Punishment: The Reward for Guilt

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PUNISHMENT: THE REWARD FOR GUILT

I. INTRODUCTION

The concept of punishment for transgression appears to have universal application. It is manifest, so far as the authors can ascertain, in one form or another in every society. Perhaps its origin lay in the need of primitive man to protect himself against the threats of other men and beasts; later, the book of Genesis portrayed punishment being meted out for transgressions against the word of God. As late as the 17th and 18th centuries animals were tried in France, Germany, Switzerland and Spain, and punished for injuries perpetrated upon persons and property, while in England "deodands" (instruments which caused the death of "any reasonable creature") were forfeited to the king for purposes of appeasing God's wrath. When the massacre of offenders later gave way to the banishment of such individuals, the razing of their property served as an efficient outlet for the hostility which was previously directed at the offenders' persons. A form of punishment which still exists in remote areas of the world is known as the blood feud, which finds its basis in the fact that every man harbors wishes and desires for power. It shows itself most strongly in the destruction of an opponent, whereby a sense of security is gained.

Corporal punishment, which lasted for centuries, has for the most part been entirely abandoned in most civilized countries because of its degrading effect on society and the resulting embitterment and hostility which the victim experienced. Imprisonment, a relatively modern penalty, was virtually unknown in the middle ages; however, it became more prevalent by the end of the 16th century for increasing numbers of minor crimes for which it was thought undesirable to inflict the death penalty. Some of the oldest forms of punishment still survive in modern society. Deportation has been employed by European nations for the last two thousand years in the form of exile to a penal colony. The brutal severity of these ancient modes of punishment is perhaps explained by the fact that criminals excite the emotional reaction of fear in both the victim and society. These fearful impulses tend to cloud our intellectual processes, causing society to relapse to blind defensive reflexes which find their expression in primitive retaliation, terrorism and the lex talionis.

Both conceptually and pragmatically punishment appears changed in modern society from its origins; however, the deep emotional connection with the prin-

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1. ZILBOORG, MIND, MEDICINE AND MAN 257 (1943).
3. In 1810 Romilly, the great English reformer, introduced a bill to abolish capital punishment for stealing goods worth five shillings. It is shocking to note that the House of Lords defeated the bill by a vote of 31 to 11; WILSON, THE CRIME OF PUNISHMENT 161 (1934).
4. 12 ENCYC. SOC. SCI. 712 (1934.)

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The principle of considering the punishment as atonement and expiation is still highly operative today. Generally we may observe that punishment in its classic sense is still the dominant basic mode of coping with "criminal behavior"; although attempts have been made toward its abolition in varying degrees, as in isolated areas of criminal law, these attempts are at best of relatively meagre significance. In forty-two out of the forty-eight states we still find capital punishment prescribed; in only fourteen of these forty-two states has capital punishment been restricted to one crime.

The failure of punishment to secure the social good has motivated enlightened theorists, here and abroad, to seek an adequate substitute for a deterrent which had its inception in a primitive mind. Currently this substitute has taken the form of therapy and treatment directed to reach the efficient cause for the deviant behavior in the criminal; this aims at exercising a deterrent effect upon the individual in question by means of obviating the need for digression. Attempts to introduce this substitute for punishment into our current legal system have been relatively unsuccessful.

II. IMMUNIZATION FROM PUNISHMENT

Under our present system no criminal responsibility is imputed to certain classes, defined by the legislature, which are immunized from punishment in the classic sense because of certain mental or chronological incapacities. The reasons for this immunization are various; the desire of society to impose punishment upon all offenders against the accepted standards of conduct is tempered by a realization that, morally, some consideration must be given to those who are not responsible for their acts, those whose asocial acts are rather beast-like than human. Extension of this immunization to individuals who should be included in the exempt group according to our advanced medical and psychological information...
tion is not presently feasible, in as much as there is a current dearth of facilities for treatment and a substantial lack of funds with which to increase them. Significantly, the reluctance of society, via the legislature, to bear the financial burden of alleviating this situation would seem to indicate an unwillingness to reduce the incidence of punishment even where medical knowledge and scientific data deemed it.

III. THEORIES OF PUNISHMENT

There are three relevant theories on which are based the ethics and desirability of punishment, as envisioned by our society. The first is vengeance, which is retrospective. The vengeance may be expressed for its own sake, to restore the esthetic balance, as a way of making reparations, to appease the gods, as a form of expiation by the offender, or to appease the "lynch instincts" inherent in the victim of the accused, his friends, his relatives, or the populace. The deterrence theory, on the other hand, is prospective, looking to prevent the commission of social damage. The ultimate goal here is to inhibit others from indulging in these acts, by using the present offender as notorious advertisement to potential offenders of the unpleasant consequences of crime. Parenthetically, the act of punishment also exerts its influence on the rest of the populace, in that a vicarious feeling of "goodness" is attained by reaffirming the moral code. The recidivistic theory contemplates the prevention of future damage to society by the individual offender who is the object of the punishment. Since he has already manifested antisocial tendencies, it appears probable that such behavior may reoccur unless he is removed from society.

The ultimate issue for our purposes thus resolves itself into the question of whether the transgressor should be punished, treated, or isolated. Ideally, it is proposed by Strahorn that "the rule should be to apply treatment [or punishment] to those who are likely to repeat, to acquit those whose likelihood is too slight to be important, and to scale the length and nature of the treatment in terms of the relative likelihood of recidivism."


11. Colorado abolished the death penalty and was forced to reinstate it because lynching and violence increased. It is thus thought that the need for retribution is so deeply imbedded in the thinking and emotional makeup of the people that they will take law enforcement into their own hands if it is not "adequately" dispensed by the proper enforcement agencies. Punishment for heinous crimes is generally severe, not only for the purpose of penalizing the criminal but also to appease the thirst for blood which becomes manifest in lynching.

12. "Men are not hanged for stealing horses, but that horses may not be stolen," LORD HALIFAX, WORKS, 229.

Notwithstanding the occasional expression of such ideas, we are inevitably led to the conclusion that society jealously adheres to its right to punish for transgressions. There appears to be a basic, primitive need to exert such punishment on the transgressor, and it is this need which dominates our current attitudes toward crime and punishment, rather than the lip service which is paid to the deterrence which punishment may accomplish. It may be of the greatest practical importance to determine what motivates such societal needs. An individual may experience feelings of guilt when he has perpetrated an act which according to his concept of morality constitutes prohibited behavior; or, as Freud points out, the mere awareness of the intention to commit an act which is defined as asocial by the individual will occasion guilt feelings. "The tension between the strict superego (conscience) and the subordinate ego (self) we may call the sense of guilt: it manifests itself in a need for punishment." The superego torments the sinful ego with a feeling of dread and watches for opportunities whereby the outer world can be made to punish it." It is necessary to point out at this stage that the sense of guilt which has its origin in crimes committed or contemplated is repressed by the ego, so that the dynamics of guilt and expiation by punishment are totally on an unconscious level, and the individual is usually unaware of these processes. It may be considered as general knowledge that all people in our society are to some extent plagued with a sense of guilt, born of the accumulation of minor digressions which society does not punish, or of which society is unaware. Certainly it is generally accepted that even where these elements are said to be non-existent, there is a latent desire in each of us to perpetrate forbidden acts. As we have seen previously, the mere awareness of the desire to transgress may occasion guilt feelings which the individual feels can only be purged by punishment. Punishing others may accomplish the necessary effect of purging these guilt feelings in the individual, in that there is a vicarious identification with the person who is so punished. Punishment of other offenders aids the superego in suppressing the hostile instincts of the Id (unconscious, instinctive drives), for the demonstration of punishment acts as an ominous warning. To state it more graphically, it is easier to subordinate evil impulses when there is a practical threat to the ego of loss of status, love or liberty, and the fear of pain which are the consequences of the ominous punishment. From this we might conclude that the fear of punishment does have a practical, significant deterrent effect upon the hostile asocial manifestations latent in the normal individual, and it would appear at this preliminary stage of analysis that the incidence of crime in any given area should be inversely proportionate to the threat of severe punishment.

15. Id., at 105.
16. Id., at 108.
17. See ALEXANDER & STAUB, op. cit. supra note 5, at 6.
IV. EFFORTS OF PUNISHMENT ON THE INDIVIDUAL

Punishment serves not only as a deprivation of basic needs and desires, but it also has the more significant effect of ostracizing the individual from society,\textsuperscript{18} transplanting him into an outgroup. Other elements are the social stigma attached to punishment for crime, deprivation of community respect and economic opportunity, and loss of prestige, status and honor. Since there is a need in the individual to associate and be accepted in a group, he almost invariably seeks refuge, acceptance, and prominence in the outgroup, which is inevitably comprised of individuals similarly ostracized from society.

Our penal system relies largely on imprisonment of the individual offender, to the extent that this imprisonment has become synonymous with the entire concept of punishment. Prison environments are among the most unnatural and artificial environments in which human beings have ever been placed. What is more unnatural and perverse than a milieu in which men are separated from women within the confines of high walls, forcibly engaged in tedious labor? How unrealistic it is to assume that people will develop self-restraint where they are herded like animals, where they live in close proximity with others who have shown disrespect for authority, and where the need for self-expression is completely stifled.\textsuperscript{19} Beyond these environs a similarly abnormal situation exists in the homes of these men, where children are deprived of parental companionship, guidance and support. The system of imprisonment, although it may accomplish its punitive isolation function, does not accomplish its rehabilitory goal.

Ideally, punishment must not have an effect of disgracing the individual in the eyes of his peers, but rather it "must bring about a [moral and psychological]... regeneration ... To this end punishment should prepare and give assurance of social reinstatement and never impose an indelible stigma ... There is a growing sentiment in favor of abolishing punishment that dishonors and of discarding the distinction made between infamous and non-infamous punishment."\textsuperscript{20} This indelible stigma is often the source of criminal recidivism; the individual branded as a criminal intellectually and emotionally tends to maintain this role, thus precluding any possibility of rehabilitation and readjustment as a conforming member of the community. If one is labelled a "criminal" society will react to him as such; since the character and personality of each individual mirrors to a great extent the attitudes and reactions of others toward him, the "criminal" will almost necessarily assume the role in which he is forcibly cast.

\textsuperscript{18} See SALLEILLES, THE INDIVIDUALIZATION OF PUNISHMENT 189-209 (2d ed. 1911); see also, CANTOR, CRIME AND SOCIETY 227 et seq. (1939).
\textsuperscript{19} See CANTOR, op. cit supra note 18, at 304 et seq.
\textsuperscript{20} See SALEILLES, op. cit. supra note 18, at 269.
V. CLASSIFICATION OF CRIMINALS

We have broadly surveyed the requirements and effects of punishment of deviant acts from the perspective of society. In order that we may evolve some understanding as to the direction in which punishment must be oriented effectively to reduce crime, we must now turn our attention to the needs of the individual and the effects of punishment upon him. At this point we shall use an arbitrary and oversimplified classification of criminals for purposes of clarity and analysis: normal, neurotic and psychotic. Since, under existing psychiatric techniques, little if anything can be accomplished with psychotic criminals and certain categories of neurotic criminals, we shall for practical considerations confine our attention mainly to the effects of punishment on the normal and the less extreme neurotic criminals.

VI. PUNISHMENT FOR CONSISTENCY

The normal criminal can be subdivided into two categories. One comprises those whose likelihood of repeating the criminal act is so small as to be insignificant; the other includes those who, because they are members of a group which does not consider criminal acts to be socially or morally objectionable, or because they view crime as a business and punishment as only a business risk, or for any of scores of reasons, are likely to continue to commit crimes. In those cases where we might accurately predict that there would be no incidence of recidivism, the only apparent legitimate motives for the imposition of punishment are for purposes of consistency or as a deterrent to potential transgressors. Many authorities in criminology rigidly adhere to the conception that the law must show itself to be inflexible, so as not to undermine the Authority or pervert punishment into an idle threat. In many cases where a particular criminal would appear to have little or no recidivistic tendency, it might serve the purposes of the state to make certain exceptions in the administration of punishment, in order that a first offender might take a useful place in society rather than be confined to the sort of imprisonment which can legitimately be called a school for hardened criminals. The difficulty with such individualized treatment has generally been conceived as twofold; it is not expedient for the administration of criminal justice to water down the deterrent effect by making exceptions, and the people's cry for vengeance and expiation must be satisfied by the legislature and the judiciary.

21. See Aschaffenburg, Crime and Its Repression 156 (1913); Schmidt, Die Aufgaben der Strafrechtspflege 369 (1895, Leipzig).

Let us, then, re-examine the dynamics of punishment on the emotional makeup of the "normal" criminal in the light of these claims. As to those who suffer no stigma in their group as a result of violation of a legal canon, we may generalize that the commission of the prohibited act will not cause the criminal to suffer guilt feelings, since, as we have noted, guilt feelings are occasioned by the superego's demanding expiation from the ego. But peculiarly we find that here the superego is in conformity with the ego, in that the commission of a crime against "society" is not in conflict with the superego; rather, it is in such cases a method of attaining prestige in the outgroup. But the other classification of the normal criminal, the non-recidivist, is usually severely plagued by pangs of conscience. His superego is conventional, from the perspective of society, and thus the commission of a crime constitutes a severe moral infraction as viewed by the superego; the ultimate result is that the superego demands expiation from the sinful ego, which normally takes the form of a need for punishment to purge the individual of his guilt feelings.

VIII. DENIAL OF PUNISHMENT—CONSEQUENCES

What effect, then, does the deprivation of punishment have on the demanding superego, since the latter will relentlessly demand "justice" in the form of punishment? In many cases we find that where society does not by itself punish the transgression, the individual will be impelled by unconscious forces to impose punishment upon himself in order to facilitate the appeasement of the superego. This may take the form of what is commonly referred to as accident proneness, the "compulsive" tendency of certain individuals to consistently court danger and the potential injuries which follow therefrom. Accident proneness may manifest itself in such acts as jay-walking and taking other risks both as a pedestrian and driver, to an extent that any average person would deem irrational; manifestations of negligence in daily routine activities are illustrated by recurrent injuries to which the individual unconsciously subjects himself. The writers suggest that another method by which the guilt-ridden individual may gratify his need for punishment is by repetition of the prohibited acts, thereby unconsciously seeking punishment from society, or external authority.

It is not illogical to conclude that in many cases recidivism may have its roots in the frustration of the desires and need for punishment. We may ask ourselves, then, whether punishment could not serve the important function of eradicating the need for committing socially deviant acts, the results of which are ultimately

23. See Menninger, Man Against Himself (1938).
calculated to pacify the stern superego.\textsuperscript{24} A contrary view is suggested by those who advocate the abolition of punishment, who reason that once the superego's wrath is appeased, the ego is purged of guilt.\textsuperscript{25} An extreme view is taken by certain criminologists\textsuperscript{26} who suggest that kindness may serve as a more effective deterrent to crime than punishment to the individual.

The Freudian school conceives of punishment as a means of expiation; it frees the ego from the confines or restrictions imposed by the now eradicated guilt, which theoretically may invite further digression, followed by further guilt and the consequent need of punishment. A vicious circle of crime, guilt and expiation (punishment) is thus created. These manifestations usually exert their influence on certain categories of neurotic criminals and on the normal criminal, the offender whose likelihood to repeat criminally sanctioned acts is improbable. Franz Alexander expressed it dramatically by stating, "the tyrannical period of punishment during which the superego celebrates its sadistic, punitive orgies is followed by a manic phase of release."\textsuperscript{27}

\textbf{IX. KINDNESS AS DETERRENCE}

Alexander and Staub propose\textsuperscript{28} that kindness may be the means of breaking the vicious circle, theorizing that kindness, being conceptually in opposition to punishment, will further increase the inhibitory restraint on the ego, because the sinful slate is not wiped clean except by punishment or atonement. Thus the ego is not freed to impel the commission of additional transgressions. There need be no justification to the individual for what he considers unjust punishment, and it is incongruous to react to kindness with hostility. This seemingly humane method of dealing with criminal offenders has its obvious shortcoming when viewed from the traditional deterrent theory of punishment,\textsuperscript{29} in that kindness can hardly be regarded as deterrent in nature. In this connection, we should examine the validity and practicality of punishment as a deterrent. As we have seen, deterrence has been rationalized as a dominant justification for the imposition of pains and penalties on the criminal. However, we have questioned the validity of this concept by pointing out that its true origin may lie in the need for a societal vengeance and balancing of the "esthetic scales of justice." It appears that punishment has little or no practical significance to the majority of the class of neurotic criminals, or a fortiori, to the psychotic criminals, since punishment for this class

\begin{itemize}
  \item \textsuperscript{24} This is discussed in detail infrat, p. XX-XX.
  \item \textsuperscript{25} See \textsc{Freud}, \textit{op. cit. supra} note 14, ch. 7.
  \item \textsuperscript{26} See \textsc{Alexander} \& \textsc{Staub}, \textit{op. cit. supra} note 5, at 69.
  \item \textsuperscript{27} See \textsc{Alexander}, \textsc{The Psychoanalysis of the Total Personality} 31 (Glueck \& Lewin transl., 3rd ed., 1946).
  \item \textsuperscript{28} See \textsc{Alexander} \& \textsc{Staub}, \textit{op. cit. supra} note 5, at 68-69.
  \item \textsuperscript{29} See \textsc{supra}, p. X.
\end{itemize}
may indeed be the motivating factor for the criminal acts.\textsuperscript{30} By way of confirmation, criminologists have pointed out that the high degree of recidivism indicates the effectiveness of punishment as a deterrent to the individual. Crimes are often born of an abnormal need for notoriety and martyrism, and history reinforces to some degree the theoretical position of the ineffectiveness of punishment. To note one example, the punitive attempts to suppress Judaism and Christianity served only to intensify the evangelical efforts of their followers; in at least some cases punishment seems to incite its recipients to over-compensatory retaliation.

Authority in the form of statistics, which reinforces the proposition that punishment is an inefficient deterrent, is abundant.\textsuperscript{31} However, we may legitimately question the validity of many such surveys, since the information is usually obtained in penal institutions or from known criminals. The St. Louis, Missouri, Association for Criminal Justice conducted a survey in 1926 showing that only one out of every 1,000 crimes committed in Missouri ever led to actual punishment of the offenders.\textsuperscript{32} Inasmuch as those who are captured once are almost invariably recaptured time after time, we may infer that the criminal aggressions of these recurrent offenders have a self-destructive motive (since unexpressed hostility is turned inward), incorporated in a quest for the infliction of self-punishment.\textsuperscript{33} No statistics, however, are available on the number of potential criminals on the verge of committing a crime who are deterred by the threat of societal retribution, though one could estimate that the number is substantial.

In order to document the theory that kindness may be the proper method of coping with criminal aggressions, Messrs. Alexander and Staub\textsuperscript{34} cite the example found in \textit{Les Miserables}, wherein the beneficent priest retaliated to the theft of his property with kindness and understanding, rather than the vindictive, hostile attitude which currently prevails. As we have indicated before, the objectives of deterrence can hardly be facilitated by kind treatment of criminal offenders; there is an anomaly in rewards being the wages of sin. The interesting question presents itself of whether the reaction of kindness to a given criminal act will have a deterrent effect upon potential criminals. Some theorists\textsuperscript{35} imply that it is difficult even for the hardened criminal to react to kindness with an attitude of further hostility and aggression. It is said that the superego is further buttressed in its attempt to keep in check the hostile drives manifested in the Id or ego, while, on

\textsuperscript{30} E.g., a masochist seeks sexual gratification through punishment. See \textsc{Thorpe} \& \textsc{Katz}, \textit{The Psychology of Abnormal Behavior} 326 (1948).
\textsuperscript{31} See S.\&E. \textsc{Glueck}, \textit{500 Criminal Careers} (1930).
\textsuperscript{32} See \textsc{Mooley}, \textit{The Administration of Criminal Justice in Missouri} (1926).
\textsuperscript{33} See S.\&E. \textsc{Glueck}, \textit{op. cit. supra} note 31.
\textsuperscript{34} See \textsc{Alexander} \& \textsc{Staub}, \textit{op. cit. supra} note 5, at 68.
\textsuperscript{35} \textit{Id.}, at 69.
the other hand, punishment tends to relieve the superego of the necessity of keeping its moral vigil upon the Id and ego.

Let us now critically examine the psychoanalytic validity of these conceptions. As we have seen, the superego torments the sinful ego upon the occasion of an infringement upon the moral authority, and thus are occasioned guilt feelings in the individual, or, indeed, hostility against the moral authority, which way be individually conceived of as hostility toward the original authority, the parent. However, such feelings of hostility against the moral authority are frustrated in their expression; thus, axiomatically, the hostility is repressed and turned inward, manifesting the result in many cases of what Freud refers to as the death drive (self-destructive motives). When punishment is meted out for an act of aggression, the guilt of the individual, to a large extent, finds ventilation. When kindness alone is substituted for the punishment, the individual is further inhibited in the expression of hostility, since the superego becomes more ominous and better fortified. We may, therefore, generalize, that since the inhibition of hostility expression increases, the hostility turned inward proportionately increases. The result can be conceived of as an increase in the self-destructive or death motives, which again may find their expression in repetition of crime; the individual may seek relief and expiation of his guilt feelings at the hands of society, and may strive to achieve this end in the further commission of more serious crimes to which society will be forced to retaliate. An enlightening example of these mechanisms may be found in the case of the first man sentenced to death in Kansas in fifty years. A manuscript left by him disclosed his incredible criminal career; he committed 23 murders, numerous thefts, and spent 22 years in jails and reform schools. This criminal, an extremely intelligent person, was completely aware of his motives, drives and needs. He sought to satisfy his need for punishment by criminal recidivism through "deliberate" captures. His goal was death, the maximum punishment, which he ultimately obtained only through artifices designed to decoy the court and psychiatrists, who recommended leniency and treatment rather than the death sentence. The manuscript recounted the condemned man's excessive hatred, scorn and contempt for all human beings, himself being the most despicable.

X. INDIVIDUALIZATION OF PUNISHMENT

A current movement is afoot among informed criminologists, who advocate individualized treatment for the criminal, viewing most classic forms of punish-

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36. Psychanalytic perceived, kindness, in order to facilitate rehabilitation, would have to be supplemented with a technique, administered in an atmosphere of understanding and acceptance, whereby the criminal would be led to understand and accept those forces which originally impelled or created hostility and which are now turned against society.
ment as barbaric. If an effective functional purpose is to be attributed to punishment (i.e., if it is administered as a rehabilitory and reformative rather than as a retributive device) then "it necessarily follows that the punishment must be adapted to the nature of the individual to whom it is applied." Not only must punishment be individualized, but the individualization must be based on objective experience rather than on "deceptive common sense." Such objective experience cannot be gleaned from similar cases, but must be based on an individual diagnosis of the offender by competent psychologists and psychiatrists. To generalize from cases of other criminals who may have certain characteristics in common with the offender is highly dangerous in this area, for a minor variance in personality trait may become crucial when viewed from the perspective of beneficial psychiatric individualization. It is necessary here to distinguish between individualization of punishment and individualization of treatment. Individualization of punishment, as we shall have occasion to use this term, involves psychoanalytical determination of what in fact can constitute "punishment" to a given individual. As we have discussed, punishment can be the desired end or motivating factor which occasioned the criminal act; to inflict punishment, as commonly conceived, on such individuals would be nothing more than gratification of their sociopathic needs. Individualized treatment, on the other hand, refers to the process whereby the individual is psychoanalytically treated with the ultimate goal of eradicating the need for transgression. To some extent the law presently gives discretion to the sentencing judge to individualize punishment as prescribed within the confines of a given statute. However, such discretion is far too subjective, and far too often dependent on the emotional disposition of the judge at the time. Similarly, in the cases of parole, a panel of laymen rather than psychological specialists becomes the final arbiter of whether a man is ready to take his rightful place in society. The late Professor George Dession, more than any other criminologist, has done some of the most advanced thinking in this area of punishment-individualization, proposing that a board of experts composed of psychologists and psychiatrists be set up to objectively determine the length of sentence and advisability of parole, but emphasizing the guarantee of procedural due process. However, there are many problems which require solution in this area of individualized treatment and punishment. Perhaps the major difficulty, which circumscribes the entire problem, is that of changing drastically the societal attitudes toward criminal behavior, and vitiating the primitive need for retribution. Derivative problems are encountered

37. See Saleilles, op. cit. supra note 18.
38. Id., at 9.
40. See Aschaffenburg, op. cit. supra note 21.
41. Dession, Psychiatry and the Conditioning of Criminal Justice, 47 Yale L. J. 319 (1938).
in the insufficiency of funds available to set up facilities for treatment, and to remedy the great shortage of trained personnel to treat these people.\textsuperscript{43} There is general agreement in the psychiatric profession that adequate treatment requires in many cases two or three years, and this assumes willingness and cooperation by the patient. Needless to add, such cooperation by criminals who are involuntarily required to undergo treatment is not forthcoming. Even under ideal therapeutic conditions, such rehabilitatory therapy often fails.

The great difficulty with the proposed establishment of a panel of experts to recommend therapy or punishment is that due process would be sacrificed, since it would not afford the defendant an adversary proceeding where no formal criminal prosecution is brought against him.\textsuperscript{44} Under the present law in many states\textsuperscript{45} there are facilities for treatment rather than punishment. The difficulty mentioned above becomes manifest here, in that the law does not in most cases guarantee the defendant even nominal due process where involuntary treatment is foisted upon him.\textsuperscript{46} Thus in many cases, other than those involving capital offenses, it may be advisable for defendant's counsel not to plead insanity, since the provisions for treatment usually are couched in terms of an indeterminate sentence.\textsuperscript{47}

XI. A COMPROMISE SOLUTION

In the light of the great difficulties of individualized treatment and society's unwillingness to renounce vengeful retaliation, a break with the principles of the lex talionis in the near future seems unlikely. However, a workable temporary compromise might involve a brief but comprehensive diagnosis which would indicate the utility of imposing "positive sanctions." We speak of "positive sanctions" rather than punishment since we have found "punishment" to connote the expression of societal hostility directed at the offender; this has the effect of stigmatizing the violator forever, which leads to a host of undesirable consequences. Positive sanctions, on the other hand, are intended to include punishment which does not lack in severity but which should ideally be sterilized.

\textsuperscript{43} Dession, \textit{op. cit. supra} note 41, at 328-339.
\textsuperscript{44} Id., at 319.
\textsuperscript{46} See \textit{OVERHOLSER, THE PSYCHIATRIST AND THE LAW} (1953).
\textsuperscript{47} \textit{People v. Tower}, 308 N. Y. 123, 123 N. E. 2d 805 (1954), noted \textit{supra}, p. XX, where defendant unsuccessfully pleaded his right to be sentenced under the punitive section of the penal law rather than the rehabilitative provision of the Correction Law, on the theory that he was "beyond redemption."
of societal stigma, to eliminate the possibility of the individual's seeking refuge in an undesirable outgroup as a result of ostracization from his customary social group. Thus, upon diagnostic determination that a particular offender falls within the category of "normal" criminal, that his offense is not motivated by seriously neurotic or psychotic propensities toward crime, and that his superego demands expiation of the offense, it may be pragmatic and beneficial from the standpoint of society and the individual to impose punishment of a severity proportionate to the guilt feelings of the individual. In these cases punishment may have the flavor of the medieval rack as long as it is devoid of societal stigma. Punishment, to be effective, may have to be severe, but severity again must have a subjective meaning to the offender. Thus what may be severe punishment to one might in no way constitute punishment to another.

Juvenile delinquents might successfully be punished by the assignment of a part of each day to some sort of labor, with community praise and admiration emanating therefrom, rather than social shame and disgrace. At this time, this mechanism can facilitate reimbursement for the injuries perpetrated on others. The physical efforts expended by the child are sufficiently suggestive of punishment to him. The repugnance of society to punish juveniles for most crimes is abortive of rehabilitation, as demonstrated by the following statement of a child under eighteen: 48 "If you're under eighteen, you can get away with anything except murder." A study made by the Gluecks 49 divided a group of juvenile offenders into a control group, to which was administered the usual sanctions in the usual institutions, and an experimental group, which was therapeutically treated. The deleterious effects of this latter program of kindness, sympathy, and tolerance are flagrantly exposed to us. There was an 88.2% rate of recidivism in the experimental group, this being higher than that in the control group. The writers suggest that a possible explanation for this result lies in the fact that punishment was denied the experimental group. The Gluecks failed to arrive at any satisfactory explanation, though inadequate facilities and failure to treat the experimental group for any significant length of time may have been relevant factors.

XII. CONCLUSION

The current indiscriminate application of punitive devices, reminiscent of the medieval penal system, can no longer be tolerated in the light of present learning, especially when its proponents fail even to admit that it rests upon the foundation of satiation of public vengeance. Having eliminated the lex talionis as a legitimate method, we must proceed to prescribe punishment in a manner

48. DOUGLAS, INCREASING RATE OF JUVENILE DELINQUENCY 245 (1950).
49. See S.&E. GLUECK, 1,000 JUVENILE DELINQUENTS (1934).
NOTES AND COMMENTS

designed to achieve legitimate ends, the protection of the community’s health and welfare and rehabilitation of social deviants.

We have cursorily examined some of the significant facets of punishment and the penal system, and various proposed modifications, alterations and improvements which might be made; individualized treatment utilizing positive sanctions seems ultimately the only feasible method of punishment administration for these purposes. The potential danger inherent in such a program is apparent—a failure of procedural safeguards is always imminent in a system of individualized standards, norms and treatment—but assurance that the basic safeguards will be maintained can be provided. In the light of prevailing conditions, the writers advocate a temporary compromise that would improve upon the present system, utilizing some existing and proposed reforms. The unpredictable human elements which permeate the entire area render remote the universal utilization of individualized therapy in such a way as to accomplish the maximum possible deterrence. But in spite of the difficulty of successfully treating the numerous criminal types which range from normal to psychotic, and although some attitudes of society will have to be clarified and possibly drastically revised, the present dilemma of conflicting policy considerations must be resolved; the legislature, executive and judiciary must be reconciled to seemingly radical innovations if we are to make any significant forward progress from the medieval conception of vindictive retaliation first incorporated in the Code of Hammurabi.50

—Arnold T. Lieberman and Dawn B. Girard

50. 1780-1750 B.C.