ON

THE PUNISHMENT OF DEATH.

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PUNISHMENT OF DEATH.

BY

THOMAS WRIGHTSON.

"L'experience a fait remarquer que, dans les pays où les peines sont douces, l'esprit du citoyen en est frappé, comme il est d'ailleurs par les grandes."
Montesquieu. De l'esprit des lois, liv. vi. chap. xii.

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PREFACE:

CONTAINING REMARKS ON THE MEASURES PROPOSED BY THE GOVERNMENT FOR THE LIMITATION OF CAPITAL PUNISHMENT.

THE present edition of this little work is submitted to the world in the hope that it may contribute something to the mitigation of the criminal law. The abolition of capital punishment has too generally been supported on abstract grounds, without reference to its practical effects. In the present treatise, theoretical reasoning will be found combined with practical arguments, and the question is considered solely as one of expediency.

Since the following pages were sent to the press, several important measures for the limitation of capital punishment have been introduced into Parliament by Lord John Russell, for which the government are entitled to, and will no doubt receive, the thanks of the country. That these are measures of large improvement, it would be uncandid, and even absurd, to deny; but it may be doubted whether a

still further mitigation is not demanded by the public voice, and whether it would not be more conducive to the interests of justice. The repugnance inspired by sanguinary punishments rises with the rarity of their infliction; and in direct proportion to that repugnance, is the failure of justice to which it inevitably leads. The mitigation of the law, will no doubt, as far as it goes, remove this cause of impunity; but it will as assuredly increase it, where the last penalty of the law is still retained. When the punishment of death is of extremely frequent application, men grow so habituated to the idea of it, that they come at last to think little more of destroying the lives of their fellow-creatures than of hanging a dog; but, when executions are very rare, they become more deeply impressed with the sanctity of human existence, and their reluctance to take it away is continually on the increase. There are many, who, although they consider the punishment of death to be one of the great safeguards of society, yet, when called upon, in the capacity of witnesses or jurors, to aid in the enforcement of a capital statute, recoil from the performance of so painful a duty. The feelings of nature, which prompt even inferior animals to spare such as belong to their own species, rise predominant over every other consideration; and they shudder at the thought of becoming instrumental to the death of one, whose limbs are formed in the same mould, whose mind is agitated by

similar passions, who has received from the munificent Author of the creation the same spark of heavenly reason, and who is accountable for its proper exercise to the same God with themselves.

And who is to blame for the failure of justice which arises from these causes? Shall we censure witnesses and jurors, because they listen to the dictates of pity, rather than to the commands of power, or, is not the law more in fault, for outraging human nature, with which it ought to harmonise? How are these evils to be remedied? You cannot deprive juries of the power of returning a general verdict; you cannot prevent witnesses from suppressing the facts within their knowledge. What then is to be done? You must mitigate the law, if you wish to render the punishment of the guilty more certain.

The government measure proposes to retain the punishment of death for burglary when accompanied by personal violence, and for robbery when attended with actual bodily harm. Let us consider what will be the consequence of making these exceptions. I refer the reader to the eighth chapter, page 79, for the clearest and most undeniable proofs that the punishment of death produces great impunity in the case of these offences. I have there taken the whole period to which our criminal returns extend, and have shewn that, precisely as the executions diminished, the convictions increased—that is, as the

probability that the last sentence of the law would be carried into effect, became weaker, there was greater forwardness on the part of juries to find guilty. It now becomes important to inquire for what acts of robbery and burglary the reluctance to convict was the greatest. It is probable that it would exist in the highest degree where the crimes were accompanied with circumstances of aggravation; for in no other was it at all likely that execution would follow a conviction. But these are precisely the cases for which Lord John Russell's bill proposes to retain the capital penalty. What then will be the result? There will be fewer convictions in proportion for those robberies and burglaries which remain capital, than for those which are subjected to a secondary penalty—that is, according as the crime is more dangerous, the chances of impunity will be greater.

The arguments for the due proportionment of punishments to offences are indeed trite; but they ought, nevertheless, to be continually repeated until they obtain the attention they deserve. Dr. Johnson remarks in a paper in the Rambler, that "to equal robbery with murder is to reduce murder to robbery, to confound in common minds the gradations of iniquity, and to incite the commission of a greater crime to prevent the detection of a less." The same reasoning is equally applicable to burglary. No fallacy has ever been detected in it: it is beyond

the possibility of refutation. Let us now consider what will be the effect of the proposed changes in this respect. The punishment to be inflicted upon the offender will not then be a matter of the greatest doubt, as it has hitherto been, but it will be comparatively certain that he will suffer death in the event of conviction. He will not then be able to reason as now;—"for one that is executed for burglary and robbery, hundreds are visited with a secondary penalty, and I will therefore abstain from the commission of murder in the hope that I may form one of the more fortunate number." Let us suppose for a moment that a robbery has just been committed under such circumstances of aggravation as will bring it within the new capital statute. In what a position is the innocent party placed? He is already plundered and wounded; and the law, which ought to have protected him in this unfortunate condition, not only furnishes his enemy with no motive to abstain from further outrage, but sets, as it were, a price upon his head, by making it the interest of the robber to destroy him, since by so doing, he incurs no higher penalty, while he greatly diminishes the chances of detection, by removing the most important, and perhaps the only evidence. Possibly, the criminal, seeing his victim prostrate and defenceless, and moved to some degree of pity by the earnestness of his entreaties, is inclined to spare his life; but the law appeals to his interest to stifle every spark of

sympathy: it suddenly steps in to urge him forward, where it ought to have held him back. If then, under such circumstances and with such inducements, the offender add murder to robbery, the law becomes the cause of the death of an innocent man: that clumsy legislation, which would seek to repress an inferior crime by offering a premium on the commission of the greatest, is chargeable with the murder to which it supplied the motives.

Neither robbery nor burglary, are capital offences by the laws of France or Austria. *Vol avec les cinq circonstances aggravantes*, was punishable with death by the Code Napoleon; but the penalty was reduced to *travaux forcés à perpétuité*, in 1832.* When the punishment of death for these offences fell into disuse in Prussia, I am unable to state; but it was certainly never inflicted from 1818 to 1834.

Robbery on the highway was not capital by the Code Napoleon; and by the revised penal code of 1832, the punishment for it was reduced: instead of *travaux forcés à perpétuité* being the invariable penalty, a scale of punishments was established, varying according to circumstances down to five years' imprisonment; and it is now only in the most aggravated cases that men are sent to the galleys for life. What

* It is to be regretted that we cannot ascertain the result of mitigation in this instance, as *vol avec les cinq circonstances aggravantes* is mixed up in the French criminal returns with other aggravated thefts.

has been the effect of this mitigation?—has the crime increased? On the contrary: in the three years ending with 1831, before the change of the law, 443 persons were accused, and in the three years ending with 1834, only 424.

Robbery and burglary are both larcenies, differing from simple larceny in this;—that they are committed with aggravating circumstances: and it is curious to inquire, whether the capital or the non-capital larcenies have experienced the greatest increase in the long period from 1810—when our criminal returns commence—to 1835. During these twenty-six years there were 362 executions for burglary and house-breaking, and 265 for robbery. Certainly so large a sacrifice of human life ought not to have been made for nothing. It has however, as far as can be discovered, been attended with no beneficial effect; for these capital larcenies, as will be seen by the following table, have increased in a greater degree than simple larceny, which never was capital.

Burglary and house-breaking, and robbery, compared with simple larceny, as regards their respective increase, in the twenty-six years ending with 1835.

	Five years ending 1814.	Five years ending 1835.	Increase per cent. in the second period.
	Committed	Committed	
Burglary and house-breaking - -	1237	3935	218
Robbery - -	578	2068	258
Simple larceny -	20,464	61,435	200

I refer the reader to chapter vi, for proofs that the small number of executions for these crimes of late years has been productive of no ill results; and I strongly urge the propriety of doing away with capital punishment for robbery and burglary entirely. It has altogether failed in keeping down the number of offenders; it has led to the greatest impunity; and if retained in aggravated cases, it will continue to produce it for the very crimes which it is most important to punish.

The House of Commons, in 1834, passed a bill, introduced by Mr. Lennard, for the *total* repeal of the punishment of death for robbery.—Will they retrograde on this point now, when the practical proofs of the inexpediency of that penalty are infinitely stronger than they were in that year?

In the following pages I have recommended the establishment of imprisonment for life: and it was

with some little surprise, that on hearing Lord John Russell's speech, I found [illegible] considered imprisonment for ten years "as in some cases worse than death." If this is really so, how merciful it would be to put to death all incurable lunatics; for they must be imprisoned for life. How cruel and inconsistent to confine insane criminals for the whole term of their existence, and thus to subject men who were not accountable for their actions to a fate far worse than death. It is difficult to imagine upon what grounds this opinion rests. The noble lord seems to have underrated the elasticity of the human mind in adapting itself to different conditions. As its circle of enjoyments becomes contracted, it finds new hopes and new pleasures, where it thought to experience none. This is the great advantage of imprisonment for life: although undoubtedly a most severe punishment, it is yet worse in apprehension than in reality—it is more dreaded than felt; and thus attains the end of penal law most effectually, and at no immoderate expense of human suffering. It has again and again been made matter of demonstration, that imprisonment for life, when properly inflicted, is attended with no injury to life or health; and this is a sufficient proof that there is no cruelty in its application as a punishment for criminals of the worst class. There cannot surely be any great harshness in confining the most atrocious offenders for life, when that is the fate of thousands of innocent lunatics.

In the great prison at Ghent, those only are confined who are condemned to *travaux forcés*, whether for life or for a term of years. The punishment of *travaux forcés à temps* is never inflicted for less than five years, and may reach to twenty. The whole prison has the air of a large manufactory, with this difference, that no manufactory, at least none in this country, could be found, where the persons employed are equally healthy. As a proof of this, while the cholera was raging at Ghent, two persons in the prison were attacked, and although it contains 1500 prisoners, the disease made no further progress.

The system pursued at Ghent is however by no means severe: the diet of the prisoners is wholesome, nutritious, and abundant; the work not severe; and the prison, which contains many large courts, extremely airy and spacious. It is conducted upon the principle (as I believe, a very wise one), that punishment should be made to consist in duration rather than intensity. The prisoners are allowed a portion of their earnings; and this is divided into two equal parts, one of which is given to them for the purchase of any innocent indulgences, in moderate quantity, such as beer, tobacco, &c. This acts as an encouragement to industry, and as an incentive to hope. The other part is put out to interest; and where the offender is confined for a limited term, it forms a fund which is given to him at his release; and thus diminishes the temptation to return to criminal

courses. Where he is imprisoned for life, he has the right of disposing of it by will. These regulations are very wise and very humane.

The same system is pursued in Holland; and a similar one at Munich, which is well described in Inglis's tour in the Tyrol.

One great disadvantage of short terms of imprisonment is this: that by the time the prisoner has learnt a trade, the period of his confinement is expired: so that his labour cannot be turned to profitable account. Where the imprisonment is of long duration, this objection does not apply. The prisons may in that case, under proper management, be made to pay their own expenses. The Belgian prisons at Ghent and Vilvorde not only do so, but yield a small profit to the state; and this, although a portion of the value of his labour is allowed to each prisoner, which, in the case of an industrious and skilful workman, is often as high as two francs a-week. How does this contrast with the system of transportation, which costs the country between 350,000 and 400,000 pounds annually!

It is desirable to have a considerable gradation of punishments; and it may therefore be wise to retain transportation in some cases. Although liable to grave objections, it may boast of very considerable advantages; and it is probably the most reformatory punishment we at present possess. It would be therefore unwise to relinquish it altogether; but it

ought not to be applied so indiscriminately as at present. It is not equally adapted to different classes of criminals. It is indeed well suited to the case of inveterate offenders against property, because they are sent from a country where the opportunities, as well as the temptations, to commit theft are very great, to one where they are comparatively small. But where the offenders have shewn a disposition to great personal violence, the case is reversed: they are sent from a country, where, from the density of the population, crimes of this nature are less likely to escape detection, to one, where the population is scattered, and the chances of impunity are consequently greater. If I were a settler in New South Wales, and my nearest neighbour, as is often the case, lived at ten miles distance, I certainly should not feel easier from having a convict in my house, who had committed an aggravated manslaughter, or shewn a disposition to cutting and maiming. A man who had filled the office of hangman at Edinburgh was convicted under Lord Ellenborough's Act, and transported for life. He had not performed the high duty to society of putting men to death without learning the lesson, which capital punishment is calculated to convey to all, but more especially to those whose hands inflict it—a contempt for human life and an indifference to its destruction. He committed five murders in the colony before he was brought to justice! This man ought

never to have been transported; nor ought any of the same class of offenders to be visited with that punishment. A gentle and reformatory system of imprisonment for a long term, varying from 5 to 20 years, similar to that which is practised at Ghent, would be a much more appropriate punishment for such persons. This may perhaps be thought rather severe. It is, however, a distinction agreeable to true morality, that crimes against the person should be visited generally with more severity than offences against property. Few enjoy the possessions which can be made the subject of extensive plunder; but all have lives and persons to be defended; and laws, which are made for the benefit of the whole community, ought first to protect—that which is a blessing to us all—personal security. I cannot consider 20 years' imprisonment too severe for an aggravated offence of maiming. But if it is, there ought to be no punishment equally rigorous for any mere offence against property.

If a foreigner were called upon to judge of the character of the English people, and had no other guide for the formation of his opinion than the state and administration of our criminal laws, he would pronounce us to be a mean and ignoble nation, to whom money was all in all; and in comparison with which, honour, personal security, and even life itself, were matters of but light esteem. He would find that the punishment of death had been prodigally

applied even for inferior offences against property, while it had been very sparingly inflicted for attempts to commit the crime of murder. He would observe that, at a time when there were near 200 capital offences, aggravated manslaughter, committed with a clear intent to kill, was not numbered amongst them. He would see—that the punishment for child-stealing is only seven years' transportation, while that for stealing a sheep is transportation for life,—that assaulting a gamekeeper in the discharge of his high functions of protecting pheasants, is visited with a higher punishment than assaulting a magistrate in the exercise of the duties of his office; that the penalty incurred by throwing lime into a fish-pond, is seven years' transportation, while for an attempt to commit the crime of rape, the highest punishment which can be inflicted is two years' imprisonment. "The female sex," says Blackstone, "is a great favourite of the laws of England." It may be so; but in the present instance, fish seems to hold a higher place in their affections.

If we look to the administration of the law, we find such absurdities as the following:—for simple larceny, which is one of the lowest offences in the scale of criminality, 61 persons were transported for life in 1835; while for attempts to murder, cutting, maiming and wounding, which are very high crimes, the punishments inflicted were as follows:

Executed - - - - - -	2
Transported for life - - - -	31
,, for 14 years - - -	4
,, for 7 years - - -	11
Imprisoned from 1 to 2 years - -	3
,, from 6 months to 1 year -	5
,, under 6 months - - -	4

So much uncertainty as to the punishment which will be inflicted is calculated to give great encouragement to crime; and it is difficult to imagine how such serious crimes against the person can ever be properly visited with short terms of imprisonment.

It is gratifying to find that Lord John Russell proposes to repeal that absurd law which takes away from the judges *all* discretionary power as to the punishment to be inflicted for certain crimes. It is, however, to be hoped that he will not fall into the opposite extreme, which also disgraces our present legislation. The power of mitigation ought always to be exercised within certain bounds, neither very wide nor very contracted. To grant an unlimited discretion, as we now do in many cases, is to unite in the same persons the legislative and executive functions; and it would be a much more compendious method, to repeal all penal statutes, and to pass an act directing that that punishment shall be inflicted in each case which to the presiding judge shall seem most proper. Besides which, men can never be aware with sufficient certainty to what penalty they expose themselves, if they commit a given crime; and punishments can only be effective inas-

much as they are previously known. If, however, no discretion be allowed to the judge, the evil is infinitely greater. It renders the laws at once absurd and unjust in the eyes of the people, when they hear the same sentence pronounced for offences which differ materially in their degrees of moral turpitude and social injury. It is a proclamation to criminals to this effect: "accompany your crimes by any circumstances of aggravation to which you may feel yourselves tempted; do it by all means; we promise that you shall have no additional punishment on that account. The law awards a fixed penalty for a given crime; it considers any circumstances of aggravation as totally beneath its notice. For them, you shall have full impunity and free pardon. Only do not be so childish as to let there be any features of palliation in the case; for that will profit you nothing: don't be so simple as to steal one sheep, and that on one occasion only, when by stealing a whole flock, and repeating the same offence several successive times, you will expose yourself to no higher penalty."

But perhaps it may be said: let all the circumstances of aggravation be defined. This, however, is impracticable. It has been attempted in some codes; and with what result? The end has not been attained, as it was impossible that it should; but this mischief has been produced: the laws have been rendered so complex as to be beyond the comprehension of those whom they were intended to restrain.

CHAPTER I.

Preliminary Observations—Obstacles to the Proper Understanding of the Question—The Punishment of Death justifiable, if expedient.

THERE is nothing of greater importance to society than the efficient repression of crime. To give security to life and property is the first duty of the legislature; and, besides the protection of the innocent from violence and depredation, to check the progress of a moral contagion, which tends to the corruption and debasement of the whole community, is a matter of the most serious concern. Great, however, and momentous as these objects must be admitted to be, there are few sciences so little understood as that of penal jurisprudence, and there is perhaps no branch of that science on which greater ignorance prevails than on the subject of the punishment of death. That, in common with many other political questions, suffers from this impediment,—

that, while there are few who possess the requisite information in order to arrive at correct conclusions, the great multitude think themselves fully competent to form an opinion upon it, although they may have bestowed upon the matter little or no reflection, and have never attempted to balance the weighty arguments which may be advanced in its favour, or against it.

This, however, is not the only cause which stands opposed to the proper understanding of it. There are several obstacles which greatly impede it, and from which other political questions are mostly exempt: sentiments of misguided humanity mix themselves up with it on the one hand, and feelings of blind vengeance on the other. It is, indeed, much to be regretted, that questions relating to the treatment of crime, are rarely considered apart from the influence of human passion: the mass of mankind either regard the infliction of punishment as the retribution of so much pain for so much guilt; or, carried away by undue compassion for the offender, whose wretched fate comes more immediately under their view,—they forget the sufferings of the innocent from plunder and outrage, which, although far more deserving of their sympathy, are less exposed to common observation.

Pity for the criminal is not in itself to be reprobated: the sufferings of all men, whether innocent or guilty, are entitled to some degree of commiser-

tion; but, where compassion is withheld from the peaceable observers of the law, to be prodigally lavished upon its daring violators, no error can be more practically mischievous.

It was a maxim of the great and good Lord Hale, that, when we feel pity for the criminal, we ought to recollect that mercy is also due to the innocent who are the sufferers from crime. This is true; and that conduct only can be here fitly styled humane, which is dictated by an enlightened regard for the public interests, as being the most conducive to social happiness.

But, while some, combining great gentleness of disposition with feebleness of understanding, are the unvarying advocates of lenity, others, formed by nature in a severer mould, think no severity in the repression of crime, excessive or misplaced. The latter, generally regard capital punishment in the light of retaliation,* or retribution; they do not say, it is necessary that such a person should be put to death, but they tell you, he deserves to die: thereby

* "Retaliation or revenge, although they may appear at first sight to be sanctioned by some features of the Mosaic code, were yet only so far sanctioned as they were necessary to deter a gross and hard-hearted people from the commission of crime; and they are utterly to be reprobated as essential principles of penal jurisprudence, inasmuch as they are contrary to the general tenor even of the law, and directly opposed to the spirit of the Gospel: 'Vengeance is mine; I will repay saith the Lord.'"—*Sermon by the Bishop of London.*

showing that they look upon the demerit of the individual, and not the security of society, as the measure by which the hand of justice should be guided. They forget, or they do not regard, the prohibition contained in these words,—"Vengeance is mine, I will repay, saith the Lord;" and although it is abundantly clear, that, if God has reserved repayment as his own prerogative, the privilege of inflicting retribution (with which repayment is here synonymous) cannot fall within the province of man, these men are utterly impenetrable to such a truth: so completely possessed are they by a spirit of vindictiveness, that they cannot see that the mission of human justice is limited by the requirements of society; that all punishments, in so far as they exceed in severity the demands of public welfare, are so much pure unmingled mischief,—so much prodigal waste of human suffering, unredeemed by any advantage whatever.

Another principal reason of the want of correct views on the punishment of death, is to be found in the circumstance that religious prejudices are often associated with the ideas which are entertained upon the subject: while some assert, positively, that it is inconsistent with Christianity, others maintain with equal vehemence, that the command given to Noah—"Whoso sheddeth man's blood, by man shall his blood be shed," was obligatory upon all future ages. It is held by the one party, that death should never

be inflicted, however expedient; and by the other, that it should be invariably so in the case of murder, notwithstanding any proofs of its inutility. That, however, would be a strange religion indeed, which should forbid men to resort to the most effective means of upholding public morality by the adequate repression of crime, and thus deprive the innocent, who ought to be cherished and protected, of a higher degree of security, which they might otherwise have enjoyed.

Neither of these parties venture to affirm that we live, like the Jews of old, under a theocracy: on the contrary, they are forced to admit, as a general proposition, that it is the design of Providence, under the Christian dispensation, to allow all nations to frame their own political laws, and to adapt them to the various and ever changing circumstances of human societies: and, this principle being granted, it certainly requires stronger evidence than they are able to produce, to establish—what is so little to be expected—one solitary exception to the rule.

The former of these opinions, that the punishment of death is forbidden by Christianity, is held by so limited a number, that it is unnecessary to reply to it at greater length. The latter—that it is commanded in cases of murder, although not often entertained by men of intelligence and reflection, is yet so widely prevalent, that it demands on that account a fuller inquiry and a more complete refutation.

It has already been observed that, it being clear as a general principle that it is not the intention of Providence in the present age of the world, to interfere in the temporal government of nations, one single deviation from this maxim of the divine polity becomes so improbable, as to require the fullest evidence in order to establish it. Does the precept delivered to Noah supply such a proof? Whence do we derive the assurance, that this command is binding to the end of time? Certainly it contains no expression with such a purport; no words to justify the conclusion that it was more than temporary. This is a sufficient answer; and here I would willingly leave the argument, but that it may be useful, by exposing the confusion of mind which afflicts the supporters of this hypothesis, to shew to how little respect their opinion is entitled. It is very surprising, but most unquestionably true, that the same men, who maintain that we are bound by a divine law to execute all murderers, approve of the prerogative of mercy vested in the crown, by which the punishment of deliberate homicide is occasionally commuted. This indeed is hardly rational; for it is plain, that the will of kings is not competent to cancel or suspend the laws of God. Again, they imagine that the words "shedding of blood," must possess precisely the same meaning, as murder according to the definition of an English lawyer. But no assumption can be more perfectly gratuitous;

and few perhaps are more absurd. It would be difficult to assign a reason why voluntary manslaughter, arising from the sudden impulse of passion, is not as fitly comprehended under them, as murder, which is a crime of reflection. It would be equally hard to say why they do not include infanticide. By the Mosaic code, all intentional homicide, whether proceeding from deliberation or otherwise, was punished capitally ;* and why then, seeing that the words "shedding of blood" are as large and comprehensive as it is possible for them to be, should men persist in assigning to them a more limited signification? Both the Mosaic code and the Noachid precept, proceed from the same Divine Author; and it is therefore fairly presumable, in the absence of evidence to the contrary, that if all intentional homicide was capitally punished by the one, it was likewise so by the other.

Perhaps it may be thought surprising that this should have escaped the notice of those who hold the command to be one of present obligation; but men too often study the Scriptures, not so much for the discovery of truth, as to find a support for the prejudices which have already gained possession of their minds.

This opinion is chargeable with yet greater inconsistency. Other commands were delivered to

* Exodus xxi. 12; Levit. xxiv. 17 and 21; Numb. xxxv. 16; Deut. xix. 11, 12.

Noah at the same time with the precept in question, one of which ordained that the beast which kills a man should be put to death. This none hold to be still in force; and yet what can be more capricious than, of two commands both delivered at the same moment of time, and both clearly resting on the same authority, to hold that the one continues to be binding, and that the other has ceased to be so? and it is assuredly not in the interpretation of Holy Writ that caprice is the most pardonable. Whence arises this distinction? It is indeed a glaring inconsistency; but it is not inconsistent with the depravity of human nature. It is traceable to the great source of evil—cupidity. *A man is of no value in the market; but a beast will fetch a price.* It is for a similar reason that the legislatures of slave states have generally shewn greater tenderness for human existence than those of free communities; because the life of man, which is lightly esteemed, when he is considered only as a rational being, as a candidate for eternal salvation, and as a brother in the great human family, becomes a matter of choice regard when he assumes the character of property, and his existence consequently rises in the scale of value, until, at length, it reaches the level of that of a beast of burden!

It results from what has been above stated, that the use of death as a punishment is not necessarily forbidden either by religion or humanity; but it is

alike contrary to both, when it is not justified by sound reasons of policy. If the same ends can be equally attained by less violent methods, it would be more agreeable to the gentle temper of our Christian religion, to allow those wretched men, who have so deeply steeped their souls in guilt, that opportunity of complete repentance and reformation which can only be found in prolonged existence. Life ought not to be taken away, even by a Pagan government, except in obedience to the sovereign rule, *salus populi suprema lex*; and it is more especially the bounden duty of the professors of a religion of mercy to be well convinced of the necessity for resorting to the punishment of death, whenever they venture to inflict it.

The question, however, is one of expediency; this is the light in which it ought to be considered; it can be properly regarded in no other. We may throw our doubts into the scale of mercy; but, in whatever the supreme law of public utility can be proved to require, we ought to follow it without the slightest deviation. If it can be clearly shewn to be conducive to social happiness to execute five hundred men annually, five hundred men ought to suffer. If, on the contrary, the public welfare does not demand the death even of one, it is a crime to put that one to death.

The prevailing ignorance on this subject is the more to be regretted in a country, where, as in

England, the ruling powers profess to be guided in great measure by the expression of public opinion. Do I regret this influence? No, I applaud it. It may be attended with temporary inconvenience, but the advantage resulting from it is great and lasting. It is this which constitutes the chief superiority of a free over an arbitrary government, that the former, by imposing upon its subjects more and higher duties, exalts the moral dignity of their nature.

Here I would beg leave to impress upon every one the responsibility which attaches to the expression of his conviction on this subject. It is impossible for him to state his views upon it, either in public or even in private, without contributing something to the formation of that public opinion, which is admitted to be a legitimate guide of government in an enlightened community. If he advocates the abolition of the punishment of death, and it should in reality be expedient, what is he doing? He makes himself a party in weakening the sanctions of morality, of which adequate punishment is indisputably one. He is not only alluring men to their ruin, by removing the restraints upon the commission of crime, but he is exposing to fresh hazard the lives and fortunes of the innocent. If, on the other hand, he supports the continuance of this punishment, and it should really be inexpedient, his conduct is equally, and even more, pernicious. As, in the former case, he is withholding from the innocent the

most effectual means of protection, and depriving the guilty of a motive to abstain from lawlessness, which might have proved adequate to retain them within the bounds of social order. Nor is this all; he is contributing, little indeed, but perhaps all which lies in his power, to hurry prematurely before the judgment seat of Heaven, him who is least prepared to meet his God; to cut off "in the blossom of his sin," that polluted spirit to whom life is more valuable, as a season of repentance, than it is to the innocent,—and this without the imperious demands of public utility, which can alone justify such conduct.

The punishment of death, however painful it may be to resort to it, is indeed fully and fairly defensible, if it can be proved to be necessary for the public good: it is in that case a positive duty to inflict it; but where expediency cannot be pleaded, it is at once morally and politically wrong.

CHAPTER II.

ON THE PUNISHMENT OF DEATH AS AN EXAMPLE.

Multi sunt qui mortem ut requiem malorum contemnunt, et graviter expavescunt ad captivitatem.—*Sallust.*

In considering the comparative expediency of different punishments, it is not sufficient to inquire which is the most exemplary, by which is commonly meant, which inspires the greatest degree of terror. This is not enough; we must consider their collateral, no less than their direct results; we must examine into their remote, as well as their immediate consequences. If that punishment were necessarily the best which excites the greatest fear, we ought to establish the practice of breaking upon the wheel; for it must be admitted, that death accompanied by acute torments, is much more terrible than the unexemplary humanity of a patent drop: we ought to revive the old English punishments of burning alive, boiling alive, and disembowelling alive: but perhaps we might im-

prove even upon these: we ought to search the records of past ages for the refinements of a science too familiar to tyrants, and exhaust the skill of modern invention, in order to discover the utmost possible degree of pain which the human frame is capable of enduring. Happily those who entertain the opinion, that that punishment must be best which is the most exemplary, (and it is held occasionally by even superior men), are not quite so consistent as to go this length.

Breaking on the wheel was indeed a very exemplary punishment; but it was not expedient: and why was it not so? Because the brutalising effects of such horrible spectacles upon public morals produced an evil of such magnitude, as far to outweigh its direct advantages.

Moreover, we must inquire, amongst other things, whether a punishment is a practical one. It is possible that a penalty may be abstractedly good, while the feelings of the people for whom it is intended will prevent them from co-operating in its rigorous enforcement. It is very easy for a government to make penal laws; but, if they offend popular sympathies, evidence will not be forthcoming; and impunity, with its natural consequent, an increase of crime, are certain to ensue.

Death, then, is not necessarily the most beneficial, even if it could be proved to be the most exemplary penalty. The question of its expediency depends

upon various considerations: and especially, upon the character of a people, and the progress made by them in arts and manners. Among wandering tribes, which can have no prisons, or indeed any secondary punishments adapted to the repression of the gravest crimes, it seems to be quite indispensable; and we may presume that it would not have been inflicted among the Jews by Divine authority, if it had not been conducive to the well-being of that community. What rendered it necessary in this instance, was probably the vindictive spirit* of the Jewish nation, combined with the weakness of the government. One great object of the institution of legal punishment, is to supersede the irregularity of private vengeance; and, if the people are very revengeful, and the executive feeble, it is impossible to attain this end without the application of very rigorous, and even vindictive penalties. Mild laws would in such a case be first despised, then abrogated by tacit consent, and individual retaliation would assume their place. By the Mosaic code, the man who accidentally killed another was liable to be put to death by the avenger of blood, unless he submitted to the alternative of banishment, by fleeing to one of the cities of refuge. This singular law, so contrary to modern ideas of justice, is only explicable, by

* Of the Jewish law of divorce it is expressly said, "on account of the hardness of your hearts He gave you this law."

supposing it to have been a concession to the spirit of a fierce and barbarous people, in order to put some check to a greater evil—the excesses of private retribution.

It may be admitted, then, that the punishment of death is beneficial in a rude state of society, when there are no efficient secondary penalties; but it does not hence follow that it continues to be so in a highly advanced stage of civilization, when other and milder modes of restraining crime have been brought to comparative perfection. It is probably true that it is necessary to prevent private vengeance among a cruel people, and under a weak government; but this does not justify its application in a country where the executive is strong, and the people in no wise remarkable for ferocity.

To return to the efficacy of *example*. That is not, as has been already shewn, the only qualification of a punishment; but it is certainly the most material one; and whether death is superior to other penalties in this respect, deserves the gravest deliberation. It may be true, that when very near, and certain to be inflicted, it carries greater terror to most minds than any other punishment. But this is not the point to be decided. It is natural that a penalty, the suffering attending which is all concentrated in a few moments of time, should be more dreaded, on its immediate and certain approach, than one, in which the pain, never very intense, is spread over a long series of

years. The problem to be solved is not, how do offenders regard it after they have committed the crime, and when it is sure to be inflicted, and that immediately; but in what light do they view it, when it appears only as a remote contingency, that is, before they committed the crime; for it is then alone that the threat of the law can operate to any beneficial purpose.

Now it is beyond all doubt, that men will often consent to purchase an exemption from great present suffering at the price of much greater future pain; but the same persons, had they been under no immediate apprehension, would have made the right choice between two evils of different degree. Many cannot make up their minds to submit to a painful surgical operation, although they know it to be the only means of saving their lives: it fills them with too much dread; but, if they had been asked, while yet in perfect health, what would be their conduct under such an alternative, they would have answered, and with the greatest sincerity, that they had rather undergo the operation than resign their lives. In like manner, most criminals ordered for execution, would gladly learn that their sentence had been commuted for imprisonment for life; but this does not prove that the former punishment is more feared than the latter, when both are regarded in distant obscurity, and viewed only as remote contingencies. This may serve as a reply to a very common argu-

ment in favour of capital punishment, which is generally put forward as irresistibly conclusive.

The degree in which the fear of death operates upon different minds, is so various, that it is extremely difficult to pronounce, whether capital punishment or imprisonment for life would be most dreaded by the majority of criminals. But this is certain: there is a considerable number, on whom the apprehension of mortal danger exercises little or no influence. There are many who love peril, as Milton makes Belial love vice, "for itself:" many who court the edge of every precipice; who find that to risk their lives, even without an object, is attended with an excitement which makes a fool fancy himself a hero; and they derive from it matter of boasting to others, and secret applause to themselves. "There is no passion of the human mind so weak, but it mates and masters the fear of death: revenge triumphs over it; love slights it; honour aspireth to it; grief flieth to it; fear pre-occupieth it. Death then is no such terrible enemy, when a man has so many friends about him that may win the victory for him."

The first of English philosophers did not probably mean to imply by this, that death is not in numerous instances an object of the deepest dread; but that there are many minds so constituted as to regard it with great indifference. This it is which renders perpetual imprisonment superior, as an example, to

capital punishment; because, the highest penalty of the law ought to possess the quality of inspiring very great dread to *all*. Perpetual imprisonment does possess this quality; capital punishment does not. Many may be more awed by the fate of the scaffold; others certainly make very light of it: but personal liberty is universally prized; and the loss of it is more equally dreaded than any other penalty that can be invented. Moreover, vanity or fanaticism easily enable men to meet the death of a public execution with intrepidity and firmness; strong minds triumph over it; but these passions will soon be tamed by perpetual imprisonment, accompanied by frequent intervals of solitary confinement:—that will subdue even the most resolute.

Besides this, the example of capital punishment is transient; while that of perpetual imprisonment is durable. The author, on visiting the Maison de Force, at Ghent, in 1833, saw one prisoner who had been confined there upwards of fifty years. Is there not something awfully impressive in such a punishment?—Is this not exemplary? The country which this man inhabited had frequently passed, during this long interval, from the dominion of one nation to that of another: it had been annexed to Austria, to France, to Holland, and lastly it had become independent; it had been ruled by a directory, by a consul, by emperors, and by kings; it had groaned under the rod of despotism, and tasted with relish the sweets of liberty; again

and again had it wept over the horrors of war, and smiled at the return of peace: but these vicissitudes were nothing to him; his lot remained ever the same; his monotonous existence knew no variety; the living tomb which he occupied had been the scene of no change, amid the convulsive revolutions of half a century which stormed around him.

The punishment of this man had been operating as an example during a period so long, that a generation of men had almost passed away; if he be still in existence, it is even now acting beneficially as a warning to others; and the longer he lives, the more awfully striking will it become. What advantages can capital punishment boast of in comparison with this? Mr. Alderman Harmer, who has had more practical experience on the subject than perhaps any other person in this country, concludes his evidence before the Criminal Law Commissioners with these words: "A man is forgotten directly he is hanged, and his friends think no more about him—indeed they do not wish to recall him to memory; but if he is alive, in misery and suffering, all his associates and acquaintances are feeling sympathy for him; and the dread of meeting a similar fate deters others from going on in the same courses."

Transportation cannot be thought of for one moment as a substitute for the punishment of death in the case of the most atrocious crimes. Incarceration for the term of life is the only penalty adapted

to such offences. Let a prison be set apart for this special purpose;—and let the man who may be tempted to break the laws, know this for a certainty, that if he once enters its walls, there will be no pardon, no commutation;—that he will never leave it until he is carried out a corpse! Such a punishment will not only prove more exemplary than any at present in use, but it will be free from those serious collateral evils with which that of death is justly chargeable.

The higher classes of this country (to which members of parliament belong) are led by the circumstances of their position in society to overrate the efficacy of capital punishment. Among them an ignominious death is regarded as the worst of ills; and they commit the common error of judging of the feelings of others by their own. But they ought to reflect, that death is less terrible to those whose poverty debars them from so many of the enjoyments of life; and that the dread of ignominy has little power, after a long course of crime has blunted, if not extinguished, the sense of shame. This may best account for the extraordinary tenacity with which the legislature has clung to sanguinary punishment.

CHAPTER III.

On the liability of the Punishment of Death to be perverted from its original intention—and on its tendency, as an example of Homicide, to encourage Murder.

> "Is it not absurd that the laws, which detest and punish homicide, should in order to prevent murder, publicly commit murder themselves?"
>
> *Beccaria.*

It will be readily admitted by those who have read history with even a moderate degree of attention, that, of the sufferings which have afflicted mankind, by far the greatest portion have sprung from a contempt for human life, and an indifference to its destruction. From this cause have arisen the wars which have desolated the earth, rendering "man fierce and unsociable to man," and the tyranny which has robbed the world of the noblest and most valuable lives. Had it not been for the operation of this feeling, there would have been no fires at Smithfield, no massacre of St. Bartholomew, no reign of terror in the first French revolution; Cranmer would not have been led to the stake in his old age, nor Strafford to the scaffold in the full vigour

of life and usefulness; Lavoisier might have lived to enlighten the world by his science, Condorcet to instruct by his learning, and Malesherbes to improve it by his virtues.

If then it be true (and it surely cannot be questioned) that the light regard paid to human existence in times past, has proved one of the most prolific sources of unhappiness, a wise legislator will be desirous, by all means within his power, to excite, to cherish, to strengthen, and to preserve a higher respect for the sanctity of life, the want of which has been productive of such extensive misery; and it becomes a matter well deserving consideration, whether the abolition of the punishment of death, (supposing it to be practicable) would not contribute in a very material degree to cultivate this salutary feeling.

History is at hand to teach us,—it is folly to refuse the instruction which it offers; it is the part of children to study to no better purpose than to burden their memories with a barren catalogue of dates and names; those who have arrived at the maturity of reason, should turn it to more profitable account. It behoves them, in perusing the records of the past, to analyse the causes of happiness and misery, that we may cling to the one and renounce the other, and that thus future ages may reap the benefit of our having rejected the errors, while we emulated the wisdom, of those which preceded us.

It was proposed in the Constituant Assembly, in May 1791, to abolish the punishment of death. The motion was rejected; and but two years after, more than half of those who voted against it, had themselves perished on the scaffold. This is indeed an awful instance of the fallibility of human foresight, and of the dreadful perversion to which the punishment of death is liable. Little did those unfortunate men imagine, that they were upholding by their votes on that occasion what was afterwards to prove the instrument of their own destruction. Little did they think that on the guillotine which they then decided to maintain, would flow so shortly the blood of a lawful sovereign and of an amiable queen; that sex would plead in vain its weakness, and age its feebleness; that virtue, public or private, instead of being a safeguard to those who practised it, would be noted only with an eye of envy, and singled out for the fatal proscription.

Madame de Stael observes, "Si l'Assemblée Constituante avait aboli la peine de mort, au moins pour les délits politiques, peutêtre les assassinâts judiciaires, dont nous avans été les témoins, n'auraient pas eu lieu."* There is some degree of probability in favour of the supposition of this distinguished writer; for it is by far easier to pervert an existing law to the oppression of the innocent, than to revive for such a purpose an old punishment, which had once

* Considerations sur la Rev. Franc. tom ii. p. 278.

been solemnly abrogated. But let us suppose that the punishment of death had been abolished in France in the year 1700; and that the whole population, existing in that country at the time of the revolution, had been brought up in the idea, inculcated by the laws, that human life was too sacred to be taken away even for the most atrocious crimes: is it likely that a people so long unaccustomed to scenes of judicial bloodshed, so long habituated to regard the life of every citizen as inviolable, to respect it even in the greatest criminals,—is it probable, I ask, that such a people would in 1792, have butchered not only the most innocent, but the worthiest members of their community; and that by hundreds? Is it not rather so improbable as to amount almost to a moral impossibility?

Happily English history has not to deplore the worst excesses of revolutionary anarchy; but it presents a frightful catalogue of judicial murders; some proceeding from the cruelty of tyrants, others from the rage of rival and disappointed parties. And it may be permitted to ask—would the innocent Ann Boleyn, the amiable Sir Thomas More, or the learned and enterprising Ralegh have been delivered over to the executioner, if the capital punishment of felons had not familiarized the minds of men to acts of judicial homicide? If the punishment of death had been previously banished from our laws, would it have been restored that the sacrifice of the

unfortunate Mary Queen of Scots might appease the jealous spirit of her rival? Would Charles, a lawful monarch, have been condemned to death by his own subjects, had the laws pronounced the life of the meanest criminal too sacred to be touched? It is not perhaps too much to assert, that if the scaffold had been previously cast down for half a century, it would not have been re-erected for the execution of these persons.

It may be unnecessary to particularise more instances of the abuse of this punishment: all history teems with such examples; but there is one of so striking and of so awful a character, that I cannot forbear to mention it. The only Being who ever trod this earth in the ways of perfect innocence, the Saviour of the world, himself suffered through the perverted application of this penalty. The Jews did not venture to demand his death of the Roman governor without the forms of law, and without the semblance of justice. In this they would probably have failed; but when Pilate found "no cause of death in Him," they appealed to their own laws denouncing that punishment; they said, "we have a law, and by our law he ought to die." It was thus that the existence of the punishment of death amongst the Jews became the pretext for the greatest of crimes which was ever perpetrated in the world,—that foul deed which is not yet expiated, although the nation which committed it have been wandering for now

near eighteen centuries, exiles and vagabonds upon the face of the earth, a bye-word and a reproach among men, "their own house left unto them desolate."

The high authority of Blackstone may be quoted in favour of the opinion, that the punishment of death is dangerous to liberty. He has the following passage: "We may further observe, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the Decemvirs were full of cruel punishments. The Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the Republic flourished; under the emperors severe punishments were revived, and then the empire fell." It is implied in the above extract that the downfall of Rome was partly to be attributed to the repeal of the Porcian law. No doubt it was: that law formed a barrier against political oppression; when it was abrogated, the limits of despotism were enlarged, the arm of the oppressor was strengthened. Cicero appears to have regarded capital punishment in this light as favourable to tyranny; he exclaims with rapture, in speaking of the Porcian law, "O nomen dulce libertalis! O jus eximium nostræ civitatis! O lex Porcia!"

It has been attempted above, to demonstrate that the punishment of death is dangerous to liberty,

inasmuch as it puts a weapon into the hands of tyrants, of which they have never failed to make abundant use in the oppression of their people. By the abolition of it, despots would be deprived of the means of ridding themselves of such subjects as were obnoxious to them; and the worse tyranny of a revolutionary mob would assume a less sanguinary complexion. Thus should we add a double bulwark to the defences of constitutional freedom.

That the power of inflicting imprisonment may be perverted to despotic purposes, is no doubt true; but the evil is a necessary one, and the danger is infinitely less. Let the patriot but live, the period will probably arrive when he will be set at liberty, and in the mean time, though he be surrounded with guards, and loaded with irons, the fears of a tyrant will not be stilled, the hopes of a people will not be blasted.

Some may perhaps think that we are so secure both from tyranny and sanguinary revolution, that these arguments are entitled to little attention. Have they considered the niceties of the machine of government, and how easily it is thrown into confusion? Have they reflected that all violent revolutions have been unforeseen, and that they have befallen men in the full enjoyment of imagined security? No; the excesses of anarchy are not so far improbable in this country, but that it is wise to consider how they may be rendered less sanguinary

if they should unfortunately occur; and my position is, that the abolition of the punishment of death would contribute powerfully towards this object; for habit is as influential with nations as with individuals, and a people accustomed during a lengthened period to regard the life of every citizen as inviolable, would find it difficult, if not impossible, to overcome this feeling.

The legal existence of this penalty is not only liable to be greatly abused on extraordinary occasions, but in its every day application it tends to encourage indirectly the greatest of those offences which it is ever inflicted to prevent—namely, murder.

Capital punishment resembles crime too closely; it, as well as murder, is deliberate homicide; and it may reasonably be asked—does it act only as an example of terror to deter? may it not also operate as an example of homicide for imitation? If the government abstained from judicial shedding of blood, is it not clear that there would be fewer examples of blood for men to follow? If they pronounced the days of the foulest criminal too sacred to be shortened, is it not probable that an increased regard for the sanctity of life would be the fruit of this forbearance, and that the number of murders would consequently diminish.

The laws establish the principle that there are acts by which man forfeits his right to live. Is this attended with no danger? May not the murderer,

goaded to revenge by a sense of injuries, real or imaginary, reason thus?—The laws teach me that very heinous deeds deserve death; the treatment which I have recently endured is of such a character; and as those laws do not award death as its penalty, I will supply their place—I will make good their defects—I will strike accordingly. Society kills; it sets the example of killing; and it is indeed no matter of surprise if such a sanction of homicide, emanating from so high an authority, should address itself but too forcibly to the minds of those who are already maddened by the frenzy of crime.

To punish murder with death, is to attempt to make life more sacred by taking life away; and to seek to diminish the number of homicides by what must naturally tend to increase them—a public example of homicide. When a parent wishes his children to abstain from certain acts, does he set them the example of similar actions himself? and why is such conduct wiser or more philosophical in a state towards its subjects than it would be in a parent towards his child?

The tendency of capital punishment, as a sanction of homicide, to encourage murder, forms the strongest argument against it. Nothing can be more clearly demonstrable by abstract reasoning; and the practical. proofs of it will be given in a subsequent chapter.

CHAPTER IV.

ON THE TENDENCY OF THE PUNISHMENT OF DEATH TO ENCOURAGE FEELINGS OF VENGEANCE.

"Il y a deux genses de corruption; l'un, lorsqu le peuple n'observe point les lois; l'autre, lorsqu' il est corrompu par les lois: mal incurable, parcequ' il est dans le remède même."

THE asperity of the penal code furnishes a standard of cruelty which regulates the degree of private vengeance, and thereby generates national habits of vindictiveness. Philosophers and statesmen may agree, that the only end of punishment is the prevention of crime; but the multitude regard it otherwise—as inflicted for the sake of retribution. The latter do not consider so much what is necessary for the maintenance of social order, as what the offender deserves; and if the laws, however unintentionally, give rise to the idea that public wrongs *deserve* the infliction of very rigorous penalties, individuals, (whose character is formed in no small degree by the laws under which they live) will imagine that the private injuries which they have received, deserve a

similar retribution; and their revenge will be proportionably excessive. To deprive the guilty of life without any political necessity, is indefensible. To put innocent men to death, would be still more unjust; but the sacrifice of the lives of a few guilty, or even innocent persons, is nothing in comparison with the mischief which is engendered when you encourage vindictive feelings in the whole population. It was a maxim of the great Duke of Sully that good laws and good morals mutually produce each other; and it is equally true, that gentle laws and gentle manners possess a similar reciprocal influence: mild laws produce mild manners, and vindictive enactments make vindictive subjects. If then gentleness be desirable in the character of a people, it should be the aim of legislators to impress upon them such a disposition through the medium of their laws; and the abolition of the punishment of death would probably be followed by this beneficial result:—that it would lower the standard of private vengeance, and thereby diminish the number of those malicious crimes, many of which are the most atrocious in the catalogue of human depravity.

In the reign of Henry VIII. 2000 persons on an average were executed annually. Sir Thomas More tells us that it was not uncommon to see twenty men hanging together on the same gibbet. Now none, it is supposed will deny that so frequent an application of the last penalty of the law is calculated to exercise

a disastrous influence upon the morals of a people, by blunting the finer sympathies of our nature, and by rendering men ferocious and vindictive. But a number, however large, is composed of units; and if the profuse infliction of the punishment of death is attended with demoralizing consequences, it can only arise from the aggregate brutalizing effect of the individual cases in which it is applied; and every single act of recourse to this penalty must be accompanied by the same ill results, though in an extremely minuter degree, as in the instance of its very frequent application. The only difference is, that in the former case, the amount of evil is too small to be detected by observation; in the latter it is easily distinguished, and becomes a matter of general notoriety.

But it is more especially in offenders themselves, that the punishment of death produces a savage barbarity of despotism—it arises from this cause; the dreadful fate with which they are threatened hardens them to the sufferings of others; and when it is recollected that society becomes the sufferer from the inhumanity of criminals, this must be acknowledged to form a strong argument in favour of the mitigation of the law.

That the spectacle of a human being strangled in cold blood, instead of eradicating bad principles, and strengthening good resolutions, serves rather to brutalise and to deprave, seems to be, now at length,

generally admitted; and a little further reflection might perhaps convince us that to read the burial service over a living man, would be in better keeping with the dreams of an enthusiastic madman, than with the practice of a sober and reflecting people. Indeed it is not impossible that a strong effort of our reasoning faculties might carry us to the conclusion, that to make a criminal pray for his daily bread, a few minutes before his execution, is rather to expose religion to scoffs and ridicule, than to use it as an instrument of edification! If to put a man to death is properly made a religious ceremony, would it not be better that it should take place on Sunday, as a substitute for one of the usual services?

A deep conviction of the prejudicial effects of such spectacles has induced the legislature of Pennsylvania to ordain that every execution shall take place within the walls of a gaol, attended only by the necessary officers, and by a jury chosen to witness it under their own hands. The Archbishop of Dublin has recommended the same plan in this country; the adoption of which would remove one great objection to the punishment of death, as at present inflicted. The only argument commonly advanced against such a measure is, that it might prove inimical to liberty, like the secret executions of Venice. This, however, is sufficiently obviated by the attestation of a jury freely chosen; and, as the public mind is not yet prepared for the total

abolition of the punishment of death, however desirable that may be, it would be wise to do away with the publicity of executions immediately; for the evil is one of such magnitude as to call loudly for a prompt remedy. The horrid spectacle of the deliberate and cold blooded homicide of the scaffold is exemplary the wrong way: it encourages where it should deter: the apparent apathy, so often exhibited by the condemned, hardens the profligates who behold them, and strengthens them in the opinion which they are most anxious to confirm, that the fate to which they expose themselves need inspire them with little fear, when they find by ocular demonstration that it can be met with such stoical indifference. It works demoralization instead of amendment: those who frequent such scenes will soon learn to look upon the last agonies of a violent death without emotion; and, this callousness of feeling once attained, they are prepared for the commission of the grossest cruelties. Such an exhibition indurates and brutalises the bad, while it scandalises and disgusts the good. Whatever be the demeanour with which the criminal meets his end, the effect must be injurious: if he display a Christian penitence, the pity of the spectators is roused, and pity for the criminal is akin to hatred of the laws; if he shew insensibility, it removes, instead of exciting, terror; if he conduct himself with fortitude, the man, who but a few moments before was

detested for his crimes, is now admired and extolled for his heroism.

There is one argument against the punishment of death, which has perhaps been less noticed by writers upon the subject than it deserves. Whatever you inflict as a legal penalty, you teach men to fear. But is it wise to teach men to fear death, when probably none can pass through their existence in the full discharge of their duties, without, on some occasion or other, either in a greater or less degree, exposing their lives to hazard? This objection is as well stated in few words as in many, but it ought to be maturely considered.

CHAPTER V.

ON THE IRREPARABLE NATURE OF THE PUNISHMENT OF DEATH.

CAPITAL punishment is irremissible; so that, where an innocent man is unjustly put to death, the fatal error is irreparable. This is a very serious defect; and one from which perpetual imprisonment is comparatively free. Were that the punishment awarded by the law for the most atrocious crimes, a mistake, if committed, might be in a great measure, if not wholly repaired. The prisoner would, on his innocence being proved, be immediately set at liberty, and some compensation might be made to him for the sufferings which he had unjustly endured. Penal enactments are framed for the punishment of the guilty; and when, through perjured evidence, or erroneous reasoning from circumstantial proof, they strike the peaceable and orderly, it would be a happy thing to be able to apply even a partial remedy to an evil, which, in consequence of the fallibility of human tribunals, it is impossible entirely

to prevent. "When the innocent become the victims of the law," says Sir Samuel Romilly, "the law is not merely inefficient; it not merely fails of accomplishing its intended object, it injures the very persons it was meant to protect, it creates the very evil it was to cure, and destroys the security it was made to preserve." When death is the penalty inflicted, we may indeed lament the gross injustice which has been committed; but this is of no avail, and it is too late to correct the error.

If any should be inclined to suppose that the justice of this country is at present administered with so much caution as to render erroneous judgements in capital cases next to impossible, they will soon be disabused of this mistake, if they will take the trouble to read the evidence of Sir Frederic Pollock, Mr. Alderman Harmer, and Mr. Wilde, in the Appendix to the Second Report of the Criminal Law Commissioners. Mr. Wilde was sheriff of London in the year 1828, and in the space of eight or nine months, while he filled that office, five persons, actually ordered for execution, were respited on the ground of innocence, in London and Middlesex alone. In the case of two of them, (Anderson and Morris), Mr. Wilde says:—

"After several communications with Sir Robert Peel, and not until half-past eleven o'clock on the night before they were to have been hanged as on the following morning, was I able to procure a

reprieve. If I had not had the assistance of the governor of the prison, (the late Mr. Wontner), and his deputy, (Mr. Barrett), the facts and circumstances establishing the innocence of those prisoners would never have been made to appear."

These men afterwards received a free pardon.

The following extract is from Mr. Alderman Harmer's evidence.

"Some years ago, a young man was capitally convicted upon the clearest possible evidence: I conducted the prosecution against him, and could not imagine that there was any doubt of his guilt; but the young man protested his innocence, and communicated facts to the then governor of Newgate which impressed him with the belief that the young man was innocent; and he begged me to see him. I heard the young man's statement, and commenced a minute inquiry into the circumstances, and I was at length satisfied that he was innocent. I consequently memorialized the secretary of state, but it was not without great difficulty I obtained his pardon, after he had been ten months in Newgate under sentence of death."

Mr. Harmer gives another instance, where execution actually took place.

"I remember another case, where, in a little more than forty-eight hours, enough could have been shewn to justify a suspension of the judgment; but the men were executed before I had time to investi-

gate. Directly I began to make inquiries, fact upon fact was developed, which would not only have justified a suspension of punishment, but would doubtless have obtained for the unfortunate men a free pardon."

Sir Frederic Pollock mentioned an execution of a man for murder, and whom he believed to be entirely innocent.

"I remember a case of a conviction for murder on the Northern circuit; the precise year I do not now recollect, nor am I desirous to name either the individual, or the judge who tried him; but I have the strongest impression that the man was convicted, being entirely innocent, the death not being at all satisfactorily accounted for as a case of murder, either in respect of the motive of the prisoner, or the means by which he had committed the crime; and I thought then, that if the attention of the jury had been called by the speech of counsel to the circumstances, the result would probably have been very different. The man was executed, and to the last persisted in declaring his innocence, and in stating *that* to be the truth, which was the view of the case taken by several gentlemen at the bar at the time. I remember in particular, one counsel who was present, and who is now a distinguished ornament of the bench, agreed with me entirely on the view I took."

It is probable, that the granting counsel to prisoners

in cases of felony will contribute something to prevent the recurrence of unjust executions; but none can suppose that it will guard against them effectually. Human tribunals cannot be made infallible by any regulation whatever. Where a man, who has previously borne a good character, gives perjured evidence, and nothing transpires to throw suspicion upon his testimony, the jury must believe it, and if they find guilty, the judge must condemn. Neither judge nor jury are censurable in such a case. Again, if the prosecutor, being a credible person, swears positively to the identity of the accused, but is in reality mistaken, and the prisoner was so near the spot where the crime was committed, that, from that or other circumstances, he is unable to prove an alibi, judgment will probably be given against him; and in such cases as these, no speech of counsel for the defence can be of the slightest avail to avert an unjust conviction. There have been such instances; and no precautions, however wise, can prevent their happening again.

Sir Frederic Pollock also mentions the cases of the men who were rescued from impending destruction by the humane exertions of Mr. Wilde.

"During the seven months he (Mr. Wilde) was in office, by his exertions he saved several men from public execution. I think as many as seven; but I am certain as to five. I had frequent communications with him upon those cases while they pro-

ceeded. My impression is, that several out of those cases were cases of perfect and entire innocence, and that the others were cases of innocence with reference to the capital part of the charge. The then secretary of state, Sir Robert Peel, paid great attention to every application for mercy, and having satisfied himself in each case that the prerogative of the Crown ought to interfere, the lives of every one of the individuals were spared. It is impossible to speak in too high terms of the zeal, humanity, unsparing labour and expense which Mr. Wilde bestowed upon those occasions, but the result satisfied me that the parties were in several instances guiltless of any crime, and in all the cases were such as did not justify capital punishment, and Sir Robert Peel after much labour in the investigation was of the same opinion. It has always, since this occurred, been impressed upon my mind as a very appalling fact, that, in one year, so many persons were saved from public execution, for which, I believe, most, if not all of them, had been actually ordered."

The case of Ellis is more recent than those mentioned by the witnesses examined by the criminal law commissioners. He was sentenced to death for housebreaking, and had it not been for the humane exertions of private individuals, and the prompt attention which Lord Melbourne (then at the Home Office), paid to the exculpatory affidavits which were laid before him, the man must inevitably have suf-

fered. He had been ordered for execution on Tuesday the 9th of April, 1831, and was respited on the ground of innocence, on the evening of Saturday immediately preceding.

Another instance occurred at Exeter last year. Two men, Oliver and Galley, were convicted and sentenced to death for a very atrocious murder: Oliver confessed his own guilt and was executed, but asserted the entire innocence of his fellow prisoner, and persevered in the same statement up to the last moment of his existence. This, combining with other circumstances to raise doubts as to the guilt of Galley, he was respited first from time to time, and lastly during his Majesty's pleasure. It is generally supposed that he succeeded fully in proving an alibi; but, as the Home Office is a secret court of appeal, it is difficult to know with certainty whether such was actually the case. We may, however, fairly presume, that a man, legally convicted of a very bad murder, would not have been spared, unless there had existed strong grounds for doubting his guilt, although perhaps the disclosures may not have been such as to establish his perfect innocence of the charge.

It is impossible not to be struck with the fact, that most of the men who have been saved from an undeserved death, have owed their escape to circumstances which must be considered as accidental. The interference of private individuals in such a case, is a

fortunate chance, which is not likely often to occur; and probably few Sheriffs of London would be able to bring to the investigation of such a matter the talents and perseverance of Mr. Wilde; and it is therefore presumable that the few, whose guiltlessness of the crime for which they were executed has been afterwards proved, bear a very small proportion to the number of these, whose innocence will never be discovered until the "secrets of all hearts shall be revealed." Whose interest is it to prove that a man has been wrongfully put to death? It is not the interest of the magistrate who committed, or of the judge who summed up for a conviction, or of the jury who found guilty, or of the witnesses who gave testimony against him. All these parties, although totally unconscious of any improper bias, must naturally be reluctant to believe that they have been instrumental in committing so dreadful an error. Is it the interest of his friends? Perhaps he has none: possibly, although innocent of any atrocious breach of law, he is an offender himself, and his honest friends have repudiated him immediately on his commencing a career of crime, so that the persons most likely to be in possession of the facts which would establish his innocence may be criminals themselves —men, naturally reluctant under any circumstances to come forward on such an occasion, whose testimony would be little attended to, even if offered, and who may frequently be induced to withhold it

by the fear, lest the disclosure of another's innocence might lead to the discovery of their own guilt or that of their associates, while it could be of no use to their companion, who had already suffered.

The innocent have fallen the victims of the executioner; and if the capital punishment be retained, the same causes must produce the same effects,—the innocent must suffer death again, and there will be nothing left to us but vain regrets to repair the irrevocable wrong.

CHAPTER VI.

Proofs of the Inexpediency of the Punishment of Death, drawn from the Mitigation which has recently taken place in England and Wales.

"For is it found upon further experience, that capital punishments are more effectual?"
Blackstone, Com. vol. iv. p. 10.

THE reign of his present Majesty is no less remarkable for the removal of many capital enactments from the Statute Book, than for the sparing infliction of the punishment of death, where it still continues to be authorised by the laws of the country.

Had this change been effected at the sacrifice of the best interests of society; had the legislature and the executive, in assuaging the rigour of our criminal laws, offended against that sovereign maxim, *salus populi suprema lex*; had they thereby diminished social security, and increased at the same time the spread of demoralization—then would all wise and good men have been forced to impute blame where they would more gladly have conferred praise. Such however is not the case; on the contrary, the success

of the policy which has been pursued on this subject, is capable of the fullest proof. The following numbers, compiled from official returns, demonstrate it even to superfluity.

ENGLAND AND WALES.
BURGLARY AND HOUSEBREAKING.

3 years ending with		1829,	executed	38,	committed	2667
3 years	,,	1832,	,,	18,	,,	2632
3 years	,,	1835,	,,	2,	,,	2134

Here then we have a large decrease of executions in each of the last two periods, and at the same time a falling off in the amount of crime. It is in the last three years, when only two persons suffered, that we find the greatest diminution in the number of commitments.

HORSE STEALING—ENGLAND AND WALES.

6 years ending with		1829,	executed	38,	committed	1140
6 years	,,	1835,	,,	none,	,,	1121

To what purpose were the lives of these 38 men sacrificed, when subsequent experience has fully proved that the crime may be as effectually restrained by a secondary penalty?

FORGERY—ENGLAND AND WALES.

3 years ending with		1829,	executed	15,	committed	213
3 years	,,	1832,	"	none	"	180
3 years	,,	1835,	"	none	"	214

Immediately after the punishment of death ceased to be inflicted for forgery, the crime diminished. The commitments have since increased up to the

point at which they stood, when executions were still frequent. This, however, must be attributed either wholly or chiefly to a greater willingness to prosecute, now that the crime is no longer capital. Mr. Alderman Harmer states, in a letter to the Marquis of Lansdowne, published in the Second Report of the Criminal Law Commissioners, that he could not calculate, even within a hundred, the number of compromised forgeries which had come within his own knowledge.

COINING—ENGLAND AND WALES.

4 years ending with	1828,*	executed	7,	committed	42
4 „	„	1835,	„	none „	41

ROBBERY—ENGLAND AND WALES.

4 years ending with	1831,	executed	29,	committed	1490
4 „	„	1835	„	13, „	1495

SHEEP STEALING—ENGLAND AND WALES.

3 years ending with	1831,†	executed	7,	committed	787
3 „	„	1835,	„	none „	716

The above calculations are for England and Wales. It is, however, in London and Middlesex, that we find the greatest change from extreme severity to lenity; and it is precisely there, that there has been the greatest decrease of the higher offences. In the two years 1828 and 1829, no less than 46 persons

* 1828 was the last year in which an execution for this offence took place.

† This was the last year in which there was any execution for sheep stealing.

were executed in this one county alone; and the commitments for offences then capital, were 679. In the last two years for which the returns have been printed—viz. 1834 and 1835—there was no execution whatever, and the commitments for the same crimes (many of which have since ceased to be capital) were only 545,—shewing a diminution of 134 in the period when there was no execution, as compared with that when they amounted to 46.

I have now to notice a most striking circumstance, which well deserves the attention of all to whom the framing or the administration of the laws is confided. Out of the smaller number of commitments in the latter period of lenity, 352, or 65 in 100, were convicted; while out of the larger number of commitments in the former period of severity, the convictions were only 299, or 44 in 100. If we deduct piracy, which is a crime of irregular occurrence, for which an unusually large number were committed in the first period, all of whom were acquitted, and which ought, I think, in fairness to be omitted, the statement will stand thus:—

LONDON AND MIDDLESEX—OFFENCES CAPITAL IN 1828-9.

	Executed.	Committed.	Convicted.	Proportion Convicted.
1828 and 1829	46	632	299	0·47
1834 and 1835	none	543	352	0·65

After all allowances which can reasonably be

required, the result is sufficiently decisive in favour of mild legislation: not only has crime greatly decreased; but owing to a greater willingness on the part of prosecutors, witnesses, and jurors, to aid in the enforcement of the law, the punishment of the guilty has become much more certain.

These facts are simple, intelligible, and conclusive. I shall therefore content myself with putting one question; and I beg the reader's attention to it. When the punishment of death, which like all other punishments, is an appeal to interest to abstain from crime, is proved to possess no superiority over a secondary penalty, in the case of offences prompted by motives of interest, and where the delinquent shews by the very character of the crime that he is open to an appeal to interest—upon what principle can it be supposed to be more effective in deterring from deeds of blind passion, such as vindictive murder, arson, or rape, where the very nature of the act proves that the offender is little likely to attend to any suggestions of cool calculation? Let this question be answered!

CHAPTER VII.

PROOFS OF THE INEXPEDIENCY OF THE PUNISHMENT OF DEATH FOR MURDER.

"For ~~it is proved~~ upon farther experience, that capital punishments are more effectual."

Blackstone Com. vol iv. p. 10.

TUSCANY.

The Grand Duke Leopold, on his accession to the throne of Tuscany in 1763, suspended the punishment of death; and in an edict, by which he promulgated a new code in 1786, formally abolished it. In that edict, of which the following are extracts, he states that the experiment had been attended with the most complete success.

Extracts from an Edict of the Grand Duke of Tuscany in 1786.

PREAMBLE.

"Since our accession to the throne of Tuscany, we have considered the examination and reform of the criminal laws as one of our principal duties; and having discovered them to be too severe, in

consequence of their having been founded on maxims established either at the unhappy crisis of the Roman Empire, or during the troubles of anarchy; and particularly that they were by no means adapted to the mild and gentle temper of our subjects; we set out by moderating the rigour of the said laws, by giving injunctions and orders to our tribunals, and by particular edicts abolishing the pain of death, together with the different tortures and punishments, which were immoderate and disproportioned to the transgressions and contraventions to fiscal laws; waiting till we were enabled by a serious examination, and by the trial we should then make of these new regulations, entirely to reform the said legislation.

"With the utmost satisfaction to our paternal feelings, we have at length perceived, that the mitigation of punishment, joined to a most scrupulous attention to prevent crimes, and also a great dispatch in the trials, together with a certainty and suddenness of punishment to real delinquents, has, instead of increasing the number of crimes, considerably diminished that of the smaller ones, AND RENDERED THOSE OF AN ATROCIOUS NATURE VERY RARE."

SECTION 51.

"We have seen with horror the facility with which, in the former laws, the pain of death was decreed, even against crimes of no very great

enormity; and having considered that the object of punishment ought to consist in the satisfaction due either to a private or public injury; in the correction of the offender, who is still a member and child of the society, and of the state, and whose reformation ought never to be despaired of; in the security, where the crime is very atrocious in its nature, that he who has committed it shall not be left at liberty to commit any others, and finally in the public example; and that the government in the punishment of crimes, and in adapting such punishment to the objects towards which alone it should be directed, ought always to employ those means which, while they are the most efficacious, are the least hurtful to the offender—which efficacy and moderation we find to consist more in condemning the said offender to hard labour than in putting him to death; since the former serves as a lasting example, and the latter only as a momentary object of terror, which is often changed into pity; and since the former takes from the delinquent the possibility of committing the same crime again, but does not destroy the hope of his reformation, and of his becoming once more a useful subject; and having considered besides, that a legislation very different from our preceding one, will better agree with the gentle manners of this polished age, and especially with those of the people of Tuscany, we are come to a resolution to abolish, and we actually abolish for ever, by the present law, the

pain of death, which shall not be inflicted on any criminal, present, or refusing to appear, or even confessing his crime, or being convicted of any of those crimes, which in the laws prior to these we now promulgate, and which we will have to be absolutely and entirely abolished, now styled capital."

Four years after the promulgation of his new code, Leopold was called to the empire of Austria; and soon after that, owing to the general alarm excited by the breaking out of the French revolution, the punishment of death was re-enacted for treason and murder. Mr. Charles Lucas, Inspector-general of the prisons of France, wishing to be informed as to the results which followed the revival of capital punishment in Tuscany, after a discontinuance of near thirty years, applied to M. Berlinghièri, the Tuscan minister in Paris, and received the following reply:—

"Il n'y a pas de doute que l'humanité de la legislation pénale de Léopold, et en particulier l'abolition de la torture et de la peine de mort, n'ait été suivie pour la Toscane des résultats les plus satisfaisans. Je ne sais pas si sous son règne il ne s' est pas commis plus de cinq assassinats; mais ce que je sais bien, c'est que ces délits de tout genre ont été beaucoup plus rares alors qu' avant et qu' après.

"Sous le règne de Ferdinand commença la révolution de France, et les effets désastreux s'en firent bientôt sentir dans les autres pays. On crût nécessaire de rétablir en Toscane la peine de mort, seulement pour les crimes directs contre l'état et pour les assassinats prémédités. Je ne crois pas cependant que personne ait été exécuté avant l'occupation de la Toscane par les Français, et pas plus d'une ou deux fois après le retour de Ferdinand. Pendant l'occupation Française les executions out été assez fréquentes. La menace de la peine de mort dans les deux cas indiqués subsiste encore; mais l'application est très rare, quoique les crimes ne le soient pas tant qu'autrefois, et il faudrait des cas excessivement odieux pour que la grace n'intervînt pas."—*Lucas de la Peine de Mort, p.* 359.

I leave the reader to attach what credit he thinks fit to this statement of M. Berlinghièri. It is probable that he was correct when he asserted that murders have been more frequent in Tuscany since the revival of capital punishment, than they were during its discontinuance; but his letter cannot in strictness be considered as proof of the fact. The edict of the Grand Duke furnishes evidence of a very different character: it is an official document; and where it is stated that crimes of an atrocious nature had become very rare since the suspension of the punishment of death, murder, which is the most atrocious, must of course be included.

Let us now proceed to other instances.

Bombay.

During seven years that the late Sir James Mackintosh presided as judge in the supreme court of Bombay, there was no capital execution for any crime whatever; and the convictions for murder were only six. In the preceding seven years there were twelve executions; and the convictions for murder amounted to sixteen.

The charge of Sir James Mackintosh to the grand jury of Bombay, which contains this fact, is so important a document, as connected with my subject, that I am induced to give that part of it which relates to the infliction of capital punishment at full.

Extract from the farewell charge of Sir James Mackintosh to the grand jury of the supreme court of Bombay, delivered on the 20th of July, 1811.

"The second circumstance which I think myself now bound to explain, relates to the dispensation of penal law.

"Since my arrival here, in May 1804, the punishment of death has not been inflicted by this court.

"Now the population subject to our jurisdiction, either locally or personally, cannot be estimated at less than 200,000 persons.

"Whether any evil consequence has yet arisen

from so unusual (and in the British dominions so unexampled a circumstance, as the disuse of capital punishment for so long a period as seven years, among a population so considerable) is a question which you are entitled to ask, and to which I have the means of affording you a satisfactory answer.

"The criminal records go back to the year 1756.

"From May, 1756, to May, 1763, the capital convictions amounted to 141, and the executions to 47. The annual average of persons who suffered death was almost seven, and the annual average of capital crimes ascertained to have been perpetrated was nearly 20.

"From May, 1804, to May, 1811, there have been 109 capital convictions [illegible] annual average, [illegible]re, of capital crimes legally proved to have been perpetrated during that period, is between 15 and 16. During this period there has been no capital execution.

"But as the population of this island has much more than doubled during the last fifty years, the annual average of capital convictions during the last seven years ought to have been 40, in order to shew the same proportion of criminality with [illegible] of the first seven years. But between 1804 and 1811, 500 European officers, and probably 4000 European soldiers, were scattered over extensive territories. Though honour and morality be powerful aids of law with respect to the first class, and military discipline

with respect to the second, yet it might have been expected, as experience has proved, that the more violent enormities would be perpetrated by the European soldiery, uneducated and sometimes depraved as many of them must originally be, often in a state of mischievous idleness, commanding, in spite of all care, the means of intoxication, and corrupted by contempt for the feelings and rights of the natives of this country.

"If these circumstances be considered, it will appear that the capital crimes committed during the last seven years, with no capital execution, have, in proportion to the population, not been much more than a third of those committed in the first seven years, notwithstanding the infliction of death on 47 persons.

"The intermediate periods lead to the same results.

"The number of capital crimes in any one of these periods does not appear to be diminished either by the capital executions of the same period, or of that immediately preceding. They bear no assignable proportion to each other.

"In the seven years immediately preceding the last, which were chiefly in the presidency of my learned predecessor, Sir William Syer, there was a very remarkable diminution of capital punishments. The average fell off from about four in each year, which was that of the seven years before Sir William Syer, to something less than two in each year. Yet

the capital convictions were diminished about one third.

"The punishment of death is principally intended to prevent the more violent and atrocious crimes.

"From May, 1797, there were 18 convictions for murder, of which I omit two, as of a very particular kind. In that period there were 12 capital executions.

"From May, 1804, to May, 1811, there were six convictions for murder, omitting one which was considered by the jury as in substance a case of manslaughter with some aggravation. The murders in the former period were, therefore, very nearly as three to one to those of the latter, in which no capital punishment was inflicted.

"From the number of murders, I of course exclude those cases in which the prisoner escaped, whether he owed his safety to defective proof of his guilt, or to a legal objection. This cannot affect the justness of a comparative estimate, because the proportions of criminals who escape on legal objections, before courts of the same law, must, in any long period, be nearly the same.

"But if the two cases—one, where a formal verdict of murder, with a recommendation to mercy, was intended to represent an aggravated manslaughter; and the other of a man who escaped by a repugnancy in the indictment, when, however, the facts were more near manslaughter than murder—be

added, then the numbers of the last seven years will be eight, while those of the former seven years will be sixteen.

"This small experiment has, therefore, been made without any diminution of the security of the lives and properties of men. Two hundred thousand men have been governed for seven years without a capital punishment, and without any increase of crimes. If any experience has been acquired, it has been safely and innocently gained."

FRANCE.

For this country we have now criminal returns for ten years, from 1825 to 1834 inclusive. It is much to be regretted that the statistics of crime and punishment have been so little attended to until of late years. They supply the most valuable information to the moral philosopher; and without them it is impossible to determine, with sufficient accuracy, what results have followed the transition from the infliction of one punishment to that of another.

On examining these returns, I found that the executions for murder had latterly diminished in the proportion of two to five. I then looked to the number of trials for that crime, in order to ascertain whether an increase or diminution of the offence has accompanied the substitution of a secondary penalty, in the great majority of cases where death was

formerly inflicted. If the punishment of death does really deserve that pre-eminence which is generally ascribed to it, its superiority must be in proportion to the frequency of its infliction for a given crime. It would be ridiculous to suppose it to be more effective than other penalties,—and yet to maintain that it is equally beneficial, whether you execute all who are convicted of murder, or only the half of them. This would be absurd. If, therefore, I can shew that a large decrease in the amount of executions for murder, has been accompanied by no increase of the crime, that must be admitted to form a fair argument against the punishment of death, and a legitimate proof of the possibility of supplying its place by a secondary penalty without danger to personal security.

In the five years ending with 1829, there were 1182 trials for assassinat, empoisonment, and parricide (all murders), and 352 executions for those crimes. In the following five years, ending with 1834, the executions for murder were only 131; and the crime, instead of increasing, had slightly diminished; the number of trials being 1172.

BELGIUM.

In this country there were executed in the four years ending with 1829, seventeen persons. The returns do not specify the crimes for which they

suffered; but it is probable that all, or nearly all, of them were murderers. In this period there were forty-five trials for murder. In the following five years ending with 1834, there was no execution whatever, and the trials for murder were forty-three.

Let us, however, omit 1830. That was a year of revolution; and the usual course of justice was so much disturbed, that it is probable that many crimes escaped prosecution. This is the opinion of persons well competent to judge of such a matter. It would have been more favourable to my argument to have included this year; but I think it ought in fairness to be omitted. The statement will then stand thus:

	Executions for all crimes.	Trials for murder.
4 years ending with 1829	17	45
4 years „ 1834	none	41

PRUSSIA, INCLUDING THE RHINE PROVINCES.

There are no printed criminal returns in Prussia; but the minister of justice, Herr Von Kamptz, with a degree of kindness and liberality which I cannot sufficiently acknowledge, furnished me, during my stay at Berlin in 1835, with the statistics of capital convictions and executions from 1818 to 1834 inclusive.

In these seventeen years there were in all 123

executions; and the crimes, for which they took place, are as follows:—

Arson - - - - - -	1	Total 123.
Voluntary Manslaughter - - -	22	
Murder - - - - - -	100	

The one execution for arson was in 1818,—since which time, consequently, the punishment of death has been inflicted only for intentional homicide of different degrees. Even for murder the sentence was nearly as often commuted as executed. In the whole of the seventeen years, there were sentenced to death for that crime 187 persons, of whom only 100 suffered.

On receiving these documents, I immediately proceeded to examine, whether the convictions for murder had increased or diminished, as the punishment of death had been more and more rarely inflicted. In doing so, I omitted the first two years, 1818 and 1819, in order to get a number divisible into equal parts; and then divided the remaining fifteen years into three periods of five years each. The following table gives the result,—

MURDER.

5 years ending with	1824,	capitally convicted	69,	executed	47
5 years „	1829,	„	50,	„	26
5 years „	1834,	„	43,	„	16

The proportion of executions to convictions was, in the first period, 0·68, in the second, 0·51, and in

the third, 0·37. Here there is a diminution of executions in each of the two latter periods, and at the same time a decrease of crime. If we compare the two extreme periods, we find *one third fewer murders* in the last with only sixteen executions, than in the first with forty-seven.

I have now produced five instances in which the punishment of death for murder has been either totally suspended, or very rarely inflicted. They all rest on official information: that of Tuscany, on the edict of the Grand Duke; that of Bombay, on the published charge of Sir James Mackintosh to the grand jury; those of France and Belgium, on the printed criminal returns for those countries; and that of Prussia, on documents supplied to myself by the minister of justice at Berlin. In all these cases a diminution of murders has taken place at the same time with the mitigation of punishment.

I now challenge the advocates of judicial extermination to bring forward *one single instance* of an opposite result, viz., where an increase in the number of murders has accompanied the discontinuance or very rare application of the punishment of death for that crime. I defy them! They cannot do it.

CHAPTER VIII.

ON THE TENDENCY OF THE PUNISHMENT OF DEATH TO PRODUCE IMPUNITY.

"Il ne faut point mener les hommes par des voies extrêmes, on doit être ménager des moyens que la nature nous donne pour les conduire. Qu'on examine la cause de tous les relâchements; on verra qu'elle vient de l'impunité des crimes, et non pas de la modération les peines."
Montesquieu De l'esprit des loix, liv. vii. chap. xii.

It must be universally acknowledged, that it is better that all offenders should be visited with moderate chastisement, than that some should be punished with severity, if that severity lead to the total escape of others.

The reason is obvious—the impunity of criminals is more powerful for the production of crime, than severity of punishment is found efficient for its repression. It is needless to prove what no one will deny.

The different ways in which capital punishment leads to impunity are as follows: those who are

privy to a crime will often, through pity, keep the offenders secret; witnesses may occasionally be induced to suppress or soften their testimony in favour of a relation, a friend, or even an acquaintance; the injured, through compassion, will sometimes forbear to prosecute; and it happens not unfrequently, that, after they have commenced a prosecution, they will abandon it at a ruinous pecuniary sacrifice, by the forfeiture of their recognizances, rather than be instrumental in enforcing a law which lacerates their feelings: "juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence; and judges, through compassion will respite one half the convicts, and recommend them to the royal mercy. Among so many chances of escape, the needy and hardened offender overlooks the multitude that suffer: he boldly engages in some desperate attempt to relieve his wants or to supply his vices; and if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate in falling at last a sacrifice to those laws which long impunity had taught him to contemn."

It appears from this passage that in Blackstone's time, half the convicts sentenced to death were executed; and nevertheless he complains of the encouragement which the uncertainty of the law gave to crime, from the hopes which it excited. How much stronger must those hopes be now, when not

one in twenty of those sentenced to death is executed!

The following calculations have been made from the official criminal returns. They serve to strengthen, by statistical proof, the opinion of Montesquieu, of Romilly, and other celebrated writers on criminal jurisprudence—that the excessive rigour of a law begets impunity.

They present to us those striking facts—1st. that the convictions for capital offences are much less numerous than for those which are not capital. 2ndly, that in the case of capital offences for which executions are most frequent, the convictions are the fewest. 3rdly, that comparing the same crimes during different periods, when the executions diminish, the convictions increase, and when the executions increase, the convictions diminish.

Whence is this dependence of the number of convictions upon that of executions? It is to be accounted for thus:—men naturally feel a strong reluctance to become instrumental to the death of a fellow-creature; accordingly, where the danger that the life of the accused will be taken away is greatest, the most are acquitted; where that danger is less, fewer; and where that danger does not exist, the fewest.

Let us first compare the proportional number convicted on capital, with those on non-capital charges, during the year 1835.

ENGLAND AND WALES.

Proportion convicted in non-capital cases - - -	0·72
Ditto in capital cases - - - -	0·49
Difference - - -	0·23

Thus we find that 23 more, out of every hundred committed for trial, escape on capital than on non-capital charges. Does not this afford a reasonable presumption that the punishment of death produces great impunity through the reluctance felt by prosecutors, witnesses, and jurors to contribute to the taking away of human life?

Let us now omit the crimes of robbery and burglary, which are at present very rarely punished with death, as well as letter-stealing and sacrilege, which have since ceased to be capital. The crimes which remain will be chiefly those which are most likely to be visited with the capital penalty.

ENGLAND AND WALES.

Proportion convicted in non-capital cases - - -	0·72
Ditto in capital cases, exclusive of robbery, burglary, letter-stealing, and sacrilege - - -	0·30
Difference - - -	0·42

It is undoubtedly true that the higher capital crimes are generally more difficult of proof than inferior offences, but this is not sufficient to account for so great a difference. For arson in 1835, but 10 were convicted out of 67 committed; for rape 4 out of 56; for murder 25 out of 78. The convictions

for the last crime were in 1835 much higher than the average proportion of late years, which is about 21 out of 100 committed. The criminal law commissioners seem, from a question which they put to one of the witnesses whom they examined, to have supposed that the large number of acquittals for murder could be accounted for by supposing that many who appear in the returns as acquitted of that crime, were convicted of manslaughter. This I believe to be a mistake. I have been informed on authority on which I can rely, that criminals are always entered in the returns under the offence of which they were convicted. If a man is committed for murder and found guilty of manslaughter, he does not appear among the acquittals for murder; but he is entered as committed and convicted of manslaughter: were this not the case, the same person would be entered twice.

It is a common saying that "murder will out!" but nothing, I fear, is less true. How many persons are murdered whose bodies are never found; and how often does it occur that coroners' juries give a verdict of murder against some person or persons unknown: and no facts are elicited then or after to throw suspicion upon any one! These are melancholy reflections; and they become still more so when we find that where sufficient evidence is collected to send men to trial, but one in five is convicted. Many of those who are acquitted may be

perfectly innocent; but it can never, or very rarely, happen that a man is committed for murder, when no murder has been perpetrated by any one; he may not be guilty; but the crime of which he was accused, has nevertheless been committed, and it remains undetected and unpunished.

Whence arises this alarming failure of justice in the case of the most atrocious and most dangerous crime? It cannot be accounted for by a reluctance of juries to find guilty; for in a clear case of murder no such reluctance exists. It proceeds chiefly from this cause:—testimony is not forthcoming upon which a conviction can properly take place. In the majority of cases of murder you are dependent for evidence upon the friends or acquaintance of the criminal; and if they suppress the facts within their knowledge, impunity must be the consequence. Now can we reasonably expect, according to any known principles of human character, that many will not rather connive at the escape of a friend or acquaintance than assist in bringing him to punishment, when that punishment is death, who would nevertheless have been ready to denounce him had the law affixed a secondary penalty? Some perhaps will come forward to aid the law under any circumstances; but these are a small minority: the many find it too painful,—too heart-rending, to be instrumental in procuring the death of one with whom they have formerly lived on terms of familiar intercourse.

I wish every one would ask himself this question:—If an intimate friend of his had committed murder, and he alone possessed the secret of the crime, is he certain that the remembrance of past friendship would not triumph over the obligations of public duty, when he recollected that the punishment was capital? Is he prepared to assert positively that he should hasten to a magistrate with a full statement of the man's guilt, when that denunciation would prove his death-warrant? Let us suppose that he is: still it would be a struggle between nature and duty; and many may not possess equal firmness. But possibly he doubts what would be his conduct under so dreadful an alternative. If so, those very doubts prove that the strong sympathies of nature would triumph over every other consideration. He is perhaps an educated and well conducted man, and he is moreover an ardent lover of justice; but he doubts whether, reflecting that the crime is capital, he should inform against his friend who had committed murder. How then can he expect greater zeal for the enforcement of the law from the uneducated and the criminal? for the friends of a criminal are often criminals themselves.

Murder is frequently supported upon indirect proof; and it is precisely in cases of circumstantial evidence that the reluctance of witnesses to come forward, if it exists at all, must produce the greatest degree of impunity. Where the evidence is direct,

and one person can prove the guilt of the prisoner, there is only one chance of escape through this cause; but where the evidence is circumstantial, the offender has as many such chances in his favour as there are witnesses required to establish the case; since from the absence of one link in the chain of testimony the whole charge would fail.

It is true that juries shew no unwillingness to convict in a clear case of murder; but, in difficult cases, they often lean too much in favour of the prisoner. Circumstantial evidence affords a great opening for difference of opinion and doubts; and the terrible nature of the punishment sways them unduly on the side of mercy. It inclines them to exaggerate their doubts as to the prisoner's guilt, and to imagine that he may still be innocent, when in fact the evidence is amply sufficient to prove the contrary.

It is not uncommon to hear from the advocates of capital punishment, that juries ought to require stonger proofs in capital than in other offences, because the punishment for the former is so dreadful. These persons do not however, I presume, mean to say that juries ought to convict of minor offences on evidence which is less than satisfactory because the punishment is not equally dreadful,—for instance, only transportation; so that it necessarily follows that the proofs to be required in capital cases ought, in their opinion, to be more than satisfactory; and if

the evidence is only satisfactory, and not redundantly conclusive, the prisoner should be acquitted,—*and this because the punishment is so dreadful.* Then, I say, substitute a less dreadful punishment—one which is not irreparable—one which, if an erroneous judgment has been pronounced, may be remitted to the innocent; and then there will be no occasion for requiring proof which is more than sufficient, and thus encouraging crime by favouring the escape of the guilty.

Let us now proceed to compare the convictions and executions for the same crimes in different periods; and it will be found that, as lenity has superseded rigour in the administration of justice, the amount of convictions in proportion to the commitments has very materially increased.

Those who advocated the abolition of the punishment of death for forgery, invariably put forth this as their principal argument—that the extreme severity of the law hindered its execution. They urged that the best punishments were useless, unless the injured could be induced to prosecute, witnesses to produce their testimony, and juries to convict. They told us that, in the case of forgery, prosecutors were in truth reluctant to come forward; that witnesses suppressed the facts within their knowledge, and that juries, through compassion, forgot their oaths, and acquitted where they ought to have convicted.

Now that a secondary penalty only is awarded for

this offence, we have the means of ascertaining more fully than before, whether or not this opinion was correct. If it was right to attribute the small number of convictions to the infliction of the punishment of death, then it must necessarily follow that, after the abolition of that penalty, the convictions will be found to have augmented. Such is in fact the case; and the increase will not fall short of the expectations of the most sanguine friends of the mitigation of the law. In the ten years ending with 1819, there were executed for this offence in England and Wales, 157 persons; and 52 only out of every 100 committed for trial were convicted. In the following ten years, ending with 1829, the executions diminished to 64; and the proportion convicted rose to 57 in 100. In the next three years, ending with 1832, there was no execution, and the convictions advanced to 0·60. In the following three years ending with 1835, the crime had ceased to be capital, and the convictions in that period were 0·71.

FORGERY.

Table shewing the centesimal proportions of executions to convictions, and also the proportion of convictions to commitments in England and Wales, during different periods.

	Proportion of Executions to Convictions.	Proportion of Convictions to Commitments.
10 years from 1810 to 1819 -	0·36	0 52
10 years from 1820 to 1829 -	0·15	0·57
3 years from 1830 to 1832	None—but the crime still capital.	0·60
3 years from 1833 to 1835	The crime no longer capital.	0·71

Of all the crimes for which the punishment of death has been repealed, forgery is that in which there has been the largest increase in the proportional number convicted, while for sheep stealing that increase has been very inconsiderable, and for horse stealing the convictions may be said to have remained stationary since the mitigation of the law. One cause why the convictions for horse stealing have undergone no increase is this; the crime is nearly always committed in the country, and there juries are composed in great measure of farmers, who were not likely to shew any great degree of lenity towards such a crime, even while yet capital. But the principal reason is to be found in the circum-

stance that, in cases of horse stealing, the prisoner is generally a perfect stranger both to the prosecutor and the witnesses. They, consequently, do not feel that sympathy for him, which springs from previous acquaintance. But in forgery, the case is reversed; there the offender is commonly known to the prosecutor and the witnesses. The small number of convictions for that offence, while it continued capital, is no doubt attributable, in great measure, to the reluctance of juries to find guilty; but it is chiefly to be referred to the fact that evidence was not forthcoming, upon which they could convict, owing to the unwillingness of prosecutors or witnesses to be instrumental in taking away the life of one, with whom they had been in frequent and perhaps familiar intercourse, and for whom they naturally felt great compassion.

It is, then, for crimes where the offender is commonly known to the prosecutor and the witnesses, that the punishment of death is most likely to lead to impunity. This is an important distinction. It is supported by past experience; and the future mitigation of the law will more and more confirm it. Of the crimes which are still punishable with death, rick-burning is probably that in which the capital penalty leads to the greatest failure of justice; not that juries often return improper verdicts of acquittal for this offence, but because the evidence which would warrant a conviction is not forthcoming. And

why is it withheld?—because the persons who could bear testimony to the prisoner's guilt are his friends and acquaintance, and they cannot endure the idea of becoming parties to his death. When evidence is wanted to establish a case of arson, you must, in the great majority of instances, go to the village where the accused lived; you must seek for it amongst those who have known him from his childhood, who have worked with him in the same field, who have joined with him in the same games, and who have drank with him in the same public-house. Is it to be supposed that these persons will come forward to aid in the enforcement of the law, when they will thereby sacrifice the life of a comrade or old acquaintance? A child might know enough of human nature not to expect any such thing. Besides, who are most competent to speak as to the time at which the accused left his house in the evening, and how long he was absent? His relations. Who are most likely to know whether he took with him any light or combustible materials? His relations. Who can bear testimony to an admission of his crime, if any such happened to escape him on his return? His relations. Perhaps it is unlikely that these parties would come forward often, even if the penalty were a secondary one; but that improbability is immeasurably increased, when the punishment is death.

The following table is for house-breaking; and, owing to the irregularity with which the punishment

of death has been inflicted for that offence, it illustrates the principle that that penalty produces impunity better than any other crime. In the fourteen years ending with 1823, twenty-two persons were executed for it, and seventy-one out of 100 committed were convicted. In the following four years, there was no execution, and the convictions rose to 0·78. In the next three years, there were frequent executions, and the convictions declined to 0·72. In the three years after that, they were very rare, and the convictions rose to 0·77. In the two years, 1834 and 1835, the crime was no longer capital, and the convictions advanced to 0·79.

HOUSE-BREAKING.

Table, shewing the centesimal proportions of executions to convictions, and also the proportions of convictions to commitments in England and Wales during different periods.

	Proportion of Executions to Convictions.	Proportion of Convictions to Commitments.
14 years from 1810 to 1823 -	00·2	0 71
4 years from 1824 to 1827 -	none	0·78
3 years from 1828 to 1830 -	00·2	0·72
3 years from 1831 to 1833 -	000.4	0·77
2 years from 1834 to 1835	The crime no longer capital.	0·79

The next table is for house-breaking in London

*** The decimal mark in the first column of the Tables on pages 77, 78, 79, should have been, in each instance, after the first nought—thus, 0·02, &c.

and Middlesex. Let us compare it with that for England and Wales. We shall see that, in the three years ending with 1830, 72 in 100 were convicted in England and Wales, and only 53 in 100 in London and Middlesex. This is a striking difference; and it is important to inquire how it arose. We must look to the number of executions in order to discover the cause. In England and Wales, only two in a 100 of those convicted were executed; but in London and Middlesex, 11 in 100. The greater probability that the last penalty of the law would be inflicted in the latter, made juries more reluctant to convict. Since the crime has ceased to be capital, the proportion convicted has been the same in both.

HOUSE-BREAKING—LONDON AND MIDDLESEX.

	Proportion of Executions to Convictions.	Proportion of Convictions to Commitments.
14 years from 1810 to 1823 -	00·2	0·60
4 years from 1824 to 1827 -	none	0·72
3 years from 1828 to 1830 -	0·11	0·53
3 years from 1831 to 1833 -	00·1	0·71
2 years 1834 and 1835 -	The crime no longer capital.	0.79

The next three tables are similar to those which have preceded them; and relate to the offences of robbery, burglary, attempts to murder, and cutting and maiming. It will be seen that for each of these

crimes the convictions have increased as the convictions have diminished; and it may be presumed with sufficient certainty, that the former will experience a further rise, whenever the punishment of death is abolished for these offences.

BURGLARY—ENGLAND AND WALES.

	Proportion of Executions to Convictions.	Proportion of Convictions to Commitments.
10 years from 1810 to 1819 -	00·9	0·59
10 years from 1820 to 1829 -	00·5	0·64
3 years from 1830 to 1832 -	00·2	0·67
3 years from 1833 to 1835 -	1 in 426	0·70

ROBBERY—ENGLAND AND WALES.

	Proportion of Executions to Convictions.	Proportion of Convictions to Commitments.
10 years from 1810 to 1819 -	0·14	0·49
10 years from 1820 to 1829 -	00·9	0·51
6 years from 1830 to 1835 -	00·2	0·55

ATTEMPTS TO MURDER, AND CUTTING AND MAIMING.
ENGLAND AND WALES.

	Proportion of Executions to Convictions.	Proportion of Convictions to Commitments.
10 years from 1810 to 1819 -	0·30	0·30
10 years from 1820 to 1829 -	0·20	0·34
6 years from 1830 to 1835 -	00·6	0·41

For attempts to murder, &c., in London and Middlesex, there were executed in the first period, 32 out of 100 convicted; and 28 in 100 committed were convicted. In the following ten years the executions rose to 0·44; and the convictions declined to 0·26. Since that time there has been no execution; and the convictions have advanced to 0·37; and they would probably have risen much more, had it not been for the apprehension lest the last penalty of the law should be inflicted.

These facts shew very clearly, from the increase of convictions which accompanied a falling off in the number executed in each period, and from the decrease of convictions which attended an increase of executions, that the punishment of death produces great impunity, even for such serious offences as attempts to murder, and cutting and maiming. This strongly favours the presumption that the same result occurs where the crime of murder is consummated. On this point however I need not rely solely upon probable conjectures or legitimate inferences; I have direct proofs to offer.

In France, early in 1832, a new law came into force, which conceded to the jury the power of mitigating the punishment in all cases. Where they declare that there are attenuating circumstances in the crime, the court is obliged to pronounce a punishment one degree lower than that awarded by the law. Thus, where the punishment is death, and the

jury find that there are attenuating circumstances, the highest punishment which the court can pronounce is *travaux forcés à perpetuité*.

The following table has been compiled from the French criminal returns. It gives the proportion of acquittals during the three years preceding the promulgation of this new law, and the three years which elapsed immediately after; and shews that in the latter period there has been a diminution of acquittals for almost every crime; but that is more especially remarkable for the offences of *assassinat*, *empoisonment*, *parricide*, and *incendie*; those being the very crimes for which execution was most likely to follow a conviction.

FRANCE.

Proportion of acquittals to commitments in the three years ending with 1831, and in the three years ending with 1834; and shewing a diminution of acquittals in the latter period.

	Three years ending with 1831.	Three years ending with 1834.
	Proportion Acquitted.	Proportion Acquitted.
Assassinàt - - - - -	0·48	0·38
Parricide - - - - -	0·62	0·51
Empoisonment - - - -	0·67	0·56
Incendie d' édifices - - -	0·74	0·62
——— d' autres objects - -	0·78	0·72
Meurtre - - - - -	0·55	0·49
Infanticide - - - - -	0·51	0·50
Blessures et coups graves - -	0·59	0·59
Id. envers les ascendans - -	0·56	0·50
Viol et attentat à la pudeur - -	0·57	0·50
Id. sur les enfans au dessous de 15 ans - - - - -	0·44	0·32
Fausse monnaie - - - -	0·71	0·42
Faux par supposition de personnes	0.65	0·53
Faux en écriture de commerce -	0·40	0·39
Autres faux - - - -	0·51	0·45
Vols dans les églises - - -	0·31	0·21
Vols sur un chemin public - -	0·36	0·33
Vols domestiques - - -	0·33	0·34
Autres vols qualifiés - - -	0·31	0·29

The minister of justice, in his report to the King prefixed to the returns for 1833, notices particularly the increase of convictions in cases of murder; and observes, "*C'est là un des heureux effets de la nouvelle législation.*"

This new jury law is generally considered to have worked extremely well, not only by rendering punishments more certain, but by doing away with those pious frauds, and pious perjuries, to which juries frequently had recourse when they considered the punishment disproportioned to the offence. To suggest a similar enactment in this country is so novel a proposition that it is likely to meet with little countenance. It is however by such a law that punishment will be rendered more certain than by any other possible means. Perhaps it may be objected that a diminution of acquittals would not necessarily follow in this country because that has been the case in France. This reasoning might be good, if the repugnance to being instrumental to the death of a fellow-creature were a national peculiarity; but it is a great principle of human nature. Indeed it is probable that such a measure would be attended with even more beneficial results here than in France, because with us the unanimity of juries is required, (which greatly increases the chances of the prisoner's escape where they consider the punishment a harsh one); but in France it is otherwise. Possibly it may be thought that such an enactment would intro-

duce great irregularity into the administration of justice. It may however be doubted whether there are valid grounds for this supposition. Inequality in the distribution of punishment often arises at present from the different temper of different judges. Sir Samuel Romilly mentions one instance where two men committed a crime: they were tried in different counties; the one had a severe judge, and was sentenced to transportation,—the other a lenient judge, and was sentenced to a short imprisonment; and before the former embarked for transportation, the latter was set at liberty. Juries could not commit any such absurdity as this; for they would only have the power of reducing the punishment one degree; and besides, their number would furnish security against any thing like caprice. Even if such an enactment should diminish the certainty of the punishment appointed by the law, it would increase the certainty of some punishment; which is of far greater importance. Had such a law existed in this country during the last five and twenty years, hundreds upon hundreds would have been punished for their crimes, instead of escaping with complete impunity. But why are the juries incompetent to exercise such a privilege without abuse? The point whether there are extenuating circumstances in the case is not one of legal intricacy: it is a question of common sense. They decide other questions of fact, and why not this? It is far easier to say whether

the crime admits of palli[illegible] than to pronounce a right verdict in a complicated case of circumstantial evidence.

But even supposing that such a measure were open to grave objections, still the advantages would probably outweigh them. It would bring the laws into harmony with the feelings of the people; and prevent the escape of many who ought to be punished. To bring justice home to as large a number of guilty persons as possible, is the main end to be looked to; and whether the punishment of death be retained or not, it is absolutely essential with a view to certainty of punishment, to give juries some control over the sentence to be pronounced; but so long as capital punishment exists, this is still more urgently required. There is a growing aversion to sanguinary penalties, and convictions for capital offences will probably become more and more difficult. They have diminished for some crimes already. For murder, in the ten years ending with 1824—28, in 100 committed, were convicted. In the following ten years, ending with 1834, the convictions were only 0·21. For rape, they have also fallen off of late years. This subject deserves the greatest consideration. Nothing is more important in the administration of justice than the certainty of punishment; nothing is more dangerous than the impunity of criminals. All penalties, how moderate soever, are the objects of some dread; but the impunity of offenders is their

triumph and the law's disgrace. When the guilty escape through the compassion of prosecutors, or witnesses or jurors, the law becomes despised; justice is defeated or mocked; those who are thus let loose upon society are encouraged to repeat their crimes, and others are allured by the example of their impunity to swell the ranks of the lawless. There is nothing in the whole science of criminal jurisprudence so indisputable as this: that crimes are better prevented by the certainty than the severity of punishment.

CHAPTER IX.

ON THE FREQUENCY OF CAPITAL PUNISHMENT IN ENGLAND, COMPARED WITH OTHER COUNTRIES.

England has long been remarkable for the extreme severity of her criminal laws: and although they have recently undergone some mitigation, other nations have softened the rigour of their penal codes in as great a degree as we have; so that the contrast still remains as striking as ever. Sir John Fortescue quaintly observed, in his time, "We hang up as many rogues in Englande in one yeare as in Fraunce in seven, because the English have better hartes." It may be permitted to question the correctness of the cause assigned, but there is no reason to doubt the fact; and from that time to this, we have probably enjoyed a similar equivocal pre-eminence. How does the case stand at present? In the year 1834, there were executed in France and Prussia together, with a population of 50 millions, 17 persons; and in England and Wales, with a population of 15 millions, 34;—that is, just double the actual number, and about seven times as many in proportion to the amount of inhabitants. In Bavaria,

from 1813 to 1831, the average of executions was three annually; in Austria Proper, in the five years ending with 1828, 19 persons suffered; in the Grand Duchy of Baden, in the four years ending with 1833, one; in Wirtemberg, in 1831 and 1832, two; in Holland, in the four years ending with 1834, six; and in Belgium, during the same period, none.

A long interval of national repose from the engrossing anxieties of foreign war, has allowed the different nations of Europe to address themselves with undistracted attention to the improvement of their internal legislation; and, amongst other desirable ameliorations, the revision of their criminal laws has not been overlooked. New penal codes have been prepared for Belgium, Bavaria, Hanover, and Norway; some of which have, I believe, been adopted. One is now in preparation for Prussia; another for Holland; and France had already accomplished this useful labour in 1832.

The following are the punishments affixed by the Austrian code to those offences which are capitally punishable in England.

High treason—art. 53—death.

Murder—art. 119, 124—death.

Arson—art. 148—(*a*) If the fire has broken out, and some one, as might have been foreseen by the incendiary, has lost his life by it; or, if the fire which has actually broken out has been laid on

repeated occasions; or, if the fire has been laid by a peculiar combination of persons bent upon devastation—death.

(*b*) If the fire has broken out, and a serious loss has ensued to the owner; as also,

(*c*) If the perpetrator has set the fire at different times, though each time without effect—imprisonment for life.

(*d*) If the fire has broken out, but is accompanied by none of the circumstances above-mentioned—imprisonment from 10 to 20 years.

(*e*) If the fire has not broken out, but was laid at night, or in such a place that it might easily have spread, on breaking out; or under such circumstances that human life was at the same time exposed to apparent danger—5 to 10 years' imprisonment.

(*f*) If the crime was committed by day, and attended with no peculiar danger; or if the fire was extinguished before it broke out, or without damage—1 to 5 years' imprisonment.

(*g*) If the offender from repentance has so applied himself at the proper time that all damage has been prevented—imprisonment from 6 months to 1 year.

Burglary—art. 158, 159, 160—imprisonment from 1 to 10 years. Burglary, when accompanied with personal violence, is punished as robbery.

Attempts to murder—art. 121—imprisonment from 5 to 20 years; or, in very aggravated cases,—imprisonment for life.

Cutting and maiming, or other grievous bodily harm—art. 137—imprisonment from 1 to 5 years.

Stealing in a dwelling-house, a person therein being put in fear—art. 171—punished as robbery.

Forgery of wills—art. 181, 182—imprisonment not exceeding 10 years.

Rape—art. 111—ordinary punishment, imprisonment from 5 to 10 years;—where the person violated has received serious injury to her life or health—imprisonment from 10 to 20 years.

Riot—art. 68—First, as regards the instigators and ringleaders,—imprisonment from 10 to 20 years; or, in cases of peculiar malignity—imprisonment for life: Secondly, as regards other persons, not instigators or ringleaders—imprisonment from 1 to 5 years; or, in cases of peculiar malignity—from 5 to 10 years.

Unnatural offences—art. 113—imprisonment from 6 months to 1 year.

Procuring abortion, the woman being quick with child—art. 132—imprisonment from 5 to 10 years.

Attempt to rob by menace committed by a single person—art. 170—5 to 10 years' imprisonment.

Robbery by menace—art. 171—10 to 20 years' imprisonment.

Attempt to rob by violence or menace, committed by a person armed with a mortal weapon, or by more than one person—art. 171-2—10 to 20 years' imprisonment.

Robbery by actual violence—art. 173—imprisonment for life.

Robbery attended by serious bodily injury or torture—imprisonment for life, of the severest kind.

There is one capital offence in Austria which is necessarily omitted above; viz. forgery of State-paper money, and uttering the same in connexion with the forger, art. 94, 95. Manslaughter in the commission of robbery is enumerated as a distinct offence, and punished capitally; but as this would be murder by our law, it does not require to be separately specified.

Rioters may be punished capitally by a court martial in extreme cases, when the civil authorities are unable to quell the riot; but no court-martial can be appointed after the riot has been once put down. In that case the offenders can only be tried by the ordinary tribunals, and visited with a secondary penalty.

The Austrian code was promulgated in 1803, and still continues in force. It is considered by German lawyers to have worked well. It is perhaps, although defective in many points, the most practical system of penal law at present existing in Europe. The Prussian, the Bavarian, and, in a less degree, the French code, are too full of minute distinctions; which is very objectionable, as preventing the laws from being generally known.

I admit that the public mind is not yet prepared for the total abolition of the punishment of death; and although I have a strong conviction of its inexpediency, I am aware that it is unwise to outrun public opinion on this, or any other political question. I do not therefore recommend the immediate repeal of it. I wish first that the reflecting portion of the community should be convinced that such a change would be wise. But I submit that public opinion is fully prepared for the limitation of that punishment to deliberate murder, or any other act of felony, by which human life is destroyed, and such a result might have been foreseen as probable by the criminal. By our present law, accidental homicide, which occurs in the commission of a felony, is considered as murder and punished accordingly. This is especially absurd.

There is no other crime attended with the same danger to society as murder; there is none which is apprehended with equal dread, or which inspires the same degree of horror when we hear of its commission; there is a broad distinction between it and any others, and that distinction ought to be observed in the application of punishment. It may be thought that attempts to murder ought to be ranked in the same class. It would however, I believe, be impossible to punish this crime with death, and at the same time supply the offender with a motive to abstain from the completion of the act: and it is quite essential to a good system of penal jurispru-

dence, that the law should always hold out an inducement to the criminal to abstain from the commission of a more heinous offence, when it is in his power to do so: otherwise it encourages a greater crime in order to prevent a less one. It is for this reason that it is inexpedient to retain the capital penalty for robbery, burglary, and piracy; and the same argument is in a less degree applicable to rape, as it is sometimes, though very rarely, accompanied by murder. The latter crime is, I believe, actually punished with death in no other European country besides England. It is not a capital offence by the laws of France, Austria, Belgium, or Holland; and by the Prussian and Bavarian codes, it is only so punishable where death results as the consequence of the violence resorted to. Such cases must be extremely rare; and although I cannot speak positively with reference to Bavaria, I know that no execution took place under this law in Prussia during the 17 years ending with 1834.

The punishment of death for treason was, I am inclined to think, highly expedient in former times for the attainment of its immediate object. By cutting off the head of the leader of a party, the whole party in many instances became annihilated; it could not exist without its chief. It was then the chief of a faction who created the party; but this is now reversed, it is the party who make the chief; and if you now put to death the leader of a popular party, not only will you exasperate a large body of

men, and thus render them more dangerous; but the same causes which brought him into existence in that character will soon create a successor. There are few in this country who did not rejoice at the magnanimity of the French nation in sparing the lives of Polignac and his accomplices. Much as I admire this generosity, and strongly convinced as I am that their execution would have been attended with no public benefit, but rather with consequences prejudicial to society, I can see no palliating circumstances in the crime of the French ministers. I cannot imagine how any act of treason ought to be punished capitally, if it was right to commute the sentence of men filling offices of the highest trust, who had trampled on the liberties of their country, and violated the constitution which they had sworn to defend, and who, by so doing, had been the guilty causes of the death of thousands—the innocent victims of their criminal and insensate folly.

Let the punishment of death then be limited to murder and any other felonious act by which human life is destroyed, and such a result might have been foreseen by the offender. Public opinion, although not prepared to go further at present, will perfectly acquiesce in this.

But that punishment will not in any case be able to survive the approach of that happy period at which Beccaria foretold its downfall—"when knowledge instead of ignorance shall become the portion of the greater number."

APPENDIX.

No. I.

Punishments for Arson by the Bavarian, Prussian, and French Codes.

ARSON—BAVARIAN CODE.

ARTICLE 248. Where the fire is set to inhabited houses or places of abode, or so near as to endanger inhabited houses or places of abode, and the crime is accompanied by one of the following aggravating circumstances, the offender is to be punished with death. Namely:

I. Where some one has lost his life, or been dangerously injured by the fire.

II. Where the fire has reduced two human habitations to ashes.

III. When the fire was laid, or has broken out, at a time when the inmates are commonly asleep.

IV. Where the fire was laid to places of assembly, so that a great number of persons were exposed to danger.

V. Where the fire was laid at the time of any common calamity; as insurrection, inundation, war, or other dangers.

VI. Where the fire was set to powder magazines, or in their neighbourhood.

VII. Where the fire was set that, under favour of it, murder, robbery, theft, or any other serious crime might be committed, either by the incendiary himself, or by some other person.

VIII. Where the incendiary has set the fire in cities, towns, or villages at different places.

IX. Where the offender has been guilty of several acts of arson.

ART. 249. Where the fire was set to inhabited houses or places of abode, but the crime is not accompanied by any of the aggravating circumstances mentioned in the preceding article—imprisonment from 16 years to imprisonment for life.

ART. 250. Setting fire to forests and standing crops, without danger to human life or inhabited houses—imprisonment from 8 to 12 years.

ART. 251. Setting fire to uninhabited houses or receptacles standing alone, gathered field and garden productions standing in an open space, so that the spreading of the fire is improbable, and no danger to be apprehended for inhabited human abodes—imprisonment from 1 to 4 years.

ART. 255. Laying a powder mine, with intent to blow up a place of human resort—death.

This Bavarian code was the work of the late Herr Von Feuerbach, and, although drawn by the most eminent lawyer in Germany, it is considered to have answered ill. If it be still in force (of which I cannot speak with certainty), it is likely to be soon superseded by a new code. The distinctions which it makes respecting the crime of arson are open to grave objections: for instance, the penalty awarded for rick-burning; viz. 1 to 4 years' imprisonment, is a great deal too low, and the life of the offender in this as also in the Prussian code, is frequently made to depend upon circumstances which may be purely accidental. The French law of arson is probably the best at present existing in Europe.

ARSON.—PRUSSIAN CODE.

Art. 1511. Every deliberate act of arson, through which one or more men have lost their lives, or whole cities, boroughs, villages, houses contiguous to each other, or ships are exposed to danger, is to be punished as a general rule with death.

Art. 1512. Where such an act of arson as in art. 1511 is perpetrated with the intention of committing murder, or some other capital offence under its favour —death.

Art. 1514, 1516. Where the fire was set at an inhabited place, provided some one has lost his life by it, or received lasting injury to his health—death.

Art. 1515, 1517. Where the fire was set at an inhabited place, and the damage occasioned by it amounts to at least 500 dollars—imprisonment for life.

Art. 1518. Where the fire was raised in an inhabited place, and no such considerable damage resulted, but the fire was laid at night—imprisonment from 10 to 15 years.

Art. 1519. Ditto, ditto—where the fire was laid by day—imprisonment from 6 to 10 years.

Art. 1521. Setting fire to forests—imprisonment from 6 to 10 years.

Ditto, ditto—in very aggravated cases—imprisonment for life.

Art. 1522. Setting fire to uninhabited buildings, or other receptacles, woodstores, field and garden productions, so that the flames cannot according to the natural course of events reach inhabited neighbourhoods—imprisonment from 3 to 6 years.

ARSON—FRENCH CODE.

Article 434. Quiconque aura volontairement mis le feu à des édifices, navires, bateaux, magasins, chantiers, quond ils sont habités ou servent à l'habitation, et généralement aux lieux habités ou servant à l'habitation, qu'ils appartiennent ou n'appartiennent pas à l'auteur du crime, sera puni de mort.

Sera puni de la même peine quiconque aura volon-

tairement mis le feu à tout édifice servant à des réunions de citoyens.

Quiconque aura voluntairement mis le feu à des édifices, navires, bateaux, magasins, chantiers, lorsqu'ils ne sont ni habités, ni servant à habitation, ou à des forêts, bois taillis ou récoltes sur pied, lorsque ces objets ne lui appartiennent pas, sera puni de la peine des travaux forcés à perpétuité.

Celui qui, en mettant le feu à l'un des objets énumérés dans le paragraphe précédent et à lui-même appartenant, aura volontairement causé un préjudice quelconque à autrui, sera puni des travaux forcés à temps.

Quiconque aura voluntairement mis le feu à des bois ou récoltes abattus, soit que les bois soient en tas ou en cordes, et les récoltes en tas ou en meules, si ces objets ne lui appartiennent pas, sera puni des travaux forcés à temps.

Celui qui, en mettant le feu à l'un des objets énumérés dans le paragraphe précédent, et à lui-même appartenant, aura volontairement causé un préjudice quelconque à autrui, sera puni de la réclusion.*

Celui qui aura communiqué l'incendie à l'un des objets énumérés dans les précédens paragraphes, en mettant volontairement le feu à des objets quelconques, appartenant soit à lui, soit à autrui, et placés de manière à communiquer le dit incendie,

* This punishment is imprisonment from five to ten years.

sera puni de la même peine que s'il avait directement mis le feu à l'un desdits objets.

Dans tous les cas, si l'incendie a occasionné la mort d'une ou plusieurs personnes, se trouvant dans les lieux incendiés au moment où il a éclaté, la peine sera la mort.

Art. 435. La peine sera la même d'après les distinctions faites en l'article, précédent, contre ceux qui auront détruit, par l'effet d'une mine, des édifices, navires, bateaux, magasins, ou chantiers.

It will be observed from these extracts, that rick-burning, which is a capital offence in England, is punished in Bavaria with one to four years' imprisonment, in Prussia with three to six years' imprisonment, and in France with *travaux forcés à temps*, that is with hard labour at the galleys, from five to twenty years. The penalties affixed to this offence in Bavaria and Prussia, are as much too low, as the punishment in England is unnecessarily severe. That of the French code is very proportionate.

No. II.

Punishments for attempts to Murder, by the Bavarian, Prussian, and French codes.

BAVARIA.

Attempts to commit crimes are divided by Feuerbach's code, into two classes, 1st. complete attempts (nächster versuch), and 2dly. incomplete attempts (entfernter versuch). The punishment for a complete attempt to commit murder is, by Article 60, imprisonment for an unlimited time; and for an incomplete attempt, by Article 62, imprisonment from three to five years. The latter punishment applies to cases where preparations have been made for the perpetration of the crime, but there has been no attempt at its actual commission.

PRUSSIA.

Art. 827. Wounding with intent to kill, where the wound is not of a mortal nature in itself, but becomes so in the event, through accident—death.

Art. 828. Wounding with intent to kill, where the wound was of a mortal nature, but the life of the person injured has been saved through peculiar circumstances or accidents—imprisonment for life.

Art. 837. Inflicting an incurable injury, with intent to kill—imprisonment from 10 to 20 years, or for life, according to circumstances.

Art. 838. Where the intention to kill has shown itself in outward acts, but no such injury has been caused by it—imprisonment from four to six years.

Art. 862. Where poison, administered with intent to murder, produces insanity, the curing of which is doubtful—death.

Art. 864. Where poison, administered with intent to murder, renders a person unserviceable or miserable for life—death.

Art. 865. Where poison, administered with intent to murder, produces a curable injury—imprisonment from 10 years to imprisonment for life.

Art. 866. Where something harmless is administered by mistake for poison, with intent to murder —6 to 10 years' imprisonment.

FRANCE.

By the French penal code, attempts to commit murder are capital, when they fall within the following article.

Art. 2. Toute tentative de crime qui aura été manifestée par un commencement d'execution, si elle n'a été suspendue ou si elle n'a manqué son effet, que par des circonstances indépendantes de la volonté de son auteur, est considérée comme le crime même.

In Bavaria, then, as well as Austria, attempts to

murder are in no case capital. The present Austrian code has been in force upwards of thirty years; and, although that empire includes countries in almost every stage of civilization, no evil has yet resulted from this lenity.

No. III.

Punishments for Cutting and Maiming, by the Bavarian, Prussian, and French Codes.

BAVARIAN CODE.

Art. 179. Bodily injuries deliberately inflicted, which cause illness for a month or longer, or prevent the person injured from following his calling for one or more months—one to four years' imprisonment.

Art. 180. Where the person injured has not been rendered for ever and entirely incapable of following his calling, but has been wounded or disfigured in his person, or has been incurably deprived of the use of one of his members—four to eight years imprisonment.

Art. 181. Where the person injured has been rendered altogether incapable of following his calling, and there is no reasonable probability of his recovery—also, where he has been deprived of the use of speech, sight, arms, hands, or feet, or rendered

unfit for the propagation of his species—twelve to sixteen years' imprisonment.

Art. 182. The same punishment is to be inflicted, where madness ensues in consequence of the violence.

Art. 183. Administering poison, without intent to kill, but with intent to injure, where it produces temporary or lasting injury to body or mind—sixteen to twerty years' imprisonment. Where the poison has accidentally remained without effect, or has produced only a slight temporary indisposition—eight to twelve years' imprisonment.

Art. 184. Where the crimes mentioned in the preceding articles 179—183, are committed against relatives in the ascending line, or against teachers by their scholars, or against masters by their servants, or generally against persons to whom especial respect is due from the offenders, the ordinary punishment shall be inflicted with greater severity, and cannot be pronounced below the medium point of its established duration.

Art. 185. Where the injuries mentioned in the articles 179—182, were committed without deliberation, by persons in a state of intoxication, or in a scuffle, or in the heat of anger, the duration of imprisonment fixed in the articles 179—182, can only be applied in its lowest degree, and even this may according to circumstances be diminished to the half.

CUTTING AND MAIMING.—PRUSSIAN CODE.

Art. 798. Where a person intentionally inflicts serious injuries on another, from which considerable damage may arise to his health and limbs—imprisonment from two months to three years.

Art. 799. Where the wounding or disfiguring was actually committed, and intentionally, the punishment may be lengthened to six years.

Art. 800. Where the person injured has been rendered incapable of carrying on his business—imprisonment from six to ten years.

CUTTING AND MAIMING.—FRENCH CODE.

Art. 309. Sera puni de la réclusion, tout individu qui, volontairement, aura fait des blessures ou porté des coups, s'il est résulté de ces sortes de violences une maladie ou incapacité de travail personnel pendant plus de vingt jours.

Si les coups portés ou les blessures faites volontairement, mais sans intention de donner la mort, l'ont pourtant occasionnée, le coupable sera puni de la peine des travaux forcés à temps.

Art. 310. Lorsqu'il y aura eu préméditation ou guet-apens, la peine sera, si la mort s'en est suivie, celle des travaux forcés à perpétuité, et si la mort ne s'en est pas suivie, celle des travaux forcés à temps.

Art. 311. Lorsque les blessures ou les coups n'auront occasionné aucune maladie ou incapacité de

travail personnel de l'espèce mentionnée en l'article 309, le coupable sera puni d'un emprisonnement de six jours à deux ans, et d'une amende de seize francs à deux cents francs, ou de l'une de ces deux peines seulement.

S' il y a eu préméditation ou guet-apens, l' emprisonnement sera de deux ans à cinq ans, et l'amende de cinquante francs à cinq cents francs.

Art. 312. Dans les cas prévus par les articles 309, 310 et 311, si le coupable a commis le crime envers ses père ou mère légitimes, naturels ou adoptifs, ou autres ascendans légitimes, il sera puni ainsi qu' il suit.

Si l' article auquel le cas se référera prononce l' emprisonnement et l' amende, le coupable subira la peine de la réclusion.

Si l' article prononce la peine de la réclusion, il subira celle des travaux forcés à temps.

Si l' article prononce la peine des travaux forcés à temps, il subira celle des travaux forcés à perpétuité.

The extreme inequality of the punishments awarded for the same offences in different countries is very remarkable. For cutting and maiming, the highest penalty which can be inflicted is, by the Austrian law, imprisonment for five years; by the Prussian law, imprisonment for ten years; by the Bavarian law, imprisonment for sixteen years; by the French law,

hard labour at the galleys for twenty years; and by the English law, death! Are not these facts in themselves a satire upon the ignorance on questions of ponal jurisprudence which prevails in civilised Europe. So little have the true principles which ought to guide it, been yet discovered.

IV.

Punishments for Rape by the Bavarian, Prussian, and French codes.

RAPE.—BAVARIAN CODE.

Art. 187. Punishment in ordinary cases—four to eight years' imprisonment.

Art. 188. Where the person was under 12 years of age, or has suffered injury to her health—eight to sixteen years' imprisonment.

Art. 189. Where the person died in consequence —death.

RAPE.—PRUSSIAN CODE.

Art. 1052. Where the person is upwards of 12 years of age—six to eight years' imprisonment.

Art. 1053. Where she is under 12 years of age—eight to ten years' imprisonment.

Art. 1055. In all cases where the person injured has received lasting injury to her health—ten to

twelve years' imprisonment. Where her death is the consequence of the violence—death.

RAPE.—FRENCH CODE.

Art. 331. Tout attentat à la pudéur consommé ou tenté sans violence sur la personne d'un enfant de l'un ou de l'autre sexe âgé de moins de onze ans, sera puni de la réclusion.

Art. 332. Quiconque aura commis le crime de viol sera puni des travaux forcés à temps.

Si le crime a été commis sur la personne d'un enfant au-dessous le l'âge de quinze ans accomplis, le coupable subira le *maximum* de la peine des travaux forcés à temps.

Quiconque aura commis un attentat à la pudeur consommé ou tenté avec violence contre des individus de l'un ou de l'autre sexe, sera puni de la réclusion.

Si le crime a été commis sur la personne d'un enfant au-dessous de l'âge de quinze ans accomplis, le coupable subira la peine des travaux forcés à temps.

Art. 333. Si les coupables sont les ascendans de la personne sur laquelle a été commis l'attentat, s'ils sont de la classe de ceux qui ont autorité sur elle, s'ils sont ses instituteurs ou ses serviteurs à gages, ou serviteurs à gages des personnes ci-dessus désignées, s'ils sont fonctionnaires ou ministres d'un culte, ou si le coupable, quel qu'il soit, a été aidé dans son crime par une ou plusieurs personnes, la peine sera celle des travaux forcés à temps, dans le

cas prévu par l'article 331, et des travaux forcés à perpétuité, dans les cas prévus par l'article précédent.

There is another carnal offence of a very revolting character, which, as far as I am informed, is actually punished with death in no other European country besides England. The treatment of this crime is a point upon which legislators have differed more than almost any other. By the Austrian as well as the Prussian law, it is visited with a short imprisonment. In the latter country there is this additional regulation, that the offender shall never be permitted to return to the place where the crime was committed. By the French and Bavarian codes, it is not punishable at all, except when committed with violence, or where one of the parties is below a certain age. Whatever may be thought of the laws of France and Bavaria in this respect, it is clear that the crime, when committed by consent, is not attended with that danger to society which can justify its being ranked in the same class as regards punishment, with offences against human life.

No. V.

Punishments for Robbery by the Bavarian, Prussian, and French codes.

BAVARIAN CODE.

Art. 236. Robbery when effected by mere threats —eight to twelve years' imprisonment.

Art. 237. Ditto. ditto. 1st. When the robber has broken into a house. 2dly. When he has disguised himself with a mask, blackening the face and the like; or 3dly. When the robbery has been committed in concerted union with one or more accomplices—twelve to sixteen years' imprisonment.

Art. 238. When the robber has threatened with deadly weapons, or used actual violence—imprisonment for an unlimited time.

Art. 239. When the robber has made use of torture in order to force the discovery of concealed property, or where the life of the person robbed has been endangered by the ill-treatment which he has received, or where he has been dangerously wounded or maimed, or has received lasting injury to his health—death.

PRUSSIAN CODE.—ROBBERY NOT ON A HIGHWAY.

Art. 1188. When effected by dangerous menace—eight to ten years' imprisonment.

Art. 1189. When effected by binding, gagging,

blows, &c., but without injury to life or health—ten to fifteen years' imprisonment.

Art. 1190. Where the person robbed has been seriously wounded, or has received lasting injury to his health—imprisonment for life.

Art. 1191. Where the person robbed died in consequence of wounds he had received—death.

Art. 1192. Where the injury inflicted was of a mortal nature, but the life of the person robbed was saved through peculiar circumstances or accidents—death.

ROBBERY ON A HIGHWAY.

Art. 1197. When effected by menace—ten to fifteen years' imprisonment.

Art. 1198. When effected by actual violence—imprisonment from fifteen years to imprisonment for life.

Art. 1199. When the person robbed has been seriously wounded, or has received lasting injury to his health—death.

Art. 1200. Where the person robbed has died in consequence of the wounds which he received, or where the injury inflicted was of a mortal nature, but the life of the person robbed has been saved through peculiar circumstances or accidents—death.

ROBBERY, ON A SECOND OFFENCE.

Art. 1203. Where a person is found guilty of repeated robbery, not having been previously convicted, or on a second conviction—imprisonment for life.

ROBBERY BY LEAGUED BANDS.

Art. 1212. As regards the ringleader of a band—death.

Art. 1214. In the case of others than the ringleader—imprisonment for life.

ROBBERY.—FRENCH CODE.

Art. 381. Seront punis des travaux forcês à perpétuité les individus coupables de vols commis avec la réunion des cinq circonstances suivantes.

1° Si le vol a êté commis la nuit.

2° S'il été commis par deux ou plusieurs personnes.

3° Si les coupables ou l'un d'eux étaient porteurs d'armes apparentes ou cachées.

4° S'ils ont commis le crime, soit à l'aide d'effraction extérieure, ou d'escalade, ou de fausses clefs, dans une maison, appartement, chambre ou logement habités ou servant à l'habitation, ou leurs dépendances, soit en prenant le titre d'un fonctionnaire public ou d'un officier civil ou militaire, ou après s'être revêtus de l'uniforme ou du costume du fonctionnaire ou de l'officier, ou en alléguant un faux ordre de l'autorité civile ou militaire.

5° S'ils ont commis le crime avec violence ou menace de faire usage de leurs armes.

Art. 382. Sera puni de la peine des travaux forcés

à temps tout individu coupable de vol commis à l'aide de violence, et de plus, avec deux des quatre premières circonstances prévues par le précédent article.

Si même la violence à l'aide de laquelle le vol a été commis a laissé des traces de blessures ou de contusions, cette circonstance seule suffira pour que la peine des travaux forcés à perpétuité soit prononcée.

383. Les vols commis sur les chemins publics emporteront la peine des travaux forcés à perpétuité, lorsqu'ils auront été commis avec deux des circonstances prévues dans l'article 381.

Ils emporteront la peine des travaux forcés a temps lorsqu'ils auront été commis avec une seule de ces circonstances.

Dans les autres cas, la peine sera celle de la réclusion.

The French law of robbery is greatly wanting in simplicity; and that of Prussia is full of clumsy attempts at refinement. The Bavarian forms the best model for imitation, as regards the distinctions made in the gradations of the crime.

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