normally performed by unpleasantness encountered in the activity of any living organism is to guide the activity so that unpleasantness may in future be avoided. The fear of unpleasantness again checks the immediacy of impulse, and so allows time for a new kind of behaviour to be substituted for the old kind which led to unpleasantness—the beginnings in the case of the human being, it is worth noting, of self-control. But it is only low down the scale of organic life that the phenomena are to be seen in their simplicity. As we pass up the scale the inner conditions which determine behaviour become more and more complex, and the actual results of any unpleasantness or fear become more and more difficult to foretell. With the human being the complexity of the inner situation has become enormous. The web of impulse and motive is so intricately and so subtly interwoven that the introduction of a new impulse and motive may come to have a result wholly unforeseen and entirely different from the result intended.

PRACTICAL DIFFICULTIES.

The most important source of practical difficulty is frequently our almost complete ignorance of the inner conditions which issue in any particular misdemeanour. This necessarily involves ignorance of the effect which our punishment is likely to produce. So far as the reformatory aspect of punishment is concerned, this is a very serious matter. We have to deal with an individual, and we must know the facts of that individual case. Any psychologist who has had experience of conflict cases among juvenile delinquents, can easily find illustrations from his experience. The usual form of misdemeanour that occurs is stealing, and frequently irrational and apparently motiveless stealing. Thus money, jewellery, and all kinds of things may be stolen and given away, or even thrown away. Until the inner conditions are understood and the causes of the trouble removed, no kind of treatment seems to be of any avail. Or sometimes, where punishment is apparently successful in eliminating the tendency to one particular kind of misdemeanour, there is a criminal outbreak in a totally different direction, the result of the punishment itself, which more than counterbalances any apparent success.

Cases of this kind tend to make one speak and think of treatment rather than punishment. It might be asked whether this is not the point of view from which all cases should be approached, not as a matter of ethics, but as a matter of practical expediency, punishment being merely a particular method of treatment. The proposition is arguable, but only so long as we confine attention to the individual delinquent, and that is only one side of the picture, as we shall see presently. Personally, I do not think the point of view will matter very much so long as we keep firmly in mind the essential fact that the action taken, whether we call it treatment or punishment, is primarily action taken by society for its own protection, the reform of the criminal being a means adopted to this end. There is undoubtedly a class of offender in whose case treatment, rather than punishment, is the appropriate notion and procedure. Other cases occur with fair frequency in which punishment as ordinarily understood is quite ineffective as regards the reform of the individual. The case of serious mental defect may be instanced.

The facts are such that we find the old problems of responsibility, so far as they were practical problems at all, cropping up in a new guise, and in new surroundings. It may be possible to determine beforehand, without waiting for the event, whether punishment will be effective for reform, and if so what kind of punishment, or whether the case is one demanding treatment, and not punishment at all, and if so what kind of treatment. The problems now, however, are neither legal nor ethical problems, but purely psychological problems.

The suggestion that in some cases punishment, as ordinarily understood, may be quite ineffective leads us on to the consideration of the measures society takes, and must take, for its own protection in certain instances. The most important method of protection that society utilises is the restraint of the offender in some appropriate institution—so far as the idea of punishment is concerned, some sort of prison. The

restraint or imprisonment may be merely temporary, or it may be permanent. In the first case it is clear that the reformatory aspect of punishment ought still to be kept in view, so far as the psychological situation is taken into account. If it is not, it does not require much foresight to prophesy somewhat lamentable results. In particular, if the criminal is returned to social life, not only with his tendency to the original form of misdeed unaffected, but with other anti-social tendencies developed by his prison life, or by circumstances arising out of his prison life, our only possible verdict is that society is playing the fool. On the other hand, when the restraint is permanent, while reformatory measures must not be entirely excluded as intrinsically hopeless in every case, it is clear that the whole psychological situation and outlook are different. The prisoner will never be returned to civil life. For the protection of society he must be kept in restraint permanently. But he is a human being, and the moral sense of society will demand that he be treated as such, not merely negatively by the avoidance of inhuman conditions, but also positively by the provision of such amelioration of his lot as is possible without sacrificing essential principles.

Every one is agreed, I think, as regards these general matters. There will also be general agreement that the stigma of prison life means in itself the very serious modification of the psychological situation in the case of every individual who incurs it, so serious that no psychologist can regard short-term prison sentences with anything but dismay. It must be recognised that it is with respect to prison treatment especially that society, in protecting itself, or attempting to do so, runs the risk of making matters worse instead of better, and the gravest practical problems arise with regard to this type of punishment. Much has been done in recent years to remove acknowledged evils and defects of our prison system. Much may still be done. Nevertheless, I personally, and I imagine most psychologists, would look upon any further advance in the directions hitherto pursued with serious misgivings as to psychological results, until we have first attacked more fundamental problems, and reviewed our whole penal system in the light of the psychological knowledge of to-day.

NEED FOR PSYCHOLOGICAL DATA.

Let me try to indicate where, in my opinion, the crux of the whole matter lies. I think all will agree that the very first essential is that we should have the requisite knowledge and understanding of the psychological situation with which we are faced, and the psychological effects likely to be produced by the action taken. Society has to decide whether an individual delinquent is to be punished in this way or that way, whether he cannot be reformed but must be placed under restraint for life, or can be reformed during temporary restraint by appropriate treatment, or can be reformed without undergoing prison life, and in each case what can and ought to be aimed at. No general theories concerning the causation of crime, no systems of penal philosophy, not even the best intentions in the world, can take the place of a thorough knowledge and understanding of the individual case. This is precisely where our whole penal system is at present most defective. Moreover, the defect is one

that can be remedied without serious difficulty in the present state of development of modern science, medical and psychological, but no opportunity is afforded.

The first and essential step towards the further reform of our penal system lies in affording this opportunity. This could be done by instituting a clinical examination, medical and psychological, of every delinquent before sentence is passed, and by taking advantage wherever possible of modern psychological knowledge. The psychological clinic is at present practically non-existent in Great Britain. It is high time this state of matters was remedied. School and law-court both demand its institution. That is the first step. When we have taken that step, we shall be able to take further steps in penal reform with the advantage of acting with adequate knowledge of what can be done, and what we are really doing in each particular case. Until that step is taken, every other change we introduce by way of reform has a hit or miss character, which cannot fail to be profoundly disturbing to any thoughtful student of social development.

It may be objected that we are in danger of losing sight of the fact that the topic under discussion is punishment, not simply the reformation of the criminal. The suggestion was made above that in certain cases at least it might be more appropriate to speak of treatment than of punishment, the suggestion involving the view that delinquency ought to be looked on as the outcome of something not unlike disease. However that may be, I do not think there is any warrant for excluding either the idea or the fact of punishment, provided we look to the future, and not simply to the past, in our conception of punishment. The action taken against an individual in the form of punishment must involve some disagreeableness or deprivation, and the reason for the punishment is some past act of the individual. But its purpose is the prevention of similar acts in the future. The fact that hitherto we have been discussing the individual aspect only has tended somewhat to obscure this deterrent function, and the consideration of this function will lead us over to the discussion of the social aspect.

The deterrent function of punishment has played no inconsiderable part in the discussion of penal measures at all times. The severity of past penal systems has been largely due—almost entirely so far as it has had a rational basis at all—to the attempt to deter others from similar offences to those for which punishment is inflicted on an offender. It is unquestionably the case that many a misdeed is prevented by the fact that the individual who is tempted knows that he will inevitably pay the penalty, and it is also a well-known fact that where, through the inefficiency of the police or other cause, punishment is easily evaded, crime shows a corresponding increase.

It cannot be lightly assumed, however, that the deterrent effect of punishment depends merely on fear of the disagreeableness or suffering which the punishment in itself involves. The penal system is an expression, however imperfect, of the sentiments of society with respect to certain acts—sentiments of hatred in varying degrees. It is not the result of a purely intellectual review of the social results and bearing of these acts. Apart, therefore, from the punishment by law decreed and legally inflicted, the

criminal act is inhibited, so far as the normal socialised individual is concerned, by this sentiment in himself and in his fellows, how developed we cannot at present stop to consider, but resting ultimately on the primitive anger evoked by injury. "The sentence of the law," to quote again the legal authority already quoted, "is 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." Fear of the punishment as such, fear of the social disapprobation dependent on the evoking of the moral sentiment, of which the punishment is a concrete and tangible embodiment, recoil from the act because of the existence in the individual who is tempted of the moral sentiment in question in however feeble, attenuated, and fragmentary a form—all these are motives holding back an individual member of society from wrongdoing. The legal punishment exercises its deterrent influence because it, as it were, embodies and presents all of them in unmistakable and arresting fashion. The relative force of the different motives will vary with individuals. But until we can rely on the last of these motives being of itself sufficiently powerful to restrain every individual member of society from the breach of social laws—which would seem to involve a radical change both in the existing social structure and in human nature—the social necessity of some kind of penal system, in the strict sense, must remain.

In conclusion I would revert to the varying motives upon which the deterrent influence of punishment depends. Two points in particular demand notice. In the first place we cannot assume that penal law and moral sentiment will always be in harmony, and so reinforce one another. There may, in fact, be acute conflict between the two, so far as a considerable minority of the members of a community are concerned. In certain cases also they may be, so to speak, indifferent to one another. In either case the psychological situation is very radically modified, and the problems of punishment may in practice become very difficult.

In the second place the influence of the different motives may, as we have seen, vary with the individual. If that be so, two consequences would appear to follow. On one hand—and this refers more particularly to the adult criminal—our penal system must be such as to appeal with sufficient cogency to all the motives, so far as the criminally disposed individual is concerned. On the other hand—and now we have in mind chiefly the juvenile delinquent—it is of capital importance that we should recognise as early as possible in their criminal career those individuals who, either by nature or circumstances, or both, are tending towards abnormality in their reactions to social claims and social penalties. This brings us back to the crux of the whole situation. Means must be provided by which a knowledge of the individual case may be made available, before the decision is taken as to how any offender is to be treated. The temperamentally defective individual may be born, the habitual criminal is largely made. It ought at least to be possible to prevent the making of criminals. Again the glaring defect of our penal system stands revealed. No provision whatever is made for the diagnosis of incipient criminality. It is not merely a case of locking the door after the horse is stolen; it is a case of providing neither lock nor door.