

The Severity of Criminal Laws

Baron de Montesquieu

CRIME AND PUNISHMENT

In his Spirit of the Laws (1748) Montesquieu, like so many of the philosophes, attacks the severity and inhumanity with which criminals were treated. He offers the principle that punishment fit the crime, “the particular nature of the crime.”

BOOK VI: CONSEQUENCES OF THE PRINCIPLES OF DIFFERENT GOVERNMENTS

12.... Mankind must not be governed with too much severity; we ought to make a prudent use of the means which nature has given us to conduct them. If we inquire into the cause of all human corruptions, we shall find that they proceed from the impunity of criminals, and not from the moderation of punishments.

Let us follow nature, who has given shame to man for his scourge; and let the heaviest part of the punishment be the infamy attending it.

But if there be some countries where shame is not a consequence of punishment, this must be owing to tyranny, which has inflicted the same penalties on villains and honest men.

And if there are others where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions.

It often happens that a legislator, desirous of remedying an abuse, thinks of nothing else; his eyes are open only to this object, and shut to its inconveniences. When the abuse is redressed, you see only the severity of the legislator; yet there remains an evil in the state that has sprung from this severity; the minds of the people are corrupted, and become habituated to despotism....

There are two sorts of corruptions—one when the people do not observe the laws; the other when they are corrupted by the laws: an incurable evil, because it is in the very remedy itself....

17. The wickedness of mankind makes it necessary for the law to suppose them better than they really are. Hence the deposition of two witnesses is sufficient

in the punishment of all crimes. The law believes them, as if they spoke by the mouth of truth. Thus we judge that every child conceived in wedlock is legitimate; the law having a confidence in the mother, as if she were chastity itself. But the use of the rack against criminals cannot be defended on a like plea of necessity.

We have before us the example of a nation blessed with an excellent civil government [England], where without any inconvenience the practice of racking criminals is rejected. It is not, therefore, in its own nature necessary.

So many men of learning and genius have written against the custom of torturing criminals, that after them I dare not presume to meddle with the subject. I was going to say that it might suit despotic states, where whatever inspires fear is the fittest spring of government. I was going to say that the slaves among the Greeks and Romans—but nature cries out aloud, and asserts her rights.

BOOK XII: OF THE LAWS THAT ESTABLISH POLITICAL LIBERTY, IN RELATION TO THE SUBJECT

3. Liberty is in perfection when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions; the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing; and man \uses no violence to man.

There are four sorts of crimes. Those of the first species are prejudicial to religion, the second to morals, the third to the public tranquillity, and the fourth to the security of the subject. The punishments inflicted for these crimes ought to proceed from the nature of each of these species.

In the class of crimes that concern religion, I rank only those which attack it directly, such as all simple sacrileges. For as to crimes that disturb the exercise of it, they are of the nature of those which prejudice the tranquillity or security of the subject, and ought to be referred to those classes.

In order to derive the punishment of simple sacrileges from the nature of the thing, it should consist in depriving people of the advantages conferred by religion in expelling them out of the temples, in a temporary or perpetual exclusion from the society of the faithful, in shunning their presence, in execrations, comminations, and conjurations.

In things that prejudice the tranquillity or security of the state, secret actions are subject to human jurisdiction. But in those which offend the Deity, where there is no public act, there can be no criminal matter; the whole passes between man and God, who knows the measure and time of his vengeance. Now, if magistrates confounding things should inquire also into hidden sacrileges, this inquisition would be directed to a kind of action that does not at all require it; the liberty

of the subject would be subverted by arming the zeal of timorous as well as of presumptuous consciences against him.

The mischief arises from a notion which some people have entertained of revenging the cause of the Deity. But we must honor the Deity and leave him to avenge his own cause. And, indeed, were we to be directed by such a notion, where would be the end of punishments? If human laws are to avenge the cause of an infinite Being, they will be directed by his infinity, and not by the weakness, ignorance, and caprice of man.

A historian of Provence relates a fact which furnishes us with an excellent description of the consequences that may arise in weak capacities from the notion of avenging the Deity's cause. A Jew was accused of having blasphemed against the Virgin Mary, and upon conviction was condemned to be flayed alive. A strange spectacle was then exhibited: gentlemen masked, with knives in their hands, mounted the scaffold, and drove away the executioner, in order to be the avengers themselves of the honor of the blessed Virgin. I do not here choose to anticipate the reflections of the reader.

The second class consists of those crimes which are prejudicial to morals. Such is the violation of public or private continence—that is, of the police directing the manner in which the pleasure annexed to the conjunction of the sexes is to be enjoyed. The punishment of those crimes ought to be also derived from the nature of the thing; the privation of such advantages as society has attached to the purity of morals, fines, shame, necessity of concealment, public infamy, expulsion from home and society, and, in fine, all such punishments as belong to a corrective jurisdiction, are sufficient to repress the temerity of the two sexes. In effect these things are less founded on malice than on carelessness and self-neglect.

We speak here of none but crimes which relate merely to morals, for as to those that are also prejudicial to the public security, such as rapes, they belong to the fourth species.

The crimes of the third class are those which disturb the public tranquillity. The punishments ought therefore to be derived from the nature of the thing, and to be in relation to this tranquillity: such as imprisonment, exile, and other like chastisements, proper for reclaiming turbulent spirits, and obliging them to conform to the established order.

I confine those crimes that injure the public tranquillity to things which imply a bare offense against the police; for as to those which by disturbing the public peace attack at the same time the security of the subject, they ought to be ranked in the fourth class.

The punishments inflicted upon the latter crimes are such as are properly distinguished by that name. They are a kind of retaliation, by which the society refuses security to a member who has actually or intentionally deprived another of his security. These punishments are derived from the nature of the thing,

founded on reason, and drawn from the very source of good and evil. A man deserves death when he has violated the security of the subject so far as to deprive, or attempt to deprive, another man of his life. This punishment of death is the remedy, as it were, of a sick society. When there is a breach of security with regard to property, there may be some reasons for inflicting a capital punishment; but it would be much better, and perhaps more natural, that crimes committed against the security of property should be punished with the loss of property; and this ought, indeed, to be the case if men's fortunes were common or equal. But as those who have no property of their own are generally the readiest to attack that of others, it has been found necessary, instead of a pecuniary, to substitute a corporal, punishment.

All that I have here advanced is founded in Nature, and extremely favorable to the liberty of the subject.

IV. It is an important maxim that we ought to be very circumspect in the prosecution of witchcraft and heresy. The accusation of these two crimes may be vastly injurious to liberty, and productive of infinite oppression, if the legislator knows not how to set bounds to it. For as it does not directly point at a person's actions, but at his character, it grows dangerous in proportion to the ignorance of the people; and then a man is sure to be always in danger, because the most exceptional conduct, the purest morals, and the constant practice of every duty in life are not a sufficient security against the suspicion of his being guilty of the like crimes.

Under Manuel Comnenus, the Protestator was accused of having conspired against the emperor, and of having employed for that purpose some secrets that render men invisible. It is mentioned in the life of this emperor that Aaron was detected as he was poring over a book of Solomon's, the reading of which was sufficient to conjure up whole legions of devils. Now, by supposing a power in witchcraft to rouse the infernal spirits to arms, people look upon a man whom they call a sorcerer as the person in the world most likely to disturb and subvert society, and of course they are disposed to punish him with the utmost severity.

But their indignation increases when witchcraft is supposed to have the power of subverting religion. The history of Constantinople informs us that in consequence of a revelation made to a bishop of a miracle having ceased because of the magic practices of a certain person, both that person and his son were put to death. On how many surprising things did not this single crime depend!—that revelations should not be uncommon, that the bishop should be favored with one, that it was real, that there had been a miracle in the case, that this miracle had ceased, that there was an art magic, that magic could subvert religion, that this particular person was a magician, and, in fine, that he had committed that magic act.

The Emperor Theodorus Lascarus attributed his illness to witchcraft. Those who were accused of this crime had no other resource left than to handle a red-hot iron without being hurt. Thus among the Greeks a person ought to have been a

sorcerer to be able to clear himself of the imputation of witchcraft. Such was the excess of their stupidity that to the most dubious crime in the world they joined the most dubious proofs of innocence.

Under the reign of Philip the Long, the Jews were expelled from France, being accused of having poisoned the springs with their lepers. So absurd an accusation ought to make us doubt all those that are founded on public hatred.

I have not here asserted that heresy ought not to be punished; I said only that we ought to be extremely circumspect in punishing it.

V. God forbid that I should have the least inclination to diminish the public horror against a crime which religion, morality, and civil government equally condemn. It ought to be proscribed, were it only for its communicating to one sex the weaknesses of the other, and for leading people by a scandalous prostitution of their youth to an ignominious old age. What I shall say concerning it will in no way diminish its infamy, being leveled only against the tyranny that may abuse the very horror we ought to have against the vice.

As a natural circumstance of this crime is secrecy, there are frequent instances of its having been punished by legislators upon the deposition of a child. This was opening a very wide door to calumny. “Justinian,” says Procopius, “published a law against this crime; he ordered an inquiry to be made not only against those who were guilty of it, after the enacting of that law, but even before. The deposition of a single witness, sometimes of a child, sometimes of a slave, was sufficient, especially against such as were rich, and against those of the green faction.”

It is very odd that these three crimes—witchcraft, heresy, and that against Nature, of which the first might easily be proved not to exist, the second to be susceptible of an infinite number of distinctions, interpretations, and limitations, the third to be often obscure and uncertain—it is very odd, I say, that these three crimes should among us be punished with fire.

I may venture to affirm that the crime against Nature will never make any great progress in society, unless people are prompted to it by some particular custom, as among the Greeks, where the youths of that country performed all their exercises naked; as among us, where domestic education is disused; as among the Asiatics, where particular persons have a great number of women whom they despise, while others can have none at all. Let there be no customs preparatory to this crime; let it, like every other violation of morals, be severely proscribed by the civil magistrate; and Nature will soon defend or resume her rights. Nature, that fond, that indulgent parent, has strewed her pleasures with a bounteous hand, and while she fills us with delights she prepares us, by means of our issue, in whom we see ourselves, as it were, reproduced—she prepares us, I say, for future satisfactions of a more exquisite kind than those very delights.

VI. It is determined by the laws of China that whosoever shows any disrespect to the emperor is to be punished with death. As they do not mention in what

this disrespect consists, everything may furnish a pretext to take away a man's life, and to exterminate any family whatsoever.

Two persons of that country who were employed to write the court gazette, having inserted some circumstances relating to a certain fact that was not true, it was pretended that to tell a lie in the court gazette was a disrespect shown to the court, in consequence of which they were put to death. A prince of the blood having inadvertently made some mark on a memorial signed with the red pencil by the emperor, it was determined that he had behaved disrespectfully to the sovereign, which occasioned one of the most terrible persecutions against that family that ever was recorded in history....

IX. Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently so little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words unless it expressly declares what words they are.

Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification, for this depends on the tone in which they are uttered. It often happens that in repeating the same words they have not the same meaning; this depends on their connection with other things, and sometimes more is signified by silence than by any expression whatever. Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established, there is an end not only of liberty, but even of its very shadow.

In the manifesto of the late Czarina [Anna Ivanovna] against the family of the Dolgorukis, one of these princes is condemned to death for having uttered some indecent words concerning her person; another, for having maliciously interpreted her imperial laws, and for having offended her sacred person by disrespectful expressions.

Not that I pretend to diminish the just indignation of the public against those who presume to stain the glory of their sovereign; what I mean is, that if despotic princes are willing to moderate their power, a milder chastisement would be more proper on those occasions than the charge of high treason—a thing always terrible even to innocence itself.

Overt acts do not happen every day; they are exposed to the eye of the public, and a false charge with regard to matters of fact may be easily detected. Words carried into action assume the nature of that action. Thus a man who goes into a public marketplace to incite the subject to revolt incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal but when they are annexed to a criminal action; everything is confounded if words are construed into a capital crime, instead of considering them only as a mark of that crime.

The Emperors Theodosius, Arcadius, and Honorius wrote thus to Rufinus, who was *praefectus praetorio*: “Though a man should happen to speak amiss of our person or government, we do not intend to punish him. If he has spoken through levity, we must despise him; if through folly, we must pity him; and if he wrongs us, we must forgive him. Therefore, leaving things as they are, you are to inform us accordingly, that we may be able to judge of words by persons, and that we may duly consider whether we ought to punish or overlook them.”

X. In writings there is something more permanent than in words, but when they are in no way preparative to high treason they cannot amount to that charge....

BOOK XXV: OF LAWS IN RELATION TO RELIGION

13. A Jewess of eighteen years of age, who was burned at Lisbon at the last *auto-da-fé*, gave occasion to the following little piece, the most idle, I believe, that ever was written. When we attempt to prove things so evident, we are sure never to convince.

The author declares, that though a Jew he has a respect for the Christian religion; and that he should be glad to take away from the princes who are not Christians a plausible pretense for persecuting this religion.

“You complain,” says he to the Inquisitors, “that the Emperor of Japan caused all the Christians in his dominions to be burned by a slow fire. But he will answer, we treat you who do not believe like us, as you yourselves treat those who do not believe like you; you can only complain of your weakness, which has hindered you from exterminating us, and which has enabled us to exterminate you.

“But it must be confessed, that you are much more cruel than this emperor. You put us to death who believe only what you believe, because we do not believe all that you believe. We follow a religion which you yourselves know to have been formerly dear to God. We think that God loves it still, and you think that he loves it no more: and because you judge thus, you make those suffer by sword and fire who hold an error so pardonable as to believe that God still loves what he once loved.

“If you are cruel to us, you are much more so to our children; you cause them to be burned because they follow the inspirations given them by those whom the law of nature and the laws of all nations teach them to regard as gods.

“You deprive yourselves of the advantage you have over the Mahommedans, with respect to the manner in which their religion was established. When they boast of the number of their believers, you tell them that they have obtained them by violence, and that they have extended their religion by the sword; why then do you establish yours by fire? .

“When you would bring us over to you, we object to a source from which you glory to have descended. You reply to us that though your religion is new, it is divine; and you prove it from its growing amidst the persecutions of pagans, and when watered by the blood of your martyrs; but at present you play the part of the Diocletians, and make us take yours.

“We conjure you, not by the mighty God whom both you and we serve, but by that Christ, who, you tell us, took upon him a human form, to propose himself as an example for you to follow; we conjure you to behave to us as he himself would behave were he upon earth. You would have us become Christians, and you will not be so yourselves.

“But if you will not be Christians, be at least men; treat us as you would, if having only the weak light of justice which nature bestows, you had not a religion to conduct, and a revelation to enlighten you.

“If Heaven has had so great a love for you as to make you see the truth, you have received a singular favor; but is it for children who have received the inheritance of their father, to hate those who have not?

“If you have this truth, hide it not from us by the manner in which you propose it. The characteristic of truth is its triumph over hearts and minds, and not that impotency which you confess when you would force us to receive it by tortures.

“If you were wise, you would not put us to death for no other reason than because we are unwilling to deceive you. If your Christ is the son of God, we hope he will reward us for being so unwilling to profane his mysteries; and we believe that the God whom both you and we serve will not punish us for having suffered death for a religion which he formerly gave us, only because we believe that he still continues to give it.

“You live in an age in which the light of nature shines more brightly than it has ever done; in which philosophy has enlightened human understandings; in which the morality of your gospel has been better known; in which the respective rights of mankind with regard to each other and the empire which one conscience has over another are best understood. If you do not, therefore, shake off your ancient prejudices, which, whilst unregarded, mingle with your passions, it must be confessed that you are incorrigible, incapable of any degree of light or instruction; and a nation must be very unhappy that gives authority to such men.

“Would you have us frankly tell you our thoughts? You consider us rather as your enemies than as the enemies of your religion; for if you loved your religion you would not suffer it to be corrupted by such gross ignorance.

“It is necessary that we should warn you of one thing, that is, if any one in times to come shall dare to assert that in the age in which we live the people of Europe were civilized, you will be cited to prove that they were barbarians; and the idea they will have of you will be such as will dishonor your age, and spread hatred over all your contemporaries.”