

such a heterogeneous mass of diseased mental cases there should be some *muscle sense* ones described. I should not accept cases of suggestion, which all know to be easily manufactured; but the difficulty with regard to this sense is the absence of such subjective feelings referred to muscles. Cases of weight, of pressure, on bones, etc., are plentiful.

My difficulties in this subject are summed up as follows:

- (1) Feelings of weight are not referred specially to muscle.
- (2) Muscles diseased, inflamed, etc., never furnish instances of *muscular sense* proper.
- (3) Muscles rendered tense by electric shock, by irritants on skin, never give but organic feelings of tension or fatigue.
- (4) The absence of the so-called muscular sense feelings among insane hallucinations referred to muscles.

Many of the above points have already been touched on, but I trust that this short notice will lead to exhaustive inquiry.

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*Punishment.* BY C. A. MERCIER, M.B.

THIS is the third or fourth time that I have been the occasion of bringing the subject of Punishment before your notice, and my justification for treating of it again is that I am given to understand you are not yet—all of you—of my opinion. On the first occasion I had but one adherent, but that one, Sir William Gairdner, was in himself a host. On the last occasion a good many voices were raised in my favour, and to-day I hope we shall be unanimous. You will remember that the first time I brought the subject forward, it was in connection with the thesis that every lunatic is not necessarily to be considered exempt from punishment; that most lunatics ought properly to be punished for some of their wrongdoings; and that the practice in every asylum is to punish lunatics upon occasion. To this it was objected that although the fact was admitted that we do pursue towards lunatics the same course of conduct that is called punishment when applied to sane people, yet, when applied to lunatics, it is not punishment, because we dare not call it punishment. This led me

to a disquisition upon the nature of punishment, in which I arrived at the conclusion that punishment is the painful consequence of conduct ; and to this conclusion I still adhere, but subsequent meditation has shown me that although it is the truth, it is not the whole truth, but that there is another aspect of punishment of equal importance. Moreover, I think that the chief reason of the disagreement between my critics and myself was that, while I looked at one side of the shield and maintained that it was black, which it was, they were looking at the other side and maintained that it was white, which it may have been—in parts. In other words, I was looking upon punishment from the point of view of the punishee, which some of you, at any rate Dr. Noott, will consider was the proper point of view for me to take ; while others regarded it from the point of view of the punisher.

Now, whatever differences may hereafter disclose themselves between you and me, we shall probably be at one up to this point. We shall admit that to the punishee punishment has a very different appearance from that which it has to the punisher.

From the point of view of the punishee I maintain that my original thesis was correct. Whatever pain is brought upon a man by his own conduct, of whatever description, in whatever department of activity, is, for him, punishment, and in this sense the punishment is a warning that, if he persists in that course of conduct, he will perish. If I strike my fist against a brick wall I suffer pain, and the pain is my punishment for acting in a way that is inappropriate to the circumstances, and is a warning that, if I continue that course of conduct, I shall perish. If I go on knocking my fist against the wall I shall get first inflammation and then gangrene in my hand, and of this I shall die, unless I alter my conduct. So if I get my feet wet and sit in my wet boots, I get a cold, and the inconvenience and discomfort of the cold is my punishment for pursuing that course of conduct, and is a warning that, if I persist in it, I shall perish. I shall get cold upon cold, and finally, inflammation of the lungs ; and of this I shall die if I don't alter my conduct. So if I assault or rob my neighbour I shall be sent to prison, and there, if I continue this course of conduct, I shall be flogged and otherwise punished until I die ; and whether I die from gangrene of the hand, or from inflamma-

tion of the lungs, or from suspension by the neck, or from the hardships of prison life, the end is the same ; and from the point of view of the punishee, punishment is a warning that he must change his course of conduct or perish.

It has been maintained from the time of Beccaria and of Bentham that punishment is effectual, that is to say, deterrent, in proportion as it is certain and as it is prompt ; but this is not the true statement of the deterrent element in punishment. The true statement is that punishment is deterrent in proportion to its known inevitableness, or, to put it otherwise, in proportion to the cohesion or closeness of association, in the mind of the punishee, between the conduct and the pain which is its consequence. It is possible for punishment to be both prompt and certain, and yet to have no deterrent effect whatever. It is possible for punishment to be neither prompt nor certain, nay, to be non-existent, and yet to be very efficiently deterrent. A man goes to the Campagna at Rome, or to the West Coast of Africa, and allows himself to be bitten by mosquitoes, and in a few hours he is prostrated by malarial fever. The punishment follows promptly, and it follows with inevitable certainty ; but, in spite of this, it has no deterrent effect, because there is no perceptible link, no connexion in the mind, between the conduct and its result. On the other hand, we see daily that if a man, especially a woman, is firmly convinced that conduct will have a painful result, that conviction will be sufficient to deter from that course of conduct, even though in fact no ill-consequence has ever followed upon such conduct. How many people are there who would not rather submit to certain inconvenience than sit down thirteen to dinner, or walk under a ladder, or wear an opal, or begin a journey on Friday, or keep peacocks' feathers in the house. No ill-consequence has, in experience, consistently followed any of these practices, and it is not the punishment that they incur which deters from them ; it is the firm conviction, the cohesion in the mind between the conduct and its painful effect, that is the efficient deterrent. So far as the promptitude and certainty of punishment are deterrent—and I am far from denying that they do deter—they deter only indirectly by establishing in the mind of the punishee a firm connection between the conduct and the punishment that it entails.

Now let us change the point of view, and regard punishment, not as it impresses the punishee, but as it is regarded by the punisher. My contention is that from the point of view of the punisher, punishment is primarily and essentially retaliatory. It is self-protective. It is a fundamental duty which every individual owes to himself, a duty the neglect of which is fatal. Punishment from this point of view is retaliation upon aggression, and if we allow aggression to pass without retaliation we must perish in the end. It is contended by Lord Justice Fry that the fitness of punishment in sequence to transgression is a fundamental fact of human nature, a moral element incapable of further analysis; but I think that it is possible to reduce it to simpler terms. "Why," says Lord Justice Fry, "do we strive to associate pain with sin? The judge who pronounces sentence on the criminal tries to do this. The parent who punishes his child for a lie strives to do this. In our whole talk about the inequality or the fitness of punishments, we assume some relation between the two things. Why do men complain of the sufferings of the good and of the prosperity of the wicked—why do they esteem it one of the hardest riddles of the universe—but that they assume that, in a right state of things, pain ought to go with sin and happiness with righteousness? Why, but for this, should not hell appear the proper home of the righteous and heaven of the wicked? Is not this the foundation of Job's loud wail, and of the echo which it has found through long centuries of men? Here we seem to be near a fundamental fact of human nature, a moral element incapable of further analysis (so far at least as my chemistry goes)—the fact that there is a fitness of suffering to sin, that the two things, injustice and pain, which are both contrary to our nature, ought to go together, and that in consequence we naturally desire to bring about an association of the two where it does not already exist.

"Whence do we derive this principle? Not from the outer world; for, as we have seen, the world responds to it only imperfectly, and by reason of its very imperfection drives us to efforts to realise by punishment that association which otherwise would not exist in fact. Punishment, in short, is an effort of man to find a more exact relation between sin and suffering than the world affords us."

The whole gist of this argument rests upon the meaning

that we attach to the words sin, injustice, transgression, wrong, and wickedness, which are used in the course of it. Taking them to be, as used here, convertible terms, then I elucidate them in this way. The verb to sin is essentially not an intransitive verb as it appears to be, but a transitive verb. There can be no sin without a person sinned against. We may sin against other men or we may sin against God, but in any case there must be another party to the transaction ; there must be an object sinned against ; and whatever the nature or precise character of the sin, it must be of necessity injurious. An act done with the object and intention of benefiting or complimenting another may be injudicious, may have various questionable qualities, but it cannot under any circumstances be a sin against that other. It is neither a sin, nor a wrong, nor a fault, nor a transgression against him, nor is it punishable by him. The only acts which are wrong or which are punishable are those which are injurious.

Now, it is a fundamental necessity for every organism that it must protect itself against injury or it must perish. Self preservation has been called the first law of nature, and although this statement is in my opinion erroneous, yet it may fairly be called the second obligation which lies upon every organism. Every organism must protect itself, on pain of death if it neglects the obligation. When we are threatened with injury, we are bound and obliged to take measures to prevent what is threatened. When we are actually in process of being injured we are bound and obliged to repel the injury, and more than this, we must, if we are to be safe, put the assailant into such a position that he cannot repeat his attack. If a man is after me with a revolver, it is not enough for me to dodge the bullets ; I shall not be safe until I have deprived him of his weapon. So that it is clear that if retaliation upon injury is to be efficient, is to be preventive, some part of it must be subsequent in time to the actual injury. And then retaliation becomes punishment. From the point of view of the punisher, therefore, punishment is preventive retaliation. It is manifest that efficiency of retaliation upon injury has been, throughout the secular struggle for existence, a very powerful factor in securing the survival of the retaliator ; and as all beneficial action will, if continued long enough, become fixed and embodied in an instinct, so has retaliatory action

been thus embodied, and thus has been originated and preserved the habit of the pursuit of punishment, or what is called vengeance, that is to say, of pursuing retaliation after the cessation of the injury.

But man is a social animal. As a member of a community he witnesses attack and retaliation made by others, *inter se*, within the bounds of his particular grex. As a spectator, an indifferent spectator, of attack and retaliation carried on between other people, he very soon learns to apportion the gravity or severity of the one to that of the other, and I venture to differ from Lord Justice Fry's supposition, that this apportionment of equality between the two is inexplicable and is a fundamental fact of human nature. A retaliation which is greatly in excess of the primary object of retaliation, viz. : self-defence, loses its retaliatory character and becomes an original aggression, justifying a counter-retaliation. Now, it needs much less keenness of the self-preservative instinct than most primitive men possess, to recognise that an internecine warfare within the limits of the community lays the community open to defeat from without ; and to guard against so obvious a disadvantage in the struggle between communities, an instinct very early becomes developed, which leads him to abhor such excess of retaliation and to strive to prevent it. To this instinct or sentiment or emotion is given the name of justice ; and the sense of justice may thus be shown to have a basis as strictly utilitarian as the instinct of self-preservation to which it is contributory. I do not say that it is the whole and sole foundation of the sentiment, but it is certainly the lowest and broadest stratum of its foundation. Gradually experience teaches that no man can be trusted to keep within the bounds of proper and justifiable retaliation ; that no man can be an impartial judge in his own cause ; and hence, to put a stop to the constant public danger of private vendetta, the right of retaliation is by slow degrees taken out of the hands of the individual and vested in a central authority representing the whole community.

It is often assumed that the establishment of courts of justice and the suppression of direct retaliation by the injured party is owing to and is a recognition of the fact that by a crime not only is the individual injured, but that the community also is injured, and with this I should agree ; but the nature of the injury

suffered by the community is variously stated to be either a kind of *lèse majesté*, or a general sense of insecurity that is diffused by the crime. I do not think that either of these is the primitive view. They seem to be too elaborate and refined to enter into the consideration of primitive people. They bear the stamp of an *ex post facto* explanation invented to fit the facts rather than growing naturally out of them. It seems obvious that long before the power of abstract thinking had so far developed as to allow of a community being conceived as a body corporate, susceptible of being injured by theft or violence committed by one of its members upon another, the primitive man could achieve the conception "while we are fighting among ourselves, we shall fall an easy prey to the Philistines, the Amalekites, the Perizzites, the Hivites, or the Hittites." This, it seems to me, is the origin of punishment inflicted by the State. It is a purely retaliatory act, undertaken by the community because it was found unsafe in practice to leave it in the hands of private individuals.

In any case, whether this be so or not, the origin of punishment is in the prolongation and completion of an act of self-defence. The effort of an injured person is to repel the injury then being inflicted, and where the injury may be renewed the moment retaliation ceases, it is evident that the retaliation must be pushed and must be prolonged. It then becomes punishment in the ordinary sense of the word. As soon as intelligence and foresight become sufficiently developed in the injured party, the object of retaliation becomes not merely the repulsion of an existing attack, but the prevention of similar attacks in future. Almost as soon as it comes into existence arises the intention to make it not merely defensive but deterrent; and in this latter day the immediate defence is swallowed up and lost sight of in the future prevention, and punishment is now regarded as deterrent only.

Thus I think that that indestructible association in our minds between pain and sin which Sir Edward Fry speaks of, can be accounted for by the principle of natural selection. It is the necessary association between attack and defence; it arises from the fundamental necessity for self-conservation. And our explanation goes further, and shows why, in the words of Sir Edward Fry, "the principle is true not only absolutely, but *secundum majus et minus*, and that we feel that great

suffering is fitting to great sin, and small suffering to small sin." For if the attack is violent, the defence, to be effectual, must also be violent ; while, if the punishment is severe out of proportion to the offence, then it will provoke a counter attack, with the danger to the community which a vendetta involves. It is a remarkable fact that this balance of proportion between the magnitude of the offence and the severity of the punishment is as clearly recognised by dogs as by men. If a dog has stolen, or destroyed, or violated any other canon of canine ethics, he will submit without a murmur to the consequent thrashing, so long as the punishment is, in his view, proportionate to the offence. But if it becomes, in his view, excessive, his outcries and expostulations leave no doubt in the mind of the observer as to the keen sense of justice that he possesses.

The deterrent effect of punishment is looked upon by Sir Edward Fry as a secondary object or motive for its infliction, but, in my view, it is not secondary but primary. The object of instant retaliation is to neutralise an actual attack then in being, and the object of the prolonged or delayed retaliation that we call punishment is to prevent future attacks. Now, to be efficient in deterring, punishment must have those qualities which are efficient in binding together in the mind of the punishee that sequence of pain upon transgression, of which Sir Edward Fry speaks. Of these qualities the promptitude and certainty with which the punishment follows the offence are two, and are very important, but, as we have already seen, they are not the only ones. What is more important is that the punishment should seem to be a natural and inevitable consequence of the conduct which brings it about. No punishments are so deterrent as those which are inflicted by inanimate things. If I hit my fist against a tree I am punished by a pain, which is not only instant and certain, which is not only proportioned to the violence which I have used, but which is inseparably bound up in my mind with the act on which it ensues. These, then, are the characters that we should seek to give to the punishments that we inflict. They should, first of all, be prompt. They should follow as speedily as possible upon the crime. Second, they should be certain ; there should be in their incidence a fateful inevitableness against which no defence or evasion should prevail. Third, they should be severe in proportion to the gravity of the offence. All this is

generally admitted, but this is not all. Punishment, to be thoroughly effectual, ought to have another quality which is not usually given to it. It ought, as far as possible, to appear to be the natural and inevitable result of the conduct to which it is applied. It should bear upon it the stamp, not of caprice, not of accident, not of haphazard, not of human invention, but of inexorable fate. It should seem to follow on the offence, from no vindictive feeling in the mind of man, but from the undeviating action of natural laws.

This has been put very clearly by Herbert Spencer in the case of the punishment of children. The passage is too long to quote, but I may paraphrase it thus. A child leaves its toys scattered about the floor, or a little girl making doll's clothes disfigures the room with shreds, or a handful of flowers is left dispersed over tables and chairs. For such misdoings the usual punishment is a scolding from the nurse while she is picking up the things. The proper punishment is to make the child itself clear up the mess that it has made. The labour of putting things in order is the true consequence of having put them in disorder. Every trader in his office, every wife in her household, has daily experience of this fact. A little girl is never ready in time for her walk; the governess and the other children have invariably to wait, and from the mother there comes invariably the same scolding. In the world, unreadiness entails the loss of some advantage that would else have been gained; the train is gone; or the steamboat is just leaving its moorings; or the best things in the market are sold; or all the good seats in the concert room are filled. The inference is obvious: if the child is not ready at the appointed time she should be left behind and lose her walk. Take the case of a boy who is habitually reckless of his clothes—scrambles through hedges without caution, or is utterly regardless of mud. If he is beaten or sent to bed he is apt to consider himself ill-used; but suppose he is required to rectify as far as possible the harm that he has done—to clean off the mud with which he has covered himself, or to mend the tear as well as he can. Will he not feel that the evil is one of his own producing? Will he not, while paying this penalty, be continuously conscious of the connection between it and its cause? Will he not, in spite of his irritation, recognise more or less clearly the justice of the arrangement? If several

lessons of this kind fail to produce amendment, and if there occur occasions on which, having no decent clothes to go in, the boy is debarred from joining the rest of the family on holiday excursions, it is manifest that while he will feel keenly the punishment, he can scarcely fail to trace the chain of causation and to feel that his own carelessness is the origin of it all.

Compare this system with the system by which our criminals are punished. Whatever the nature of the crime, the punishment is the same ; and whatever the nature of the crime, the punishment is ingeniously devised so as to have no natural connection with it whatever. The man who habitually beats his wife, the man who strikes her in a fit of passion, the shop boy who takes money from his master's till, the vagrant who sleeps under a haystack, the jealous lover who shoots his mistress, the fraudulent trustee who converts trust funds to his own use, the solicitor who contumaciously clings to a document, the wife who poisons her husband, the cabby who gets drunk in his day's work, are all punished in precisely the same way, by precisely the same means, to precisely the same extent, save only in the duration of the punishment. Could anything be more unintelligent? It is the treatment of Dr. Sangrado applied to crime. And not the least of its defects is that it deprives the judge of the exercise of his ingenuity in devising a punishment that would fit the crime. Why should not the thief be compelled to make restitution? Why should not the wife-beater be flogged? Why should not the homicide be compelled to work in slavery to support the family of his victim?

But it will be objected, what has this to do with insanity, and with the punishment of insane people? It has this to do with them—that so long as the mind of the lunatic is clear enough to be capable of forming a true and intimate connection between the wrong doing and the punishment which follows it, so long we are justified in inflicting upon him some punishment. I do not say, and I have never said—I have always protested against the position—that lunatics should be treated in the same way and punished with the same severity as sane people ; but I still maintain, as I have always maintained, that of the conduct of most lunatics part is sane and part is insane ; and that while they may not properly be

punished for the insane part of their conduct, they may properly be punished, though with mitigated severity, for wrong doing which belongs to the sane part of their conduct.

#### DISCUSSION

At the General Meeting of the Medico-Psychological Association, 23rd May, 1901.

The PRESIDENT.—Dr. Mercier has explained to us, in that very lucid manner which you all know is characteristic of him, his attitude on this subject. We have here to-day several distinguished members of other professions who are specially interested in the subject of punishment. We, as medical men, welcome them, and I have much pleasure in inviting them to take part in the discussion.

Mr. MONTAGUE CRACKANTHORPE, K.C.—When I came into this room I had not the slightest notion what part of the subject named on the card Dr. Mercier intended to deal with, and I confess that to be called upon suddenly to make some observations on his very able and very interesting paper is, even to a veteran lawyer like myself, a little disconcerting. Dr. Mercier, whose argument was not the less cogent because it was concise, began by maintaining that punishment was, in its origin, retaliatory or vindictive, and that it remained so still. I agree with him on the first point; I venture to differ from him on the second. There are many conceptions and institutions now in vogue which are very different from what they were in their origin. Of such, punishment is, in my opinion, one. Dr. Mercier has quoted my friend Sir Edward Fry as an authority for the dictum that criminal punishment is "suffering following upon sin." With the greatest respect both to Sir Edward and Dr. Mercier, I regard this dictum as of no value from the juridical point of view; and even from a moral standpoint I doubt its propriety, for are we not told in the Scripture, "Vengeance is mine, I will repay, saith the Lord"? In this metropolis there is a great deal of unpunished and unpunishable sin. If the law were to deal with sin, as such, the criminal courts would be always open, and as for the unfortunate judges, they would never get a holiday. They have enough to do in dealing with those offences against society which are defined as criminal, and to mix up sin and crime is, to my mind, to obscure the issue.

The next observation I should wish to make is as to the object and end of punishment. I hold that its main object is a double one: (1) to deter others from doing likewise, (2) to restrain the original offender from repeating his offence while his sentence lasts. Its secondary object, which Dr. Mercier did not, I think, mention, is, in my view, to endeavour to reform the criminal. This I regard as a State duty. If the State shuts up a man in gaol for a number of months or years, it should take care not to turn him loose at the end of that time a worse or more helpless man than he was before he was convicted. Many in this room will probably agree that the effect of a long incarceration is to destroy rather than to strengthen the power of will and self-control, because the conditions of prison life are wholly artificial and differ from those of the outside world. Hence it is well to allow a man a certain amount of liberty at the end of his sentence that he may know how to order his own life and be able to grapple with the difficulties he will have to encounter when he becomes a free man. Our present prison system for adults, in which there is no halfway-house resembling that of our juvenile reformatories, leaves much to be desired in this respect.

With regard to the measure of punishment, it would be a great mistake (to use a hackneyed phrase) to try to "fit the punishment to the crime" without reference to the individual offender. This is what we formerly did in England and what the Code Napoléon would be doing at the present day in France but for the introduction of "extenuating circumstances" which it is competent for the jury to find. Prisoners guilty of the same crime may be of very different kinds and may require very different treatment. All of them may be roughly classed under four heads:—(1) There are those who, in the opinion of experts like yourselves, are totally incapable of distinguishing right from wrong, and who are properly detained "until the pleasure of the Crown shall be made known." These are the insane. (2) There are those who have committed a single crime from passion—*un crime passionnel*,

as the French say—which they are never likely to repeat, but for which they must be punished by way of warning and example; (3) There are the habitual offenders, the men who steal again and again, or who give way again and again to drink which leads them into other criminal courses, and whose brain is below par, either from hereditary causes or by reason of their own acts of self-indulgence. For these a prison-asylum would be a more fitting place than a gaol as at present conducted. (4) There is the professional criminal, the man who has several times been previously convicted, and who deliberately pursues the career of preying upon society for his own private ends. This class of person should (and here I agree with Dr. Anderson's recent article) be sequestered for a considerable period, if not for life, but he, too, should, after a time, be allowed a certain amount of freedom. The element of hope should never be wholly shut out, but he should only be liberated, if at all, when the prison authorities have become satisfied that this may be done with reasonable safety to the community. In this respect he should be placed on the same footing as the inmate of a lunatic asylum who, after long confinement, is discharged as of sound mind. The "indeterminate sentence" resorted to in some of the states of America has not been without good results.

One other point with regard to the measure of punishment occurs to me. Some persons hold that an educated man who betrays a trust should be punished with a much longer sentence than a common thief who has frequently been convicted of larceny. This at first sight seems reasonable, but I am not sure that it may not sometimes work injustice. The educated man, who has lost the whole of his worldly prospects by reason of his misconduct, has been already punished severely, and it may be unfair to put him on the same level as the professional pickpocket, burglar, or blackmailer who has lost practically nothing, and to whom, in some cases, a prison affords as many material comforts as did the surroundings from which he has been forcibly removed. This matter has not, so far as I am aware, been considered by our judges in conclave. Would it not be well that they should come to some agreement about it, with the view of making their sentences more uniform?

Before sitting down let me again refer for a moment to the test of criminal responsibility known as the rule in MacNaughten's case. It was there laid down, in effect, that the crucial question for the jury is, Did the accused, at the time he committed the act charged, know that he was offending against morals? This test has been conclusively shown by Sir Fitzjames Stephen to be unsatisfactory. And so it is. Whether a jealous husband shoots down his wife's lover in order to vindicate his own honour, as sometimes happens in France, or a burglar stabs a policeman in order to prevent being arrested, as sometimes happens in England, each is, at the time of the act, incapable of distinguishing right from wrong. In the first case, the thirst for revenge; in the second, the desire for liberty, completely deadens all moral sense. If the test of momentary responsibility was applied without discrimination, a large percentage of sane persons must either be acquitted of crime or sent to Broadmoor. Here then, too, there is room for improvement of the law, and it would be for the benefit of the community if the rule in MacNaughten's case were authoritatively re-stated in clearer and more precise terms.

Dr. SAVAGE.—Mr. Chairman and Gentlemen, I think there is a misunderstanding in something said by the last speaker. I certainly did not understand Dr. Mercier to say that the essence of punishment is retribution or revenge, but rather that in the evolution of legal punishment this was the starting-point, the original idea, but that now this had been subordinated to the deterring influences of education. Similar evolutions have taken place both in Medicine and Law. I remember nearly forty years ago, when our best medical teachers were beginning to impress upon us the fact that it was not the function of Medicine to treat disease, but that we had to treat the diseased person. That we had not fever to treat, but a fevered man, and so I recognise the importance of what the last speaker said when he spoke of the real question of treating not crime by repression, but the criminal by training and reforming where possible. It would certainly be very satisfactory if one could make the criminal in some way restore to the injured what had been lost or destroyed, but the old Mosaic idea of an eye for an eye, a tooth for a tooth, is no longer to be considered as practical. I have nothing to say in relationship to the question of sin—that does not at present

concern us, either as lawyers or doctors; but from my personal experience I may be expected to speak of the connection between insanity and punishment. I have no doubt that the mere bringing the two terms together will offend many, for the insane are taken to be irresponsible, and therefore beyond the question of punishment. It is all very well to say that the insane are all to be treated as irresponsible; I should not go this length without a clear definition of insanity; for I feel that there are many persons who are of unsound mind, and yet who are not to be treated as legally insane. One of my chief difficulties in practice is to distinguish clearly those who, being of unsound mind, are legally insane. I have to decide which are so far alien as to require removal from social life, and such as, though of unsound mind, may be guided, directed, influenced, and, perhaps, Dr. Mercier would say, punished for their own good and for the benefit of society. I have developed in my ideas, and I feel more in harmony with many of my legal friends now than I formerly did. I recognise the justness of the French "mitigated responsibility," and if we admit the limited responsibility we must allow limited power of receiving correction. The much-abused British jury, after all in most cases, judges fairly enough as to the limited responsibility. I have often thought verdicts wrong, but this does not prevent me from seeing that as Society is constituted the jury system works fairly well. To sum up I cannot admit any necessary exclusion of all persons suffering from some degree of mental unsoundness from all the legal consequences of their acts.

SIR HERBERT STEPHEN.—I am glad to find myself in agreement with a good deal of what Dr. Mercier said in his paper. I agree with what I take to be his practical conclusion, namely, that some lunatics ought to be, and probably must be, punished when they do wrong, by those who have the control of them. I also agree that, historically speaking, the infliction of punishment by human beings upon each other was probably founded upon what has been called retaliation, but may perhaps as well be called revenge as anything else. That is to say, the principal sentiment in the minds of the persons who first inflicted punishment probably was, "You have hurt me, and I am going to hurt you." So far I agree, but I go much further. I think that this sentiment of revenge, or retaliation, is still, and will continue to be, the principal ground upon which punishment is based. I differ from those who hold that the idea of revenge in this connection is an archaic barbarism, that it has passed away from the minds of benevolent legislators and administrators of law, and that all that has to be considered in the proper infliction of punishment is, (1) an endeavour to reform or improve the character of the offender, and (2) what has been called its "deterrent" effect upon other persons likely to offend in the same manner. Let us test this opinion by reference to an actual case, and consider how it would work if judges were actually to take into their consideration nothing but the improvement of the guilty person's conduct, and the desirability of preventing other people from behaving in the same way. Consider such a case as that of Jabez Balfour, which I specify only because its general features are probably within the recollection of every one present. Jabez Balfour was convicted of a number of frauds by committing which he deprived a great many people, some of them very poor, of all they had. For these crimes he was sentenced to a long term of penal servitude. What would have been the position of the judge who had to pass sentence upon him if he had not been allowed to give effect to any feelings except the wish to improve Balfour's character, and the wish to deter him and others from committing similar offences in future? He would probably have addressed him somewhat in this fashion:—You have been found guilty of extremely grave crimes, and in the ordinary sense of the words you may be considered to deserve severe punishment. But that is in itself no reason for sending you to penal servitude. I am not here to gratify any feelings of animosity, or to make you suffer because others have suffered through you. I have to consider, first, what course of treatment will have the most effect in reforming your character, and making you a useful citizen; and secondly, how I may best prevent you, and similarly evil-minded persons, from perpetrating similar frauds in future. First as to your character. It is manifest that at your age, and after the life you have lived, no punishment that I could inflict would have any effect upon that. It is impossible to suppose that, going into prison as bad a man as you are, you would come out any better. From that point of view, therefore, no punishment would

be of any use. Next as to "detering" you from doing the same things again. In your particular case, sending you to prison would have no such effect. You are not like the professional housebreaker, whose habits are so deeply ingrained that the only way to protect the public from his depredations is to lock him up. He will break into people's houses whenever he is at large, and it may be sometimes necessary to imprison him for a long period on his conviction of an offence trivial in itself. You, on the other hand, are rendered harmless by the mere fact of your conviction and disgrace. All your offences were founded upon the misplaced confidence of rash people, in your supposed intelligence and probity. Your name and character are now universally known, and nobody would be foolish enough to subscribe a shilling to a company of which you were known to be a promoter, nor would any sane person associate himself with you in any such enterprise. The only remaining reason that there could be for subjecting you to punishment would be that other wicked people might be afraid of following your example. The experience of mankind teaches that the fact that disgrace such as yours may culminate in imprisonment, probably has no such "deterrent" effect. Persons who steal on the enormous scale that you do are essentially gamblers. They always hope that things will go well, and that they will realise huge fortunes, and be able to meet all their obligations. They know from the beginning that if they fail they will be utterly ruined and lose all their property, their seats in Parliament, their social consideration, and so forth. That is the penalty which they dread and seek to avoid, and if that risk does not "deter" them from embarking on a course of crime, they will certainly not be "deterred" by the added risk of being sent to prison when they have failed and their offences are discovered. I should therefore serve no useful or humane purpose by sending you to prison, and my order is that you must be bound over in your own recognisance to come up for judgment when called upon.—Can any one suggest that such behaviour on the part of the judge would have been anything but a flagrant and inconceivable dereliction of duty? Take again what has been described as the *crime passionnel*—the case of a man who finds himself betrayed or disappointed in the master passion of his life, who watches for his successful rival, and kills him deliberately and with forethought. Such cases are not very common, but they occur now and then, and if you are not angry with such a man for committing murder, why in the world do you want to punish him? It is futile to suggest that his character is likely to be effectively reformed by punishment. The probability is that he was a perfectly respectable and well-conducted person before the crime, but he was one of the few people who, once or twice at most in a lifetime, become so entirely engrossed in a personal affection, that for the moment no other considerations have any effect upon their minds in comparison, and that will continue to be his nature however much, or however little, you punish him. And as for deterring others, when a crime of this kind is committed the offender is, *ex hypothesi*, perfectly willing to take his chance of any kind of punishment in order to gratify the passion which wholly engrosses him.

In reference to the general question of the reformatory effects of punishment upon the characters of adults, I was once making inquiries of a well-known prison official, who was at that time deputy governor of a prison with an average population of about one thousand convicted persons, and I asked him what proportion of that number were, in his opinion, persons with regard to whom there was any hope whatever of improving their characters or doing them any good. He answered, after consideration, "Perhaps four." I do not of course suggest that anything like this is true of what are called "juvenile offenders," but my own belief is that, among criminals twenty years of age and upwards, the hope of making any considerable number of them honest and respectable is chimerical.

In one point I must express total disagreement with Dr. Mercier, and that is in his wish for the introduction of what I may call fancy punishments, of the kind suggested by Bentham. Penal establishments can be conducted only by rule, on lines ascertained beforehand, and life is not long enough for the invention and execution of penalties supposed in each case to have some specific appropriateness to the circumstances of the offence.

It gave me great pleasure to gather from one or two speakers confirmation of an opinion I have lately formed—that we have got pretty well to the end of the

old quarrel between you doctors and us lawyers as to the effects of insanity upon legal criminal responsibility. I cannot see that there ought to be any quarrel at all. Whether a man is mad is a medical question, upon which we want your advice. Whether he is legally responsible is a legal question, upon which you are interested only in so far as you may be lawyers. The law is, and I believe you will agree that it ought to be, that some men are mad in such a manner as not to be legally responsible, and others are legally responsible although they are mad. The tests actually accepted for distinguishing, in criminal cases, between these two classes are, in my opinion, susceptible of some slight improvement, but the more I see of them the more I am inclined to think that they supply a good working rule, which juries can and do apply with results that are satisfactory in the main. I have noticed of late years that medical witnesses on the Northern Circuit, especially at Liverpool and Manchester, seem to understand perfectly what is and what is not required of them, and to give their willing assistance in the application of the established legal principles to the facts of particular cases.

In conclusion, I wish to reiterate my opinion that the true and ultimate basis of all human punishment is retribution, or retaliation, or revenge, or whatever you like to call it, and that it will continue practically to be so whatever any of us may be able to persuade ourselves, or each other, to the contrary.

REV. R. D. SWALLOW.—The subject under discussion is one in which I take a good deal of interest, but I have no right to intrude upon you this afternoon. I have no acquaintance with criminal law or with mental diseases, but at the same time there are two or three points on which I may venture to ask for information, and shall be very grateful if some of my medical hearers in particular will satisfy me upon them. I think everyone who knows anything about the training of the young is conscious that at the present time there is a growing reluctance to submit them to punishment at all. I frequently as headmaster of a school, where I have been for some twenty-five years, find parents coming to me asking me to abstain from punishing the children. Children over and over again are neglected in their homes in respect of punishment, and parents are constantly desiring the same sort of neglect on the part of the schoolmaster. Of course, we have outlived what I must call "the good old days" of Mr. Wackford Squeers. I feel perfectly convinced from experience that in almost every schoolboy there is a strain of the "offending Adam," which ought to be whipped out of him, and I shall make earnest appeal to the doctors to support the schoolmasters in this respect, and not to comply with the wishes of parents, who like to be told that their children are unable to bear punishment. I say the mother is chiefly to blame, but ultimately the fault must come back on the father, because I will mention what bears more or less upon the subject, and that is that in my boyhood it used to be the custom for the father to interview the headmaster, and for the father to deal with the boy at school, but it is the mother who does nearly everything now, and this really has a very serious effect upon the discipline of school life. Now we are hearing a great deal of Hooligans among the working-class population, and I regard with very great apprehension the growing Hooliganism in the middle classes. Up to this time I am glad to say that boys of the higher middle class are more or less free from a taint which developed into the "Mohawks" of the eighteenth century, for the English boy who is well born and bred does submit to punishment, but in the lower middle classes, especially in those large classes of boys who are being drafted in greater numbers every year from our Board Schools, punishment is a very difficult thing. Boys of that class, as a rule, cannot submit to punishment as boys of a higher class do, and it is perfectly impossible to imagine that all punishment in schools should be made as absolutely suitable for the character of the offence as Mr. Herbert Spencer would have us believe.

The opener of this discussion quoted Mr. Spencer as suggesting that to leave children out of the "family walk" would be a suitable punishment for such as were not ready for it at the hour fixed. I have known children who would have been guilty of the unpunctuality for the sake of earning the punishment. In my own well-disciplined society the outlawry of an unpunctual boy from first lesson would hardly tend to promote punctuality.

The difficulty of the position which I have indicated is accentuated by the

neurotic tendency of the rising generation. The schoolmaster may well appeal to the doctor to assist him in the disciplinary side of his work by strenuous effort to control this disposition, which is surely mischievous for the moral as well as for the physical fibre of the race.

Dr. NICOLSON said that when Dr. Mercier took up a subject he dealt with it in explicit terms, and never failed to call a spade a spade; but he objected most strongly to the word sin being introduced into the discussion, because in his opinion sin and sinning were subjects entirely outside the range of work which the members of the Association as practical psychologists had to deal with. There was no saying where the metaphysics of punishment might lead them in their discussion, but coming to the matter-of-fact modes of punishing crime, misdemeanour, misconduct, or offence, or whatever (except sin) we chose to call it, he (Dr. Nicolson) thought that, taken on the broadest grounds, the question of punishment had to be considered from three general standpoints. The first was the legislative and judicial, where the judge had to award sentence or punishment upon lines laid down by the laws of the country: as in sentencing to death a person convicted of murder, or to penal servitude or imprisonment a person convicted of a less heinous offence. The second was the official standpoint, where, for instance, governors or superintendents of prisons, asylums, reformatories, and the like, colonels of regiments, schoolmasters, and heads of departments, firms, or families had to inflict punishment. Here a sense of duty in seeking to carry out successfully a responsible trust was the gauge or guide by which punishment was measured, and notions of mere vengeance were not to be entertained. This sense of duty was no doubt varied in its outward expression by the individuality of the punisher. The third standpoint was the personal one, and here sentiment on the one hand and retaliation on the other were the feelings which struggled for the mastery in the mind of the individual when meting out the punishment. A point that has to be considered is the variety of ways in which the same punishment affects different individuals. *Quot homines tot sententia.* I have seen a convict take three dozen lashes without turning a hair or making a sound above his ordinary breath, and another writhing all through the flogging amidst his penitential howls. It is many years since I witnessed a flogging, but much as I personally disliked seeing it, my opinion is that in prison it is necessary to retain flogging as a punishment in extreme cases, and after careful and well-considered examination into the circumstances of the case. For us, as asylum medical officers, the official standpoint is the one of chief interest, and when an inmate of an asylum has to be corrected, or, if you like it, punished, as children have to be corrected or punished, we must never forget that the feelings of the inmate, however much or however little his insanity is now actively at work, have in the first instance been outraged by his having been compulsorily taken from home and shut up and deprived of his civil and domestic rights and privileges. I think that this point is one that is apt to be overlooked. Again, we ourselves, as we get older—at least, that is my experience—are influenced by considerations which in our younger days of sterner notions on the punishment question were less apt to sway us. By all means let order be maintained on firm principles and by disciplinary means, but my somewhat lengthy experience has taught me to derive greater satisfaction from the success of punishment by kindness, if I may use the phrase, with its genuine spontaneousness, than at the not always lasting success that attends punishment on rigorous principles. We are all conscious that we ourselves from time to time offend others by saying something for which we are sorry, or by doing something which on reflection we regret; and it is well for us to try not to forget this when we are searching in our mind for the appropriate punishment for those who similarly offend or who break rules.

Dr. DONKIN.—I think that an equivocal use of the word "punishment" has been a source of much confusion in this debate. Those who hold that the spirit of the "lex talionis" still largely informs the principle of legal punishment cannot reasonably extend this theory to the punishment in any form of those not wholly sane. But punishment according to another definition, with the sole object of restraint and improvement, in the form of deprivation of comforts or privileges, etc., is practically admitted as necessary and beneficial in some cases of this kind. On the other hand, those who contend that retaliation has no part in the State notion of punishment, the objects of which are only deterrence and reform, cry out against the punishment in any form of persons of imperfect control, thus using

the word "punishment" in a sense different from that of their own definition of it. The matter is thus largely a war of words. I agree so far with Sir Herbert Stephen that, rightly or wrongly, we have not rid ourselves of the *retaliatory* or "serve-him-right" notion as an element of State punishment of offenders, and would further say that without this notion, consciously or unconsciously held, public opinion would scarcely justify even the comparatively mild forms of modern penal methods.

Dr. JAMES SCOTT.—A good deal has been said as to the object of punishment. I do not think this can be stated in one word, for it is complex. I consider, however, the chief aim is deterrence. Dr. Mercier has been sweeping in his denunciation of our system of punishing criminal offenders. He spoke as if the deprivation of liberty is scarcely a punishment at all. From my experience I think there are comparatively few prisoners who do not consider this a very great punishment. It would be difficult to argue in the Law Courts that insane offenders should be punished to some extent. At present the state of matters is practically this—when a person is a certifiable lunatic he is exempted from penal treatment. If one can only say that the prisoner is of weak mind, he or she is liable to be sent to prison, but the degree of their responsibility is taken into consideration.

Dr. J. BENSON COOKE said this was a subject of peculiar interest to all who, like himself, were engaged in medical work among prisoners. None of the previous speakers had referred to public opinion as the strongest influence at work in moulding and shaping the decisions of magistrates and judges in awarding sentence and in determining the character of prison discipline. The trend of public opinion was all in the direction of excessive leniency. The prison population was a dwindling one, and if the conclusions of some optimistic student of morals were correct we must rapidly be approaching the Millenium. This might seem absurd (a voice—"It is!"), and some among them would be of opinion that there was another side to the picture. But if these conclusions were correct, the subject for discussion that afternoon would be one of academical rather than practical interest. He referred to the animated discussion on the habitual criminal that has recently been carried on in the daily press, and expressed the opinion that the law was wrong in making it possible for a professional criminal to be constantly in and out of prison. In this the country was not dealing fairly with itself, or with the criminal, or with his relatives and friends. Whenever he went outside a prison he was a focus of moral infection. He should be considered unfit for liberty, but his continuous imprisonment should be made easy. It was objected that no judge or jury would undertake the responsibility of branding any man as an habitual criminal. He (the speaker) allowed that this was a very strong objection, but he thought the difficulty might be surmounted by taking the penal record as a guide, and when it was found that something like three sentences of penal servitude and five or six or more minor convictions were recorded against the accused, the burden of proof that he was not an habitual criminal should rest upon him. The way in which men of this class spend a large part of their lives in prison, with intervals of liberty, was most distressing, and was fraught with great danger to the public.

Dr. HAYES NEWINGTON.—I am glad that on this occasion the question of punishment has not got as far as the asylum, the discussion having gone on more general grounds. I am sure that several present would have been ready to join issue as to the admissibility of punishment into the treatment of insane patients. On the occasion of a similar discussion some years ago I analysed as far as I could the purposes of punishment on the same lines as have been adopted to-day, and I gave reasons against its employment in the case of the insane, whether as a measure of retribution, as a deterrent, or as an improving agent. It is satisfactory to find that in regard to the latter, which affords the only possible ground for even discussing the matter from our point of view, the eminent authorities who have spoken to-day have such divergent opinions as to put it out of court altogether.

Dr. MERCIER, in reply, commented upon the progress that had been made since he first introduced the subject. He then almost needed an escort of police to get him safely out of the room, while now he had the powerful support of Dr. Savage and other members of the Association, while the opposition was practically non-existent, or at any rate silent. It had been made a complaint that he had made no

mention of reformation, but he regarded reformation and punishment as totally distinct things, though they might be conducted together. The fire that cooks our dinner may be very useful in drying our clothes also, but a section on the drying of clothes would be out of place in a cookery book, and the treatment of reformation would be equally out of place in a paper on punishment. It was no doubt true that public opinion was more and more against the infliction of punishment, both in gaols and schools, as well as elsewhere, and he was not sure that the trend of opinion in this direction was wholly beneficial. He was himself at a public school where the boys were caned all day long, caned for everything and caned for nothing, and, "Gentlemen," said he, "look at the result." The suggestion that judges would never allow unsoundness of mind as a plea for mitigation of punishment was a little unfortunate in view of the cases which it had been his duty to report in the *Journal of the Association*, in which this plea had again and again been accepted and acted upon; and cases of the kind were, he was glad to say, becoming more numerous. He was a little sceptical about watches having been hung by the wayside in the reign of Henry VI, seeing that they were not invented until Henry VIII was king.

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### Clinical Notes and Cases.

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*A Case of Epileptic Homicide.* By R. PERCY SMITH, M.D., F.R.C.P., Physician for Mental Disorders, Charing Cross Hospital.

ON March 4th, 1901, Charles Edward Canham was tried at the Nottingham Assizes for the murder of his wife and infant child. The facts were as follows:

On November 29th, 1900, prisoner and his wife went to bed at 11 p.m., the child sleeping in the same room. At 7.30 the next morning the eldest daughter went as usual to call her father and mother and to take them cocoa. She knocked, but received no answer; about half an hour later she knocked again and thought she heard him say, "Your mother and I have had a bad night; go down and come up again." She went again subsequently and obtained no answer, but eventually assistance was obtained, and at 12.30 the door was broken open. The wife was then found to be dead in bed with four penetrating wounds in the skull, as well as three other contused wounds, and a mark in the pillow as if it had been struck with an instrument which had penetrated it; the child was found to have its throat cut so extensively that all the vessels and the trachea were completely divided, while the wound had extended through an intervertebral disc, and had even gone into the