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Simeon E. Baldwin
Yale Law School

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CORPORAL PUNISHMENTS FOR CRIME.

BY HON. SIMEON E. BALDWIN, LL. D., OF THE SUPREME COURT OF ERRORS OF CONNECTICUT.

I have been asked to speak to you to-night on the subject of Corporal Punishments for Crime. It is one which concerns everybody, but, if we except the criminal himself, no one so much as the lawyer, the physician, and the psychologist—those, in short, of whom this section is composed.

The law which is violated by a crime is an imperfect one unless it has provided a proper sanction. The sanction is improper if it inflicts any unreasonable injury upon the body or upon the mind and character of the offender. Over one, in human society, the physician stands guard; over the other, the psychologist.

Let me address myself first more particularly to those moral considerations which underlie the whole matter.

What is it that authorizes human government to punish, at all?

How can one man assume to restrain another man’s liberty, or subject him to suffering and degradation, and claim a warrant from it under the principle of justice, which are at bottom principles of equality of right?

Am I my brother’s keeper? And how does an aggregation of individuals gain a power which each by himself confessedly has not?

Nothing which belongs to the realm of the infinite and the divine can ever be fully apprehended by inhabitants of this little dot in the universe, which we call the Earth. But if Christianity be a true religion for mankind, and there are any teachings which we can trace back to Christ, they surely comprehend the duty to render unto Caesar the things that are Caesar’s, as well as unto God the things that are God’s.

They comprehend also the still broader doctrine of the fatherhood of God and the brotherhood of man.

Read before the Medico-Legal Society, Psychological Section, March 17, 1899.

Read before the American Association of Physicians and Surgeons, Chicago, June 3, 1899.
The tendency of our times has been to emphasize the second of these most strongly. It is that which we can understand the best. But the fatherhood of God is the more important conception in respect to whatever belongs to the domain of government. A pure sentiment of fraternity leads logically to anarchy. Fatherhood implies power, restraint, correction. If in the moral system of our world there is punishment for sin ordained of God, all considerations of analogy require that the governmental systems, under which its civil affairs are regulated, should provide punishment for those offences against the good order of society which we call crime. Nor, notwithstanding all that the school of Tolstoi may say, have the authoritative writers on the nature of Christianity failed to declare that this is so.

When St. Paul sent his epistle to the Christians at Rome in the reign of Nero, they were restless under the strain of subjection to a tyranny that for them foreboded religious persecution. What is his word of advice? That all civil power in the State is ordained of God, and acts in the repression of crime as "God's minister, an avenger for wrath to him that doeth evil."* 

And is not this general law of retributive justice in equal measure—aside from anything that Christianity teaches, and even from any conception of a personal God—part of the order of the universe?

The first lesson we learn in physics is that action and reaction are equal and proceed in opposite directions. If I give a blow with my fist to a tree, the tree gives my fist an equal blow. It pays me in kind. Animated nature of all forms seems governed by a law much the same. We get what we give.

This has been an age prolific of new sciences. One of them has for its object to stand guard over the interests of the worst of men, in their dealings with society, and to keep all it can from writing that name. We call a Penology, but it often seeks rather to exclude than to regulate punishment. It has done something towards propounding a new theory of morals—something, one might perhaps say, towards interposing a check to the natural operation of the law of cause and effect, in the dealings of governments with crime.

I am inclined to think that some of its exponents have gone too far in these directions. They assert that human punishment has no legitimate object except human reform, and that if it

*Romans xii. 4.
hurts, it hurts only to save. Five of our state constitutions rest their penal codes upon this position* But society needs saving from the criminal, quite as much as he needs saving from sin. "The wages of sin is death." To that end it logically tends. The extinction of sin may require the extinction of the sinner, at least in this world.

The punishment of sin on earth is partly, at least, left to human government. When it takes the shape of crime, government must meet it with the strong hand, and add the human sanction to the divine,—the sentence of the courts to the sentence of the conscience and the community.

I have thus ventured to go back to fundamental principles and maxims in order to clear the way for a fair view of our system of criminal punishments in its relation to the facts of history and the laws of the universe.

The nature of things seems to require that the man who strikes shall be struck back. In rude times, this punishment is promptly administered by the party injured or his friends.

The next step, as men become civilized, is to have the State do it. The lex talionis is followed. Three times over it is laid down as the fundamental rule of criminal justice in the Pentateuch: in Exodus, in Leviticus and in Deuteronomy. In the New Testament, indeed, Christ tells his followers that it is no guide for the individual, as to his personal conduct.† He is not to punish at all, but to forgive. No reference, however, is made to punishment by the officers of government to vindicate its authority.

Every national habit which has endured through two generations comes to be generally regarded by the people as immemorial. It may have been contrary to what had always been before the practice of the inhabited world. It may still be contrary to that of all other peoples. Nevertheless to those who have grown up under its influences, and from their earliest recollection saw it followed by their fathers as a settled rule of life, it will have all the sanction that a remote antiquity could bestow.

It has been to Americans a national habit for sixty years to punish all ordinary crimes by imprisonment, and imprisonment

†Matt. v. 38.
only. It has come to seem to us the natural way of treating convicts. Is it, indeed, this? Or may this national belief be a bit of provincialism, due to an inadequate consideration of the lessons to be learned in other lands or from other times?

In all previous centuries which have left us any record of human life, the prison played a temporary and insignificant part in the administration of criminal justice. Occasionally some prisoner of State was confined for years or possibly for life in the dungeon of a castle. Often these were used as a place of detention, in which to keep men a few days or weeks, until they could be brought up for trial. Now and then, some tyrant like Bomba of Naples of more recent days would abuse his power by keeping not only leaders in schemes of political revolution, but multitudes of their followers, under lock and key for an indefinite period, upon pretence that there had not been time to prepare the case against them. But all such instances of imprisonment were exceptions to the common rule. In nine cases out of ten, in ninety-nine cases out of a hundred, the man convicted of any of the common crimes, unless banished to some distant place of exile, was dismissed, after paying a fine, or being subjected to some form of bodily suffering, or social degradation.

The substitution of imprisonment for all other forms of corporal punishment has involved the modern State in two great evils. It has added enormously to its annual outgoes. It has taken thousands of its people from their natural surroundings and opportunities for profitable industry, and shut them up in an artificial and unnatural environment, where they are almost always in a moral atmosphere that is foul and contaminating.

True, the attempt was early made, and has never been abandoned, to make the jail a school of discipline and reform. At the beginning of the eighteenth century, Pope Clement XI, in erecting the prison of St. Michael for juvenile offenders, and setting up there a system of manual training, put upon its walls the inscription, Parum est improbos coercere poena, nisi bonos efficias disciplina. But what has really been accomplished towards turning the convict out a better man than he went in?

One of the persons most closely connected with the State Reform School at Meriden, Connecticut, stated recently that of the boys kept in the principal building of the institution, not one, so far as they could discover, led an honest life after his release, though part of those housed in detached cottages were apparently improved. A better showing is made by the statistics put
forward by the Elmira Reformatory, but there are few Brock-ways to be had. No system of prison discipline is worth a rush, as a mould of character unless the man who is responsible for its administration is gifted with exceptional, and, one might almost say, transcendent powers.

The great change in the system of criminal punishments to which I have alluded came to the United States as a part of the new life upon which they entered after their independence was established and the forms of modern government set up. It came gradually, and almost insensibly,—the natural outgrowth of democratic institutions. Whipping, branding, mutilation and the pillory, one by one faded out of use before they disappeared from our statute books.

The object of the lex talionis is to apply what seems the rule of natural justice. It is to punish, to punish in a way that will deter other men from acts of similar violence, and in many cases to stamp the offender with a mark that will be a perpetual warning to the rest of the community to be on their guard against him. It hurts the body and it is apt to hurt the soul. The continuing degradation which it generally entailed, did as much as its cold cruelty, perhaps, to bring it into discredit.

But one remnant of it now endures in our law, that of capital punishment for murder in the first degree. Hanging hurts, and the hurt and shame of it are both needed, our people think, to give his due to the man who deliberately and maliciously takes another's life.

Is it certain that some other punishments which hurt might not also have been wisely retained, might not now be wisely re-in-stated for particular offences?

I do not hesitate to avow my conviction that whipping would often furnish a mode of punishment far more appropriate than fine or imprisonment for minor offenses, and a useful addition to imprisonment for graver ones. While holding criminal terms of the Superior Court I have more than once had occasion to sentence culprits to confinement in jail, whose case would have been, in my opinion, better fitted by some form of punishment shorter in duration, and sharper in pain. Many of you, I am sure, must sometimes have had similar reflections as you reviewed the course of criminal justice in the case of young offenders, whose fathers had apparently spared the rod and spoiled the child.

A London magistrate of long experience, Sir Edward Hill, once said that long sentences make very little difference in their
deterring influence upon criminals as compared with short ones, for the simple reason that the criminal classes are devoid of imagination. They do not and cannot picture to themselves the dragging monotony, year after year, of prison toil, or month after month of prison idleness, with that vividness and sense of reality with which it strikes an industrious citizen. Whether they are sent up for two years or for twenty seems to them of slight account.

No sentence to a county jail is greatly dreaded by a hardened criminal. It gives him in most cases an assurance of better housing and of better food than he is in the habit of gaining by any other mode of exertion. He has never taken into his soul the full measure of the good of liberty. It is not a good, except so far as its possessor knows how to make good use of it; and that to him was never known, or but half known. On the other hand, whipping is dreaded by every one, man or child. We shrink from it first and most, because it hurts. It is no degradation to a boy to be whipped by his father, or by his master at school. That is not his objection to it. He feels that it is a reasonable and natural consequence of misdoing, and leaves him better, rather than worse. The sailor and the soldier, until recent years, met it in the same way, and with no loss of spirit, or of loyalty to their flag. Custom, for them, had dissociated it from disgrace. It was simply retribution. Among civilians, however, to the grown man, it is and always was a mark of degradation in the eyes of the community. But as a penalty for crime, it is a consequence of degradation rather than a cause of it. It was the crime that really degraded.

The criminal dreads whipping mainly, as the boy does, because it hurts. A French physician, at the head of the great prison hospital at Toulon, in a work on the characteristics of convicts, has said that the abolition of punishment accompanied by torture has resulted in greatly augmenting the number of homicides.* A convict, whom he quotes, had been sentenced to fifty stripes. “Ah,” said the man, “that is worse than fifty strokes of the guillotine. One suffers during it, and after it, too.”

There has never been a time when whipping was not a mode of criminal punishment in at least one of the United States. The United States themselves introduced it together with the pillory into their original Crimes Act of 1790, but it was abolished by

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Act of Congress in 1839. Flogging in the army, however, continued until its character was revolutionized by the introduction of so vast a multitude of volunteers at the outbreak of the civil war. In the navy it was retained until 1872.

Great Britain did not abandon its use in her army until 1881, and it has never been disused in England as a punishment for crime. In 1861, when her criminal procedure was made the subject of revision, it was given new prominence as a penalty for offenses of boys. Soon afterwards it was added to imprisonment, in cases of robbery with personal violence, garroting or other aggravated assaults on life and wife-beating. The results are conceded to have been most salutary.

Maryland in 1882 followed her example. Whipping was there made a penalty for wife-beating. In 1884 there were one hundred and thirty-one arrests upon this charge in the city of Baltimore. Early in 1885 a man, and the first white man, was sentenced under the new law to twenty lashes, besides a year in jail. At the close of the year, there had been only sixty-seven cases of wife-beating before the court. The next year showed a still further decrease, and the police authorities stated it as their opinion that the fear of a whipping had prevented half the assaults of this character that would otherwise have been committed.* As was rightly said by the father of the law in the Maryland legislature, the man who beats his wife and is cowhided for it by her father or brother is thought by all to have received his just reward; and why then cavil at a similar punishment inflicted in an orderly way, after a full hearing of his defence, by an officer of the law?

Let us admit that degraded as such a man is by his brutal act and the brutal heart behind it, he is further degraded in the eyes of his fellows by the whipping to which he may be sentenced. I do not hesitate to say that he ought to be, and that this further degradation, however we may deplore his fall in the eyes of the world at large, is a strong argument for the infliction of this particular penalty. The social sting often goes deepest. A man hates to lose caste among those with whom he associates familiarly. The term "jail-bird" shows how the community regards the man who has been once sentenced to imprisonment. But his mates often look upon him as none the worse for it. He has simply been unlucky. Let him be stripped and put under the lash, however, and he sinks in their estimation. It may, indeed,

*Reports of Am. Bar Association for 1886, 291.
have another good tendency from that very fact. It may drive him out of their company, into that of honest men again. But, be this as it may, to flog one criminal, deters by the very disgrace of it, hundreds from crime.

I am speaking to men not unfamiliar with the administration of criminal justice, and desirous to make it better. Let me ask you to think of these things; to turn the light of your own observation or experience on the subject; and as you look back on the story of sentence after sentence inflicted on some habitual rounder, to whom the jail has become a home, to consider if one good whipping at the outset might not have saved what has been not simply a wasted life, but a life that has wasted the property of the community and the peace of the State.

I would not, of course, stand here to advocate the restoration of the public whipping post, or the award of this penalty for many offences. Let it be inflicted in private, and when upon grown men, for such offences only as involve great personal violence and indignity to another.

We do indeed resort to it still, in addition to the penalty of imprisonment, where a convict proves idle or insubordinate. The warden of the State's Prison in my State, under our General Statutes, in case any prisoners “are disobedient or disorderly, or do not faithfully perform their task, may put fetters and shackles on them, and moderately whip them, not exceeding ten stripes for any one offence, or confine them in dark and solitary cells.” A similar authority is given to the Superintendent of our State Reform School, by the rules of that Institution; to the head of Elmira Reformatory; to most wardens of penitentiaries. Why need we hesitate to punish a criminal in this way for his crime by the sentence of a court, when we allow it for mere disobedience to the orders of his jailer, and at that jailer's will? May it not, we may further ask, be a lighter punishment than confinement in “dark and solitary cells” for such time as the warden may think fit? Those of us who remember the thrilling pages of Charles Reade's Never too Late to Mend, will have no great hesitation as to the answer.

Nor, to go one step further, am I sure that there is not a certain crime to repress which we might not wisely resort to another still sharper and more degrading punishment, which former generations and our own ancestors, even, did not hesitate to apply where it would do most good.

There is one wrong to a woman which some have deemed worse than death. In every country where men alone make the laws, they owe a special duty to secure the weaker sex against that offense, and to punish it, whenever committed, with just severity. In the early days of New Haven Colony, the laws provided, with meaning obscurity, that it should be "severely and grievously punished"* by the magistrates. It is probable that the planters had in mind that this grievous punishment might sometimes be castration.† Can there be one more precisely answerable to the wrong?

In the early criminal codes of Europe we find it in use for several of the graver crimes. In the laws of the Visigoths, it was inflicted for sodomy.‡

William, the Conqueror, brought it into England for rape, and—coupled with putting out the eyes that had "looked upon the woman to lust after her,"—it stood as the legal punishment until sixty years after the grant of Magna Charta, (3 Edward I).§

In Connecticut, the first record of an recourse to it is found in the first half of the eighteenth century. A man convicted in the Superior Court of mayhem, was sentenced to this form of mutilation because it was doing to him precisely what he had done to another. At that time there was no punishment prescribed by law for such a crime. There was a statute, which had been in force since 1672, "that no Bodily Punishment shall be inflicted that is Inhumane, Barbarous, or Cruel."|| The court stayed judgment until the will of the General Assembly could be known. That body thereupon resolved "that the Judges cause such punishment to be inflicted as to justice appertains, according to their best skill and judgment." The Superior Court was then composed of Roger Wolcott as Chief Justice, who was afterwards Governor of the Colony; James Wadsworth; Joseph Whiting; William Pitkin, afterwards Chief Justice; and Ebenezer Silliman. It has seldom in its history been better manned. They did not think it inhumane or cruel to adopt the lex talionis, and passed sentence of membrum pro membro.”**

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* N. H. Col. Rec., II. 278.
§ 2 Coke's Inst. 180, 181.
**Col. Rec. of Conn. VIII. 578; State v. Danforth, 3 Conn. Rep. 120 (Peters J.) The next year a statute was passed to make such an offense a capital crime.
Forty years later, at the close of the Revolutionary War, a British deserter, who had been sentenced by the Superior Court to death for rape, preferred a petition to the General Assembly for a commutation of punishment. The woman did not wish to press the charge, and she had been the only witness against him. The assembly granted the petition and ordered the sheriff to castrate him and let him go unhanged.*

Some years ago, John Hooker, the late Reporter of the Supreme Court of Errors of Connecticut, a man whose humane temperament and philanthropy are as well known as his critical and philosophic knowledge of the law, wrote on this subject for the press, in advocacy of our return to the use in this respect of the lex talionis.

At about the same time, a petition to Congress to introduce it into the system of criminal procedure of the District of Columbia was sent in by a number of women, headed by the wife of the then Chief Justice of the United States, Mrs. Waite. The Woman's Christian Temperance Union published, not long since, a vigorous article, in favor of the general adoption of the penalty for this particular crime by Dr. Thomas D. Crothers, of Hartford.

There are weighty reasons for it.

As fully as the death of the criminal, it ensures the community against his repetition of the offense. It reforms his body if it does not his soul. A convict is now in our State prison upon a second conviction for this crime. His first term of imprisonment had no deterrent influence on him. Twenty-one in all are there for this offense, and twelve more for an attempt to commit it.

Such a punishment is also appropriate in this. It puts on the criminal a shame of the same nature that he has put upon another. It dishonors and degrades, as he has dishonored and degraded.

It would be dreaded by most men, little less than capital punishment; but less it would be for there are few who do not cling to life under the most adverse circumstances. Rape ought not be punished as heavily as deliberate murder with malice aforethought. It is an offense that is seldom long premeditated, and to which men are urged by a blind, impetuous passion which,
while it cannot excuse, may sometimes extenuate the wrong. Nor in the interest of the woman, ought rape alone to be visited with as great a penalty as rape followed by murder. If it were to be, the murder often would follow; for the dead tell no tales.

There are two objections. and really but two objections, to reinstating this ancient penalty of law.

It involves an act which might be criticised as cruel; and its effect is to lower a human life, beyond recovery.

As for the cruelty of it, the same degree of suffering is inflicted, for a purpose in one respect not dissimilar, on half of our larger domestic animals. We do not deem it cruelty to them. It is an adjustment to their environment in society. It is necessary to make it safe to keep them about us.

The same thing has for ages been often done to boys in Italy, to serve the purposes of church and operatic music. The terms "Castrato" and "Singer to the Pope" were used there as synonymous late into the last century.*

To treat men thus would certainly be, in each case, to lower a human life beyond recovery. It would indeed make crime yield bitter fruit. But this ruined life has been the means of ruin to another life. It loses, as it has destroyed.

There is a crime still meaner than that to which I have alluded, that a man can commit towards the weaker sex. It is when he lures a child into dishonor. The penalty to be measured out for any act must be partly determined from its natural consequences. This act, therefore, is not one to be punished as rape or murder is. But a sentence to mere imprisonment seems to me a very inadequate one. If every such offender were also smartly whipped, I believe there would soon be fewer of them.

The apprehension of resultant bodily pain is a strong deterrent to any course of action by ordinary man or brute. It is nature's penalty for any abuse of our physical powers,—her inevitable penalty, we may say, in the end. The man has no right to complain who is made to suffer it for a physical outrage wantonly committed on a child.

It may not be amiss, as I close, to say a word as to the immediate effects of the disuse in 1830 of whipping by Connecticut, as a punishment for crime.

It had been the commonest one during the greater part of our

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*Beccaria on Crimes and Punishments, Chap. XX.
The convict was flogged and then dismissed. Few were sentenced to imprisonment, except for crimes so aggravated as to require their confinement in Newgate. A great increase in petty crimes naturally followed its abandonment.

The negroes had always been the most common offenders. The vices of slavery still tainted their character. They constituted a third of all the prisoners in Newgate (then the name of our State prison) in 1826, although our colored population was then but 8000 out of a total of nearly 300,000. There were more of them in the State prison in 1838 than there were in 1898.* The county jails had no terrors for him. There they could find the only ground on which to mingle with their white fellow citizens on terms of social equality. They were sensitive to pain, and had thoroughly disliked being flogged.

So, it seemed, had many others, whom now there was little to deter from violating the law. In 1821 under the old order of things, there were 45 commitments to the New Haven County jail. The year after the abandonment of the whipping-post, the number rose to 95. Five years later it was 270.

The discipline in all such institutions is necessarily lax. The food is abundant, the roof weather-tight, and the society generally quite congenial. In a report on the New Haven jail, made in 1838, one of its convict inmates was quoted as saying "that he had no objection to being shut up there, so long as he had cards and a plenty of company."†

The position of affairs was thus summarized in the report of the Joint Standing Committee on the State Prison to the General Assembly of Connecticut in 1840:

"In the present state of our criminal law, there is almost an impunity for offenses not punishable in the State Prison; pecuniary fines and imprisonment, are the only punishments that the humanity of the age would tolerate. The first, from the circumstances of the offender, is generally nominal, and the latter is only a charge upon the public, and a matter of derision to the idle and dissolute offender."

The half century and more that has elapsed since this report was made has wrought considerable changes in our county jails. They have become cleaner, healthier, quieter. And what has been the effect on the idle and dissolute offender, to whom the committee referred? We find that if he does not relish the

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*49 out of 190 convicts in 1838; 47 out of 513 in 1898.
greater order and better discipline, he can appreciate the greater warmth, light and cleanliness, and the better table. If he is put there once, he is apt to be found a returning guest.

As we review the subject, and compare theory with experience, sentiment with facts, we must, I think, own that there is much to be said for the system of corporal punishments so hastily abandoned in this country during the first half of the nineteenth century.

I noticed the other day that the grand jury at the Warwickshire assizes in England had recently made a presentment in favor of flogging for criminal assaults on women and children. Public opinion is gradually shaping itself towards that end, I believe, on both sides of the Atlantic; and other States, in my opinion, might do well in ranging themselves by the side of Maryland in bringing back some such remedy for the more effectual support of the weak against the strong, and of the juvenile offender against himself.

I believe that President Woolsey was right when he said that the only theory of criminal punishment which rested on solid ground was that to punish was to give the offender his deserts, and that government had a right to use its power for that end.

But if we were to accept the sentimental or humanitarian position, that the right to punish rests on the duty to educate the ignorant and reform the vicious, I should none the less insist that whipping was, for many cases, the best incentive to education and reform. He who has learned to refrain is half reformed. A whipping has a very direct tendency to teach a man to refrain from whatever is likely to entail another punishment of the same sort.

To psychology and physiology, to medicine and law, this is one of the known lessons of life. May not the disciples of these sciences wisely lend their aid to make it again a lesson to be taught, and taught effectually, to those whom a mistaken humanitarianism has allowed to forget it?