on the second attack, or should it be reserved for the third and subsequent attacks? Or, in a case of *circular insanity*, at what point of the malady is the patient to be so classified?

Reviews.

The Report of the Commissioners of Prisons (England) 1900, with special reference to the working of the Prisons Act, 1898.

The very general use of expressions such as the fitness of things, the survival of the fittest, a perfect fit, a fitting reason and the like, raises the presumption that fitness is that which we now strain after in especial. Fitting correctly punishment to crime, then, if the thing to try to do, is yet presumably difficult, assuming that such a statement as the following by Sir H. S. Maine is to be accepted unreservedly: "It is always easy to say that a man is guilty of manslaughter, larceny or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry or in the analysis of motive which we may not be called upon to confront, if we attempt to settle such a point with precision."(1)

Nor is the difficulty lessened if we recognise the force of the arguments used by Mr. H. Ellis in his chapter on the treatment of criminals(2), in which he quotes with approval two such different authorities, as Reinach saying in *Les Récidivistes*, "Imprisonment, especially if short, is an excitation to crime;" and the words of Prins the Inspector-General of Belgian Prisons, "What is the advantage, unless the necessity is absolute, of putting into prison the head of a family, etc.?"(3).

In fitting punishment to crime we are, therefore, met with two initial difficulties—(*a*) the form of the punishment to be inflicted, due regard being paid to the kind of criminal and the nature of the crime; and (*b*) its quantum, by reason of his imputability and susceptibility. There is not one common antidote for all poisons, nor is the same medicine given in similar doses to every patient. Why, then, should all offenders be either fined or imprisoned, and all who, for example, steal £5, be (broadly speaking) treated to a like amount of punishment?

As an aid to appreciate the advantage of appropriate punishment, that is, of retributive treatment, as being the form modern society's dealing with a recalcitrant member should rather take, a few preliminary observations upon the history of punishment and the right to punish, as well as upon its proper aims and objects, may here, perhaps, be not out of place.

The origin of punishment is often attributed to the reflex action of the individual injured, which in the case of a person struck prompts

him to strike back (4), with a force to some degree proportionate to the impression the blow just received has made upon himself. Some evidence of the truth of this view is seen in the circumstance, that, when the duty of punishing passed to the head of the family as part of the *patria protestas*, he adopted much the same principle as did the Sovereign power upon which it devolved in the next stage, which latter authority, even in the highly developed instance of Roman law, always permitted the offended person to strike back the offender with a harder blow when caught red-handed, than after the sting of the original outrage, through the action of time, ought to have gone off.(5) A similar principle is still recognised with us in provocation being permited to reduce murder to manslaughter in aggravated cases, and in penal science this is now usually expressed by the formula that the punishment meted out in each case should be proportionate to the offence committed, and also since we look further ahead in this regard to the circumstances of the offender.(6) Thus a poor man should not be fined as heavily for a similar theft as should a rich one, (*a*) because the punishment would not be equal in the two cases, and (*b*) because the temptation to steal was inferentially greater to the first than to the second offender. Another great rule, namely that punishment should be personal, that is should strike the wrong-doer only, and not like an angry blind man swinging a club others as well, is of later origin. In olden days the community to which he belonged was equally liable with the actual offender for *wehrgeld fredum* or *bannum*, and if he could not be found some relative was wont to be punished in his place; the root idea being that the tribe must not be allowed to suffer, and that the injured member should at all hazards be compensated. The same thing is done now-a-days. Not that a substitute is accepted for the offender who shall be permitted to suffer for him vicariously, but his family is too frequently reduced to misery along with him, as the necessary result of his punishment. Prins, to continue the quotation given above, says, "What is the advantage, unless the necessity is absolute, of putting into prison the head of a family to devote him to infamy, to compromise him in the eyes of his fellow workmen, of his wife and of his children? Is this not to condemn these latter to abandonment, misery and mendicity?"(7)

Among the difficulties, then, that arise in making punishment proportional, are that in so doing we shall probably be effecting in it too great a similarity to the *Lex Talionis*, and in making it strictly personal, we shall be freeing the offender from what he ought to suffer, in order to save the family from misery. As the right to punish springs from the impossibility of society going on without its proper exercise, and not from any obligation on our part to make the offender expiate his crime for any reason, nor yet to show our abhorrence of his act by making him a moral scarecrow, so its primary object should be reparation to the injured party (8) combined with reformation of the offender, rather than retribution or even prevention of apprehended crime on the part of other evil-doers. About the sixteenth century the idea of punishment got itself crystallised into that of public vengeance and public utility conjoined. To make an example was at that period the main object

of the criminal law, and therefore torture and all sorts of other methods were resorted to, that admissions of guilt might be freely obtained. Thus the *Défense Sociale* became so arbitrary in its methods that Beccaria, Kant, Voltaire, Bentham, and Romilly rose in their wrath against it, almost at the same period, a century and more ago. The pendulum then swung into the opposite direction, and free trial by jury became the order of the day. Whereupon the idea grew up that ten criminals had better get off, than one innocent man be wrongly condemned. With regard to punishment, Kant put an end to the doctrine which had been unreservedly accepted for so long, that its application merely depended upon public utility, and not upon principles of abstract justice as well. After him De Broglie and Rossi clearly showed that if the root idea of punishment was justice, so that it could only be exercised in cases of violation of the moral law, yet that its measure depended upon contemporary social requirements. The double principle of punishment was now for the first time fully recognised, that not only should a firm attempt be made to reform by its means the criminal himself, but also to repress the manifestation of crime by others. Soon, however, the principle of utility got the upper hand again with penal scientists, as these mixed methods failed to stop recidivism, and thus *La défense Sociale* became the chief and almost only object of the modern Positivist school. To carry this out society has to be made to believe that the criminal is a wild beast, who kills because he has an atavistic instinct to kill, and the chief question is not his guilt, because he is practically held to be irresponsible for his acts, but the measure of his danger to society, and not his blameworthiness, as is the main doctrine of Spiritualists. With the Positivists, then, the question of the appropriateness of retributive treatment does not arise. All that is before them is what is best for the State, of which they fail to remember that offenders are an undivided fact. Some Positivists think them curable, others not, but most of them consider criminals as the fated victims of atavism, and a return to the savagery of ancestors. This is not true, because criminality is not so wholly repugnant to the ideas of men as it would be if it were the case, and also because much of what is now held to be crime, has always been considered as such(9) in the past. Directly the individual, and not the family or tribe became the unit, the life of the individual got itself respected, and to kill him was punishable. In early days men were not anarchical in the modern sense of the term, nor was man then upon the whole more criminal than now. And so atavism cannot be pleaded as an excuse for lack of self-control. In the same way it may be shown that crime is not madness, nor wholly even due to defectiveness, but that a vast proportion of criminals are normal beings, who have taken to crime as a profession, and it is with such as these that we are chiefly concerned in the application of appropriate punishment. For defectives of all sorts have to be treated rather with a view to their infirmity, than to their quantum of imputability, if any.

Appreciation of what was then conceived to be the appropriateness of punishment is to be seen in the burning of heretics by the Church in early days; the idea being that such a form of punishment was the only one by means of which effective purification would take place.

Another example of the same attempt to fit punishment to crime, is to be seen in the old law of Béarn with reference to forgery. The forger had the forged instrument affixed to his head with tintacks, and was in that condition marched round the town, and subsequently expelled. The adulterer, too, was hustled through the streets in a state of nudity, and likewise expelled from the scene of his iniquity. Bentham had a similar idea in mind, when he proposed the punishment of perforating the tongue and affixing to it a huge pen, in the case of those who had been guilty of a serious crime of deceit and false representation. Not so long ago in Denmark, infanticide and bad cases of concealment of birth were punished with imprisonment and a whipping once a year, on the day the offence was committed. In yet older times, the punishment in Egypt for the same offence was, having to hold in the arms the dead child for three days ([10]), the idea of which seems somewhat similar to the cutting off in certain cases of the offending member.([11]) As Tarde well says, "In this way the authority attempts to oppose to such manifestations of crime as it dreads, obstacles of a kind similar to that which is their cause.([12]) That our present methods are not satisfactory the statistics of most countries clearly show. Garofalo says that the worst class of crime has made great progress throughout([13]) civilised Europe during the past fifty years. In France, in 1891, there were([14]) 95,213 recidivists, and but 508,255 offences in all reported by the police. In 1889, out of a total of 13,075 convictions for serious offences, 11·6 per cent. were of recidivists.([15]) With us, in the last report, it seems that 107,724 men and 48,118 women went to gaol, of whom 48,699 men and 11,999 women had been there before.([16]) On the other hand, a parliamentary paper recently issued([17]) shows that in the Metropolitan district, out of 2,820 prisoners released, and so not sent to prison at all under the provision of the Probation of First Offenders' Act, 1887, the number of reconvictions was only 290. In Lancashire the figures are respectively 3,741 and 372; in the West Riding of Yorkshire 961 and 132; in Staffordshire 658 and 81; and in Durham 579 and 98. From these figures, if only approximately correct, it is a fair inference that other methods rather than prison ones have in our case proved the more satisfactory. The compilers of the French statistics likewise speak of the good effect of *La loi du 26 Mars, 1891, sur le sursis conditionnel, dont l'habile et salutaire clémence rend la menace de l'emprisonment plus efficace bien souvent que son execution*([18]), the result of which has been not only to reduce the number of recidivists but of first offenders, the latter from 126,857 in 1894, to 115,085 in 1897. The *sursis à la relégation* also seems to have worked well, as even in 1890 it is spoken of in M. Herbette's *Code Pénitentiare* as *La mesure si utile de sursis.*([19])

So, too, most humane persons would think who read the life history of prisoners like the following. B—, 55 years, fifty-four convictions of, in all, 168 months' imprisonment, besides the time spent in gaol awaiting trial. Two convictions having been for theft, he was sentenced to transportation. Being very ill when sentenced he was not transported, and died shortly afterwards. Or that of C—, 57 years, a violent prisoner, who soon after the age of sixteen was convicted many times of outrages on the police and similar offences. At twenty-four he began to steal. After this he was

frequently imprisoned for poaching, drunkenness, vagabondage, and assaulting the police. He has been convicted sixty-six times, and undergone fifteen years of prison, and five of transportation.(20) What then but harm can their penal treatment have done these individuals?

May not the true position of the State towards the offender be thus summarised? In dealing with him, not only he, but those dependent upon him as well as the offended person, the public, and those likely to offend in a similar way, have to be kept in view. His treatment should take a form likely to prove, if not beneficial, at least not harmful, to him or his wife and children, beneficial, if possible, to the injured person, and a useful object lesson to other probable offenders. The treatment adopted, at least with reference to him and his congeners' future conduct, should be prophylactic, and not simply therapeutic, and the position be further improved all round by enforced better hygienic surroundings. Its necessary characteristics are that the remedial agency employed be as personal, proportionate, quick, certain, just, and humane as may be. What exact form it takes should be made to depend upon the class of offender to be treated, and the nature of his offence. For example, whether he be a professional offender or not. His age, his temptation, his motive, and general circumstances too will have to be considered. The nature of the offence, that is, whether a crime of violence or deceit, aggravated or simple, or merely venial as a contravention of some municipal law, necessarily goes far to determine the form of the retribution to be demanded of the offender. One great thing to strive after is appropriateness; that is, that the proper class and degree of retributive treatment be dealt out in each case. Fine, imprisonment, work in a penal colony, work in a disciplinary regiment or ship, exile and loss of station, are among the forms of practicable punishment. A crime of violence should be treated more sternly than one of deceit, because the class of offender who does such things is probably of a rougher and harder character, temperament, and type than the mean thief, who is gentle if cunning, timid if resourceful. The professional criminal should be interned, when he has shown himself unmistakeably to be such, for the term of his natural life.(21) No one should ever be sent to prison except as a last resource, and plenty of time must always be given for the payment of fines. Offenders when fined ought always to be fined according to their means of paying. A man, especially if married, will not, as a rule, run away to escape a fine which is not grossly exorbitant. The fines should go mainly to the parties injured and not to the State. It is more fitting that the injured should get reparation than that the fisc should gain by the commission of crime. A fine or a few days' imprisonment is no appropriate manner of dealing with a drunkard, who ought to be made to work in an inebriates' home.

Few realise, and yet it is certainly true, if drunkards were dealt with thus, and time given for the payment of fines, that our criminal population would be decreased by about one third. When all youths fit for the army and navy are compulsorily enlisted, our prison population will be considerably further lessened. Penal colonies can be made more healthy and beneficial in their action than prisons, especially prisons in towns, which should be kept for incurables who are unfit to

work on the land. Let the renegade by all means continue in scarce ness. It is fitting that he should not be comfortable, until he has made reparation. But let his discomfort be such as he is able to bear, and his treatment likewise tolerable and moralising in its character. Let all who know what it is be struck by its reasonableness and unerring precision, which will depreciate the force of crime as a competitor in the labour market. Then, when the miserable who require State aiding are eliminated from the list of offenders, it will be reduced chiefly to those who slip but occasionally from the proper course, and for these a happy issue from the result of their mistaken conduct may be often confidently expected, if they be but appropriately taken in charge by an offended but discriminating Society, in which their rights and privileges are held to be but temporarily suspended. In this way the appropriate measure of punishment will be dealt out to the various classes, who have shown themselves unable to adapt themselves to their environment sufficiently to avoid grossly outraging the moral law.

Such measure is more difficult to ascertain than the measure of damage in civil matters, because more complex, affecting as it does so many difficult interests. It has nothing to do with Mr. Crackanthorpe's Standardisation of Punishment, nor is it like Sir E. Fry's somewhat Mosaic methods, nor again does it group all offenders alike in a moral hospital, suitable perhaps for some, or the perchance too academic groves of an American Elmira. It tries to differentiate and to deal appropriately with each class thus differentiated, so as in this way to arrive at the fitting measure of retributive justice due in each case to the offender, the offended individual, and Society alike. Have we not here more than is purposed to try to effect in most other systems of penal science at present in operation?

(1) *Early Institutions*, p. 380.—(2) *The Criminal*, chap. vi.—(3) *Criminalité et Repression*, ed. 1885.—(4) Whence came directly the *Lex talionis, talis*, similar, though Franck says it was never used by States, *Philosophie du Droit Pénal*, p. 83.—(5) Maine, *Ancient Law*, ed. 12, p. 378.—Franck, *Phil. du Droit Pénal*, ed. 2, p. 156, cf. The Idea of Prescription.—(6) Picot in *Journal des Savants*, 1900, p. 562, cf. *Tarde. Crim. Comp.* p. 146, as to the modern liability of an entire body of armed men for the deed of one of them.—(7) See, too, Franck, op. cit., p. 155.—(8) This principle is recognised in the *Code Pénitentiare*, and by Garofalo., *Crim.* p. 375.—(9) "Joly, Le Crime," reviewed by A. Franck, *Journal des Savants*, 1889, p. 580.—(10) Tarde, *Criminalité Comparée*, ed. 2, p. 133.—(11) Cf. the excuse for castration in the *Code Napoleon*, sect. 325.—(12) Tarde, op. cit., p. 131.—(13) *Criminologie*, p. 230.—(14) *Compte Général de la Justice Crim.*, p. 14.—(15) *Code Pénitentiare* for 1887, p. 58.—(16) *Prison Commissioners' Report*, 1900, p. 71.—(17) *Daily Chronicle*, 14th January, 1901.—(18) Page 14.—(19) *Code Pénit.* for 1899, p. 48.—(20) *Code Pénit.* vol. xiii, pp. 58 and 59.—(21) The object of the French Law of 27th May, 1885, was avowedly "*Expulsion du continent des malfacteurs d'habitude, c'est là le principe de la loi*," *Code Pén.* vol. xiii, p. 59, the idea being "*chaque méfait qui s'ajoute multiplie le coefficient moral de criminalité*," *Code Pén.*, vol. xiii, p. 410.

W. R. WHITEWAY.