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Why Imprisonment Must go

By Giles Playfair*

Imprisonment is a punishment—with the exception of the death penalty, the severest sanction at the disposal of the criminal law. And a punishment, unless the dictionary lies, is retribution. These perhaps obvious facts are stated emphatically, because there is a tendency among contemporary penologists to gloss over the first of them in order to deny the second. But one cannot get rid of something inconvenient merely by saying that it isn't there. Whether retribution is a euphemism for vengeance or whether it is an expression of righteous disapproval may vary according to circumstances and is always open to question. But, whatever the case, retribution is indubitably a form of retaliation: a payment which society exacts in the coinage of suffering, great or small, be it death, imprisonment, fine or what you will.

Criminal sanctions are, of course, used for other purposes besides retribution. At one time courts had a virtually unrestricted license to deal with law-breakers as they pleased, but during the last century legislators throughout the greater part of the civilized world grew increasingly ashamed of the savagery and violence that characterized the administration of justice, and they tried to give punishment a new rationale. This was the rationale of deterrence, the concept of punishment to fit the crime. Maximum and minimum penalties for every offence were fixed by statute to accord with supposed deterrent needs.

But the courts were still left with a wide discretionary latitude to act retributively—to punish offenders “according to their deserts.” In effect, indeed, this was an obligation which the statutes,

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* Giles Playfair is an English barrister who formerly practiced at the criminal bar in London and who has for many years been interested in penal problems. He has a fairly extensive acquaintance with the United States and was a visiting professor at the University of North Carolina in 1953 and 1954. He is an author and a journalist.

1 In England some common law offences remained. For example conspiracy, which could still be punished by prison sentences of unlimited mildness or severity. Hence the gargantuan sentence, exceeding life in practice, recently passed on spies and train robbers.
excepting for those few that provided for a mandatory sentence, imposed: an obligation frequently referred to by contemporary judges as their "duty."

In England, the Judiciary has yet to make even a formal renunciation of retribution as the ultimate objective of criminal justice. "The sentence of the law," wrote Sir James Fitzjames Stephen, "is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. It converts into a permanent judgment what might otherwise be a transient sentiment." If it is supposed there has been any change in the position of the English Judiciary since Stephen's time, the answer is to be found in a statement made by Lord Denning, the present Master of the Rolls, to the Gowers Commission on Capital Punishment (1948-55): "The punishment for grave crimes should adequately reflect the revulsion felt by the majority of citizens for them. It is a mistake to consider the object of punishment as being deterrent or reformative or preventive and nothing else. The ultimate justification of any punishment is not that it is a deterrent but that it is the emphatic denunciation by the community of a crime. (My italics).

So long, then, as the power of dealing with convicted criminals by sending them to prison for greater or lesser periods is at the disposal of a judiciary, imprisonment itself is bound to remain primarily a means of punishment for punishment's sake, or in other words a form of retribution. It has, however, become fashionable to deny or avoid this fact; and, to judge from expressions of pious hopes and good intentions among legislators, as well as slogans and promises that issue from executive departments of Government, one might imagine that prison was now a thoroughly beneficial institution, wholly dedicated to reform. Thus it is said that people are no longer sent to prison for punishment, but only as punishment.

Now if this means anything at all, it should mean, to begin with, that every prisoner is treated alike, that none is subjected to greater hardships than any other, that each is offered the same opportunities of self-improvement. Is that the case? It might conceivably become so, within a given jurisdiction, if the conditions of punishment by imprisonment were legally and exactly defined. But they are not, of course, and one may doubt whether
they ever could be. No legislature has ever attempted to set precise and rigid limits to the sufferings that a prisoner may be subjected to or, in other words, to specify qualitatively as well as quantitatively just what retribution may be exacted from him. In general, it would be fair to say that while a legislature authorizes punishment by imprisonment and a judiciary imposes it, neither exercises any direct control over its execution. That is left to administrators who have always had, and still retain, wide discretionary powers. What punishment by imprisonment means depends in practice, to a large extent, on what prison officials want, and can afford, to make it mean. It is more or less painful in effect as well as more or less reformatory in design, according to these two variables. And, understandably, there is no uniformity about it.

Again, if the concept of imprisonment as rather than for punishment, were more than bureaucratic “double-speak”, it would mean that though a person might be punished through being deprived of his liberty by judicial order, he would thereafter be subjected to no additional suffering or humiliation; everything would be done to make his enforced stay in prison as helpful and painless to him as possible. It has, indeed, been said that this is precisely what the aim of a progressive penal policy should be. Yet it is an aim that, under a retributive system of justice, cannot logically be pursued.

For many classes of people, besides convicted offenders, are subject to deprivation of liberty: lunatics, charged but untried suspects, material witnesses, sufferers from virulently contagious diseases such as smallpox; and, in a different sense, during a national emergency, every physically and mentally fit man of military age. But such people are not thereby being punished, nor have they made themselves liable to punishment. Thus the law, by implication at least, makes it inescapably clear that imprisonment is a punishment, whereas deprivation of liberty in itself is not. To equate the one with the other, and render them indistinguishable would, under existing circumstance, be ethically, as well as legally, indefensible.

When a lunatic is confined in a mental hospital, it is not, even though he has committed a crime, because he is held to owe society any debt, but because society needs protection from him
until such time as he has recovered his wits. Moreover, it can be claimed at least with some theoretic justification that he is confined "for his own good." Certainly, a modern mental hospital is dedicated to curing its inmates; and there can be no doubt that all lunatics need treatment and that all of them in principle—since advances in medical knowledge are continually being made—may eventually respond to it.

But though a judge may occasionally assure an offender that a dose of imprisonment will be the making of him, this is a nasty medicine that, however therapeutically desirable it may be considered, cannot be prescribed unless it is held to be "deserved"; nor, save in exceptional circumstances, prescribed in greater measure than a court, after due reflection on its "duty", decides is deserved.

Moreover, even assuming that prisons were wholly geared to a reformative program, which certainly they are not, who as a result would stand to benefit from being sent to them? Not, surely, the Alger Hisses or the few white collar offenders who were already well educated and professionally qualified people before they made the slip that brought them into conflict with the law. Not the much greater number of mental defectives and others of weak intelligence, who are untrainable and un-treatable, except by specialized methods in an institution adapted to their needs. Not the still greater number of "short-timers"—the drunkards, the prostitutes, the petty thieves, the minor sex offenders and so on—who are in and out of gaol before any reformative programme, if it existed, could have the least chance of helping them.

There is, in fact, no pretence made by a prison administration anywhere in the world that "short-timers" are being offered "training and treatment." Yet they represent by far the largest group of prisoners at any given time. A European Working Group reported to a United Nations Congress in 1960: "The statistics supplied by the various countries [including the U.S.] show that . . . sentences of six months and less form on the average more than 75% of all prison sentences. That proportion shows the importance of the problem of short sentences and brings out the distinct contrast in this respect between, on the one hand, the legislations which provide for such penalties and
the courts which apply them and, on the other, the teaching of penological doctrine in which attention has for some time been drawn to the highly undesirable aspects of this type of penalty.” (My italics).

These “highly undesirable aspects” were spelled out in a further conclusion of the Working Group’s report to the United Nations Congress “... Short sentences... have all the drawbacks of deprivation of liberty in any form with none of its advantages. In fact, habituation to prison life, the danger of moral contamination and the break with the family and the social and occupational environment are not, in this case, offset by any constructive contribution provided by a sufficiently lengthy treatment.” (My italics)

One way of avoiding these “deplorable consequences” is to permit a short sentence to be served over a series of weekends instead of continuously. This idea was initiated in West Germany some years ago for adolescents, and was later extended to adults. It has since been adopted in Belgium and South Africa.

In West Germany, apparently, weekend imprisonment was originally intended as more than a device to prevent the loss of employment and the serious interruption (or actual destruction) of family life that a sentence served continuously involves. Some hope was entertained that it might actually prove reformative, when the judges agreed to visit the “weekenders” in gaol, and lecture them on their civic responsibilities! However, the judges soon wearied of this task; and weekend imprisonment, in West Germany as in the other jurisdictions where it is being tried, is undisguisedly punishment—and nothing else. What it really amounts to—for it is an administrative, not a judicial concept—is a declaration of no confidence in the reformative pretensions of the prison system by those whose duty it is to maintain it in operation. And indeed one may view nearly all the supposedly progressive experiments undertaken by penal administrators, such as open prisons, as attempts not so much to transform imprisonment into something positively beneficial for the individual as to make it less damaging to him than it might otherwise be.

The courts, for their part, usually neither know nor care, when they sentence a man, whether his time will be occupied in productive work or mere drudgery; whether he will be kept in a
closed institution or an open one; whether he will receive psychiatric help or whether he won't. From their point of view, imprisonment is just a punitive instrument which they may or may not think it proper to use in a particular case. So long as this is so, so long as it is left for a Judiciary to decide who shall and who shall not be imprisoned, it is plainly absurd to imagine that the prison system is or ever can be even primarily dedicated to reform.

What, however, of prevention? Isn't that a consideration which makes imprisonment something which is indispensable in itself, though its use ought to be greatly curtailed?

The argument is put simply with the rhetorical question: “What do you do with dangerous or incorrigible criminals, if you don't lock them up?” Or it is expressed in more academic language by, for example, the late Professor Paul W. Tappan. “No single few should be cleared to the criminalized,” Tappan wrote in 1960, “than the necessity of preventing the dangerous criminal from repeating his offences, by coercive repressive measures, even if these measures increase the difficulty in effecting his reformation. The incapacitation and intimidation of the repetitive delinquent, sometimes termed 'individual prevention,' is essential. The community cannot await the possible reformation of criminals living under conditions of freedom while they continue to inflict injury on vital social interests.”

One may readily agree that it would be no solution to the problem posed by the dangerous or habitual criminal simply to leave him at large. But the fallacy in Tappan's argument is that under a retributive system of justice, whereby criminals, dangerous or not, are dealt with according to their supposed deserts, "individual incapacitation" is more often than not impossible, except for a limited period. And the fact is that throughout its mournful history as a punitive measure, imprisonment, far from halting recidivism, appears to have fostered it. Consequently, while it has given "vital social interests" some temporary protection against criminal activity, it has often ended by putting those same interests in greater jeopardy than ever before.

By contrast, the criminal lunatic—and for that matter, the non-criminal lunatic—can always be "incapacitated" permanently; and great indignation would certainly be caused, if it were
seriously suggested that a time-limit, measured by the gravity of his condition, should be placed in advance on his confinement. Actually, the dividing line between the lunatic and a dangerous criminal whom the law holds to be responsible for his actions is apt to be a very thin one, but, so far as its own safety goes, society deals far more sensibly with the one than with the other. It is no longer believed, as it once was, that the lunatic can be terrorized into becoming sane again. Instead, by means of a form of indefinite confinement, which is nominally at least non-punitive, he is rendered socially harmless until such time as he recovers his senses either automatically or in consequence of medical treatment. Not so the dangerous criminal who, regardless of whether he is "reformed" or not, regardless of whether he has been "intimidated" into behaving honestly and peaceably or not, must be returned to the free community upon the expiration of his prison sentence. Hence, unless that sentence happens to be life, or so gargantuan that it amounts to the same thing, society can never be permanently and indubitably safeguarded from him.

How ineffective the prison system actually is as a means of prevention is shown by the fact that nearly all the worst and most horrifying crimes are committed by graduates of penal establishments. The New York "monster", Albert Fish, for example, eventually convicted of killing a small child whose body he cooked and ate, had previously served several gaol sentences. There might be some public alarm expressed, if a circus manager were to announce that having found the way to tame wild animals by cruelty, he intended to set all his lions and tigers free after a certain period of service to him. And there might be something more than public alarm expressed, if he stuck to this policy after the experiment had been tried once and his animals had proved themselves on release as savage as they ever were in the jungle. Yet to maintain a prison system as a means of "individual prevention," in the late Professor Tappan's sense, seems hardly less eccentric.

Penologists further maintain, of course, that society cannot afford to do without a prison system, if its offending members are to be sufficiently discouraged from offending again and its law-

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2 i.e. The criminal held to be responsible under the M'Naghten Rules.
abiding members from offending at all. This is the deterrent argument; and since Beccaria, Bentham and others founded the so-called classical penology, it has come to be assumed that deterrence, like prevention and reform, is an aim that can be pursued quite separately from retribution. But—to repeat a point—the fact that humanitarians revolted against a penal system based on arbitrarily applied violence, the fact that they evolved the theory that deterrence should be the principal objective of punishment and that no punishment should be more severe than was necessary to achieve that end (a clearly impossible assessment to make), the fact that they were eventually successful in establishing imprisonment rather than violence and physical torture as the backbone of the penal system, and in imposing some semblance of uniformity on the sentencing powers of the courts—none of this brought about any fundamental change in the judicial concept of guilt and individual responsibility, or altered the basic relationship between society and those who violate its laws.

Now it may very well be that any kind of punishment deters some people to some extent; and common sense would suggest that if this is so, the more brutal the kind of punishment, the more effective it is likely to be. It may also be that law and order could not be maintained, if society were to abandon all punitive sanctions. But this does not mean that a particular penalty is necessary, desirable and justifiable simply because of its deterrent potentiality. If it did mean that, one might confidently propose, at a time like the present of a rising crime rate, a return to presumptively more fearsome punishments. Indeed, it is noteworthy that the most retributive-minded of judges are those who speak out most strongly in favor of such measures as the death penalty. Recently, Lord Goddard, former Lord Chief Justice of England, went so far as to suggest the re-employment of the stocks, and one must at least credit him with the logic of his convictions.

Whether imprisonment does in fact act as an effective deterrent against crime, or as a more effective deterrent than, say, a fining system with teeth in it, is, of course, another matter. One

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3 i.e. Graded according to an offender's means and calculated to hurt in every case.
can say with certainty that there are people, including the dangerous and habitual criminals aforementioned, whom it does not deter. But since no scientific investigation that might supply a reliable answer has even been made, it is anybody's guess what manner of people, and how many, imprisonment does deter. The same is true of the death penalty when and where it is still applicable to crimes such as murder, treason and rape. For the statistical evidence commonly produced by abolitionists to “prove” that the death penalty is not more deterrent than life imprisonment can easily be exposed as misleading, or inconclusive.

Bernard Shaw pointed out that among normally balanced people in a society the greatest deterrent is not man-made, but God-given: the human conscience. And even though one may believe that the law must have some sanctions at its disposal, it seems certain that the essential difference between the non-recidivist and the recidivist is the difference between a temporarily lapsed conscience, or a conscience in need of minor repair and a conscience that is chronically weak, faulty or distorted.

But the point is that deterrence, though obviously not irrelevant to sound penal practice, is or should be subordinate to the question of whether or not any given penalty is a morally permissible one for a civilized society to use. Historically, this seems hardly disputable, in spite of the fact that the theory of the minimum deterrent, invented by the 18th century reformers as a means of persuading society that it could adopt supposedly more humane retributive measures at no added risk to its own safety, has bedevilled penal policy ever since and has to a large extent blocked humanitarian progress. For even if it could be established beyond doubt that boiling malefactors alive were a uniquely effective deterrent and would result in an immediate and dramatic fall in the crime rate, one can safely assume there would be no chance of its re-introduction. Actually, that most barbarous of all English punishments was abolished as early as the 15th century, not because it failed to deter (one may assume, had the issue been raised, that it would have been considered extremely deterrent), but because it was held to have a degrading influence on the onlookers. Taking the broad historic view, therefore, if a punishment, whether deterrent or not, is indefensible on moral grounds for what it is, then it is not defensible at all.
Now until the 18th century reformers got to work, imprison-
ment was simply a means of keeping suspected offenders in safe
custody until they could be tried, or of keeping convicted of-
fenders in safe custody until they could be publicly liquidated at
the end of a rope or got rid of through transportation. Doubtless,
Bentham and his like genuinely believed that just as society had
no moral right to deal with its criminals by openly brutal and
violent methods, so it had a moral duty to make its “wicked”
members “good.” Unfortunately, the system that was conse-
quently evolved, though its brutalities were more easily cloaked
in righteousness, turned out to be no less destructively cruel than
the one that it replaced.

Again, this is not opinion. It is fact, in the sense that social
history has already condemned as barbaric prison conditions of
the 19th century which, through imposing total isolation by means
either of solitary confinement or of a rigid enforcement of silence,
sent some men mad and drove others to suicide. Yet these
conditions did not provenly fail in the deterrent part of their
purpose; still less, have they been replaced since by conditions
of provenly greater deterrent effectiveness.

For example, the English prison system was at its most coldly
and calculatedly punitive between 1878 and 1898 when under
the Du Cane regime the policy of “hard labour, hard fare and a
hard bed” was in full force, and during that time the general
crime-rate steadily fell. Why, then, were reforms instituted?
Why was the tread-wheel abolished? The reason given in Parlia-
mament was that Du Cane’s system, for all its success as a general
deterrent, had utterly failed to halt recidivism. But, in retrospect,
that reason, though true so far as it went, cannot be said to
explain Parliament’s intervention. For the liberal reforms that
were instituted then, and others that have followed since, while
possibly weakening and certainly not strengthening the deterrent
effectiveness of imprisonment, have not solved the problem of
recidivism, either. Yet one may be reasonably certain that today
there would be as much social resistance to reverting to solitary
confinement, the rule of perpetual silence and forced labour at
the tread-wheel as there would be to restoring the stocks, the
pillory, the ducking-stool, and other penalties long since repealed
as intolerably cruel. Thus one may conclude that whenever the
prison system has been “reformed”, it was because its rigours and brutalities had become too much for society’s conscience to bear.

But this raises the central question. Was the prison system ever sufficiently reformable, that is to say, transformable from a moral wrong into a moral right? Is it now?

Bernard Shaw, in his preface to the Webbs' account of *English Prisons under Local Government*, published in 1922, wrote sardonically of contemporary penal reformers as “philanthropists bent on reforming a necessary and beneficent public institution,” and compared them with John Howard and the other 18th century pioneers who “had . . . made the neglect, oppression, corruption, and physical torture of the old common gaol the pretext for transforming it into that diabolic den of torment, mischief, and damnation, the modern model prison.” Yet at least it can be said for the creators of Millbank in London and, before them, the creator of the American penitentiaries in Pa. and New York that they were fundamentalists—advocates, within limits, of a new penology. Though they quarrelled a good deal among themselves about ways and means—about the rival merits of “silence” and “separateness”, work and spiritual guidance—they all believed that if criminals were confined, and at the same time prevented from contaminating one another, they could be induced to see the error of their ways. It was a simple and appallingly misguided theory, but in its time it was a radical one that had radical results.

By contrast, the reformers of the past forty years (and more) have, in general, been mere tinkerers: well-intentioned woodmen trying to prop up a tree with rotten roots. Imprisonment as the mainstay of punitive justice is for them, apparently, an immovable fact of life, with the result that penology has become bogged down in unrealistic arguments about the rival claims of “deterrence” and “rehabilitation.” An allegedly “progressive” penal policy is directed, as has been said, toward alleviating the inherent cruelty of imprisonment and to minimising its destructive consequences. The logical conclusion to be drawn from such a policy is that the thing it is trying to correct is an evil in itself, and had better be abolished. But this is a conclusion which contemporary reformers decline to face. Instead, they make

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4 E.g. Weekend imprisonment, *supra*. 
nonsense of the whole theory upon which the prison system was based, through weakening the (presumptive) deterrent of imprisonment effectiveness, on the one hand, and undermining its rehabilitative method, on the other. John Howard was surely right in denouncing the common goals, where men and women awaiting trial or punishment were herded indiscriminately together, as "schools of crime", just as he was right in believing that society should attempt to reform rather than eliminate its law-breakers. What was wrong, provenly and disastrously wrong, was his remedy. But it is no radical substitute for this remedy to permit, for example, "association"—to allow prisoners to eat together, enjoy a certain amount of recreation together, talk to one another at work or exercise. That is merely to re-introduce, in the name of humanitarianism, the very danger of moral corruption and mutual contamination among criminals that the "modern model prison" was designed to remove.

If a patient returned to his doctor with a half empty bottle of medicine, complaining that the stuff had done him harm and no good, he would hardly be reassured if the doctor simply filled the bottle up with water, thus diluting the original prescription, and told him to try again. But that essentially is what attempts to reform the prison system amount to; and it is not surprising that while the crime rate has moved upwards, the problem of recidivism seems no nearer solution than it was a hundred years ago.

It may still be asked, however, whether the system has been sufficiently watered down to make it morally harmless. Or, to put the question in another way: If one assumes that no more effective method exists of preventing crime, is society justified in the second half of the 20th Century in continuing to punish people by imprisonment?

Here the answer that Bernard Shaw gave in 1922 still seems valid. Shaw not only called the prison system extremely cruel, but denounced it as a fraud. It is a fraud, first of all, Shaw said, because the retributive theory to which it is bound is in itself fraudulent. The convicted offender who is sent to prison is given an express or implied assurance, in society's name, that when he has served his sentence, the slate will be wiped clean. But this is a bargain that society almost invariably dishonors. If a person
accepts a prison sentence as his “just deserts”, it is only to discover in the end that he has been cheated; the payment that was said to be the debt he owed and that has been exacted from him in full is not accepted as payment at all. On the contrary, if he is able to re-establish himself in the free community, it will be in spite of, rather because of, the fact he has “done time.”

Shaw further described the reformative claims of the prison system as fraudulent on the grounds that “to punish and reform people by the same operation,” is like putting a man suffering from pneumonia out in the snow all night, and then feeding him with unpleasant-tasting lozenges. Admittedly Shaw made this point before the psychiatrists and psychologists came to the aid of the prison service, but it is surely as true now as it always has been that the objectives of treatment and punishment are fundamentally irreconcilable: the one is to “make well”, the other to “make ill.”

Yet the objective of punishment remains embedded in the prison system because penal administrators, for all the essential lack of faith which they sometimes evidence in the efficiency and morality of their own work, cannot help being aware that ultimately they are the servants of the criminal law and are bound to execute its punitive orders. They have never said that imprisonment should not be a punishment at all; they have only tried, the more progressive among them, to make themselves (and the rest of us) believe that imprisonment can be curative as well as punitive.

In fact, prison life, though it is less inhumanly abnormal than it used to be, is still a calculated cruelty; and, as Gresham Sykes has pointed out in a detailed study of an American penitentiary, its “pains” are in the final analysis inextricable from what the concept of punishing malefactors by isolating them from the free world for prescribed periods means and is bound to mean. Sykes describes prison inmates as a “captive society” ruled by an administration with totalitarian powers. The extent to which the rulers govern benevolently or oppressively depends partly on how little or how much trouble they are willing to spare themselves in discharging their prime responsibility of keeping all the inmates safely confined, and partly in turn on how hidebound they are by conventional ideas of what this
necessitates. "Security," said the English Prison Department in a recent report, "must be an important consideration even in the most progressive penal system, because, apart from the public duty of holding in custody those whom the courts have sentenced to imprisonment it is, of course, axiomatic that a prisoner cannot be trained in absentia." That is an understatement, and the last part of it something of a sophistry. As all penal administrators are perfectly well aware, society does not consider them to have failed in their "public duty" when they discharge prisoners who are unreformed. Society does, however, blame them if they don't "hold" a person "in custody" for as long as a judge has said he should be held. Screaming headlines report the news that an "escaped prisoner" has committed a further crime, but a discharged prisoner who offends again on the day of his release will be unlikely to make the papers at all.

So long as this attitude persists, prison administrators will risk being liberal only to the degree that the safe custody of their most recalcitrant charges is thought to allow, and if this means the thwarting or impeding of the rehabilitative programme (whatever that may be), then rehabilitation as an aim is sacrificed. It invariably does mean that in any closed institution the inmates who are not "escape risks" or troublemakers—often the great majority—have to be disciplined as though they were. There is a statutory provision in England, echoed in many other jurisdictions, that the "treatment of prisoners shall be such as to encourage their self-respect and a sense of personal responsibility." Generally speaking, a provision of this kind is flagrantly violated by the regime as a closed prison or penitentiary, unless it can be seriously maintained that to strip a man of all his democratic rights (and responsibilities), to deny him any say in the management or organization of the society in which he is compelled to live, to regulate his life by orders and hardly ever to permit him to act on his own initiative, to lock him up in a cell, as though he were some dangerous animal who might otherwise get loose, and even then to keep him under regular observation—that such treatment is to encourage his self-respect and sense of personal responsibility! The truth is that even if that were the only possible method of guaranteeing the safe custody of all the inmates of any given prison (the "escape risks and trouble-
WHY IMPRISONMENT MUST GO

makers," included), which is open to question, it would still be blatantly antireformative, and in most cases pointlessly oppressive.

Nor are all the hardships and indignities that a prisoner suffers defensible or explicable on security grounds alone. It is worth repeating that efforts to humanise prison life have led, paradoxically, to the abandonment of some policies that were originally supposed to be reformative rather than punitive, notably solitary confinement and/or the Rule of Silence. On the other hand, certain practices survive which are plainly punitive, not only in effect, but in intent. For example, though labor is, on the average, no longer nearly as hard as it was once was, it is still forced; the most privileged of prisoners do not normally receive better than a sub-standard *ex-gratia* payment for their work. Consequently, the freedom that a prisoner may have to purchase tobacco and certain other luxuries is so severely curtailed that it produces its own kind of starvation. This, in turn, is the direct cause of one of the most glaring evils of contemporary prison life—the existence of the "Tobacco-Baron," an illicit trader who preys on the smoke-hungry state of his fellow inmates and uses strong-arm methods to enforce his demands. Again, except in a few institutions throughout the civilized world, prisoners are subjected to total heterosexual starvation; and this results in widespread instances of unlawful homosexuality, which would doubtless shock John Howard even more than the promiscuity between men and women that he discovered in the common gaols of England.

But even if no such strictures as the above could fairly be made, it would still be generally true to say of the prison system that it "endeavours to make men industrious by driving them to work; to make them virtuous by removing temptation; to make them respect the law by forcing them to obey the edicts of an autocrat; to make them far-sighted by allowing them no chance to exercise foresight; to give them individual initiative by treating them in large groups; in short, to prepare them again for society by placing them in conditions as unlike real society as they could well be made." Those words were written more than half a century ago by Thomas Mott Osborne, himself an American prison administrator. Osborne tried to meet his own devastating

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criticism of the system by introducing a form of self-government at first at Auburn and later at Sing Sing. But this experiment, though it flourished for a while, eventually foundered, just as similar experiments had foundered before and have foundered since. Indeed, the student of prison history may wonder whether it is possible so much as to imagine any such apparently pioneering venture that has not already been tried—only, in the end, to wither and die of its own accord or to be stifled.

In short, punitive imprisonment appears to have proved itself an irredeemably poisonous institution. For that fundamental reason, it is historically doomed, and, in the writer's opinion, the sooner it goes the better. How, then, should it be replaced?

To answer this question very briefly, no one can tell to what extent it might be possible to deter crime through the planned development of a morally acceptable form of retribution such as fining, which is already, of course, being widely employed by the courts. At the same time, there is now a recognized alternative to punishment as a defense against crime, and that is treatment. This is not to imply adoption of the extreme determinist view that all lawbreakers are "sick" people who cannot help themselves and should not be held responsible for their actions. It is to say, however, that when punishment fails to deter, society should, in its own interest, have resort to treatment as an alternative means of prevention. But if treatment, whether medical or sociological, is to have any real chance of success, then the commitment to it, once it is called into play, must be total. This means essentially that it cannot be used as an instrument of retributive justice, for other considerations apart, if one wants to cure a person of pneumonia one does not sentence him to a fixed number of days in bed, and equally, if one is intent on teaching an untutored child to read, one does not prescribe for him an arbitrarily fixed period of tuition. Thus the abnormality, social or mental, and hence the non-responsibility of offenders proved to be undeterred or undeterrable by a morally acceptable form of punishment, should be presumed. They would then be liable to treatment over an indefinite period and under strictly non-punitive conditions in the same way that certified lunatics are.

It does not follow from this that every convicted offender
found to be in need of treatment would have to be deprived of his liberty. On the contrary, custody as a concomitant of treatment, should only be permitted as a last resort and its use should be subject to the strictest safeguards against abuse of individual rights. In fact, while one must assume that there will always be a certain number of offenders too dangerous to be left at large, there are undoubtedly many others who could be successfully treated in freedom. Probation, though it needs to be widely developed and re-conceived as a treatment method rather than as a "last chance", already points the way to this.

But space is too limited to be concerned with details. What this paper has set out to demonstrate is that there can be no true penal progress short of the abolition of punitive imprisonment and an end to the confusion between retribution and reform.