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SIR EDWARD FRY, L.J., ON PUNISHMENT.

IN early times priests were judges, and inasmuch as they believed themselves to be the depositaries of God's law, it appeared to them proper to use man's power to its enforcement. This notion, abandoned by civilization for ages, has found an advocate for the investment of judges with authority to punish sin, as sin against God, and not according to its evil effects upon man.

Man's punishment of a criminal has been understood to be based upon the necessity for the establishment of a regard for laws which prohibit, under various penalties, acts which the community believes to result in evil to itself—offences against "the peace of Our Sovereign Lady the Queen, her crown and dignity." Sir Edward Fry, however, would amend the indictments and substitute "Lord God Almighty" for "Our Sovereign Lady the Queen," and "His Holy Law" for the statutes.*

But let the learned judge state his own position. He asks: "Why do we strive against sin?" and answers the question by pointing to "the fact that there is a fitness of suffering to sin, that the two things, injustice and pain, which

* Essay on "Inequality of Punishment," *Fortnightly Review.*

are both contrary to our nature (!) ought to go together, and that, in consequence, we naturally desire to bring about an association of the two where it does not already exist. Whence do we derive this principle? Not from the outer world; for, as we have seen, the world responds to it only imperfectly, and by reason of the very imperfection drives us to efforts to realize by punishment that association which otherwise would not exist in fact. *Punishment, in short, is an effort of man to find a more exact relation between sin and suffering than the world affords us.* . . . In a word, then, it seems to me that men have a sense of the fitness of suffering to sin, of a fitness both in the gross and in proportion; that so far as the world is arranged to realize in fact this fitness in thought, it is right; and that so far as it fails of such arrangement, it is wrong, except so far as it is a place of trial or probation; and, consequently, that a duty is laid upon us to make this relationship of sin to suffering as real, and as actual, and as exact in proportion as it is possible to be made. This is the moral root of the whole doctrine of punishment. If this be the true view, some things become clear to us. First, we see that in the apportionment of penalties, we have to regard primarily and directly the moral nature of the crime, and to assign pain and suffering as nearly as we can to the enormity of the sin. . . . On the theory I present, the evil consequences of an act are important so far, and so far only, as they were known, or ought to have been known, to the actor, and so ought to have acted on his conscience, and are an element in the magnitude of his sin. It follows again, from what I have said, that reformation, repression, example, however important they may be in themselves, are only secondary and collateral to the main idea of punishment; and I stand in hopeless antagonism to those philanthropic minds who seek to make our punishments solely reformatory, and to eliminate from our penal institutions every trace of moral reprobation."

The learned judge has the courage of his opinions and follows them to their logical conclusion: "The gun has been loaded, the victim has been tracked, the watch has

been kept through long hours of patient wickedness, the gun has been aimed and discharged, but the victim has escaped; on the primary principle of punishment, that man appears to me to be worthy to be punished as a murderer."

And, in awarding sentence, he could not avoid acting upon his opinions: "Punishment is a part of justice if it is anything of moral worth; and I cannot bring myself to think of justice without regard to right and wrong, without regard to the utterances of the human conscience, without a thought behind all of an infinite and perfect judge."

When inflicting punishment, then, we should primarily regard the offence, as God would regard it, as an offence against Him, attend, in the first place, to "moral reprobation"; and with this view we must listen "to the utterances of the human conscience."

Now let us assume that "the human conscience" is a divine preceptor, and let us ask of the oracle its directions. If it happen to have drank deeply of the wells of christian charity, we will hear the familiar words: "Judge not, that ye be not judged;" "He that is without sin among you, let him first cast a stone at her;" "Go and sin no more;" "The Lord willeth not the death of a sinner, but rather that he should turn from his wickedness and live." "A fitness of suffering to sin"! No: "The blood of Christ cleanseth from all sin;" "Though your sins be as scarlet they shall be as white as snow." "Men have a sense of the fitness of suffering to"—unrepented and unforgiven—"sin." Ah yes! but what ermined judge can divine the intents of the heart, and apply his chemistry to contrition. A child sins, and its father is a brute if he strikes while sorrow and repentance are heaving the breast with sobs and cries. A man sins, and if, further than protecting society, a judge administers chastisement, he not only arrogates to himself the functions of God's avenging angel, who is perfectly competent, we believe, to perform his duties unaided, but he assumes that he is doing God service and vindicating His law, when God

has already told him "thy ways are not my ways, nor thy thoughts my thoughts."

"Moral reprobation!" What are God's ways, so far as he has revealed them to us in this regard? The wicked prosper and the good suffer in this world, although there is to be a reversal in the world to come. Why endeavor to disarrange this order, and anticipate the punishment of evil-doers, which is sure to be inflicted. If there were any doubt about sin meeting its just rewards eventually, Sir Edward Fry might be justified in attending to the matter now, but we do not suppose it takes that ground.

If we had been told that christians recognize "the fitness of suffering to *righteousness*," we would have assented; but, if he argued from this fact that our judges should see to its practical application in life, we should not feel inclined to grant his conclusion. And so, when he tells us that there is a sense of the fitness of suffering to sin, we reply that this may also be true, but our business, from a christian standpoint, is to save the sinner, and not to send him as quickly as possible to his final account.

Blasphemy and idolatry may be practised with impunity until the life-blood, losing the beat of vigorous manhood, insensibly slackens and rests from the weary work of a long life. Shall we stop it sooner? Are we, as the soldiers of Israel, to insist upon the worship of the Lord Jehovah, and exterminate all the Canaanites who worship false gods? And if we allow the Canaanites immunity from idolatry, why award "moral reprobation" in the case of the Thugs?

"The gun has been loaded, the victim has been tracked, the watch has been kept through long hours of patient wickedness, the gun has been aimed and discharged, but the victim has escaped"—and the would-be murderer has repented in dust and ashes, been forgiven by God, and taken to the bosom of his intended victim. "On the primary principle of punishment"—moral reprobation—"that man appears to" us to be entitled to acquittal, and it would be a

very old testament course that he should "be punished as a murderer." We go further and contend that, had the murder been accomplished, acquittal must, from a merely moral standpoint, follow contrition; and that as contrition is an illusive state of mind or heart, frequently deceiving the subject himself, and wholly outside the possibility of judicial investigation, its absence or presence can in no case be certainly predicated, even when the lips continue to glory in the crime of the hands, or the flesh to waste away in tears. Consider for one moment the public consternation that would attend upon a decision of the judges of the Court of Probate and Divorce to the effect that "he who looketh upon a woman to lust after her, hath committed adultery with her in his heart," and that such an one should be treated and branded as an adulterer. Harem concealment of beauty would become a necessity, or politeness and gallantry would have to be abandoned, if one would save himself from malicious charges.

Bentham and Beccaria agree that crimes are punishable not for their immorality, but because of their effect upon society, and our jurisprudence adopts the principle, and punishes those acts only that are injurious to society. Mr. Justice Fry argues "that a duty is laid upon us to make this relationship of sin to suffering as real and as actual and as exact in proportion as it is possible to be made," and upon this principle legislators and judges must become penance-prescribers, and award the heaviest punishments for breaches of the positive commandments, among which are: "Honor thy father and thy mother," "Thou shalt not covet," "Thou shalt have no other gods before me," "Thou shalt not take the name of the Lord thy God in vain," "Remember the Sabbath to keep it holy," and the requirement of the New Testament, "Love one another." When a sin has been found, Mr. Justice Fry will permit consideration for society to weigh in the awarding of punishment, but only as a secondary and subsidiary consideration. If, therefore, there could be a wrong to society without sin, there would be no punishable crime. It would be *damno sine injuria*. But sin

without damage to society—*injuria sine damno*—would be punished.

Let us now examine a few of the arguments of the learned judge, and some of his criticisms of Bentham.

1. In combatting the theory that crimes are only to be measured by the injury done to society, he puts the case of an attempted crime, which, had it not miscarried, would have shocked the sensibilities of the whole nation. Some years elapse and circumstances being changed, the necessity for an example to society has passed. The learned judge thinks that under such circumstances the punishment awarded should be according to the great evils which the culprit entertained, otherwise, "a great wickedness, which resulted in no harm to society, would go absolutely unpunished." We would like to have a more specific statement of the supposed facts before giving an opinion, but if it be absolutely true that no harm has been done to society, and that there is no possibility of any necessity for the exercise of preventive justice, either as regards the man or the community, we cannot understand what society has to do with the case any more than if the offender had coveted my horse but refrained from stealing him—in each case "a wickedness, which resulted in no harm to society, would go absolutely unpunished."

2. "If the prevention of future offences is the sole ground of punishment, why are punishments to be apportioned according to the malignity of the offences"? "Our sole concern is the balancing of future evils to be prevented, against the future evil to be produced by the punishment." The answer is simple, and we are surprised that Mr. Justice Fry should have missed it. Punishment must protect society; and the least punishment which will have this effect is the proper measure for each offence. It is plain that a week's imprisonment would not protect society from murder, and that hanging is unnecessary to protect against petty larceny. The measure is not marked off into inches, but the experience of centuries has brought about an approxi-

mate accuracy upon these points. But is Mr. Justice Fry's rule more simple? Adjust suffering to the enormity of the sin! Let somebody catalogue the sins in order of their enormity, and let us behold it. Will blasphemy or murder head the list? Will a son's petulant answer to his father, or treason to a tyrant take precedence? And when this is settled and society's protection requires a heavier punishment than the schedule exhibits, a heavier may, it is said, be properly inflicted, for the highly satisfactory and scientific reason, that "*the culprit has no merits which he can oppose to his thus being made useful for the good of society.*" In this scheme therefore, the possibility of fixing punishment by reference to the wrong to society is admitted, and the only question left therefore, is whether in case the sin-schedule should show heavier punishment, it should be inflicted.

3. "On the theory I present, the evil consequences of an act are important so far, and so far only, as they were known, or ought to have been known, to the actor, and so ought to have acted on his conscience, and are an element in the magnitude of his sins." Among the heads of enquiry into this matter is:—"The moral responsibility of the actor; by which I mean not merely the question whether he be sane or insane, but what is the nature of his moral training, his ethical environment, his knowledge of right and wrong; what is the light against which he is sinning—for surely it is true now as of old, that "He that knoweth his master's will, and doeth it not, shall be beaten with many stripes, but he that knoweth it not, with few." All this is very well in theory, but in practice it would acquit the thugs, or at all events, reduce their hanging to a few stripes. "If *his* conscience" is not up to the "*human* conscience," then he must submit to the consequences and become an example for the humanizing of other consciences, and we should think that he had very few "merits which he could oppose to his thus being made useful for the good of society."

"If the utility of the punishment is the only object, the punishment of an innocent victim is as satisfactory, if the

error is undiscovered, as the punishment of the guilty .... In fact, according to this theory, the association of the punishment and the crime in the same person is absolutely immaterial for the purposes of justice." This is unworthy of the writer's logical power. In awarding moral reprobation, would there not be as much satisfaction in punishing the innocent as the guilty if the mistake were undiscovered? According to the utilitarian theory, for the purpose of prevention, it is clearly necessary that the guilty should be punished, and that punishment of the innocent should be, as far as possible, unknown. But the defender of moral reprobation administered by men must be well aware that sin can never be adequately punished or atoned for by the sinner himself, and that it is in the christian scheme of punishment, not in Mr. Bentham's, that vicarious suffering has a place.

The result seems to be, that notwithstanding the learned judge's criticisms he admits the adjustability of punishment to the injury to society and the prevention of crime; that man is incapable of awarding punishment for sin apart from its effects upon society; and that even if man were able to punish sin as sin, judges have no commissions from God, but only from the government, and the latter no mandate but from society. The inquisition would be the result of any other theory.

CODIFICATION.

JEREMY BENTHAM'S tirade against the common law, as judge-made law, is interesting and suggestive at a time when codification is the subject of so many brochures and essays. We give below an extract from the fourth of the famous letters to the citizens of the United States.

"To be known an object must have *existence*. But *not* to have existence—to be a mere nonentity—in this case, my friends, is a portion—nay, by far the largest portion of that which is passed upon you for *law*. I speak of *Common Law*, as the phrase is; of the whole of Common Law. When men say to you the *Common Law does this*—the *Common Law does that*—for whatsoever there is of reality, look not beyond the two *words* that are thus employed. In these words you have a name, pretended to be the name of a really existing object: look for any such existing object—look for it till doomsday—no such object will you find.

Great is Diana of the Ephesians! cried the priests of the Ephesian Temple, by whom Diana was passed upon the people as the name of a really existing goddess. Diana a goddess, and of that goddess the statute, if not the very person, at any rate the express image.

Great is Minerva of the Athenians! cried at that same time—you need not doubt of it—the priests of the Temple of Minerva at Athens: that Athens at which St. Paul made known, for the first time, the unknown God. The priests of Athens had their goddess of wisdom: it was this *Minerva*. The lawyers of the English school have her twin sister, their Goddess of Reason. *The Law* (meaning the *Common Law*.) "*The Law*" (says one of her chief priests, Blackstone), "is the perfection of reason."

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Would you wish to know what a law—a real law—is? Open the statute book—in every statute you have a real

law; behold in that the really existing object, the genuine object, of which the counterfeit, and pretented counterpart, is endeavoured to be put off upon you by a lawyer, as often as in any discourse of his the word *Common Law* is to be found.

Common Law the name of an existing object? Oh, mischievous delusion—Oh impudent imposture! Behold, my friends, how, by a single letter of the alphabet, you may detect it. The next time you hear a lawyer trumpeting forth his *Common Law* call upon him to produce *a Common Law;* defy him to produce so much as any one really existing object, of which he will have the effrontery to say that that compound word of his is the name. Let him look for it till doomsday—no such object will he find.

Of *an individual, no; but of an aggregate, yes.* Will that be his answer? Possibly; for none more plausible will he find anywhere. Plausible the first moment, what becomes of it the next? An aggregate? Of what can it be but of individuals? An individual Common Law—no such thing, you have acknowledged, is to be found. Then where is the matter of which your aggregate is composed? No: as soon will he find *a body of men* without *a man* in it, or a *wood* without a *tree* in it, as a thing which, without *having a Common Law in it,* can with truth be styled *the Common* Law.

Unfortunately, my friends, unfortunately for us and you —in the very language which we all speak, there is a peculiarity, in a peculiar degree favorable to this imposture. Not in any Existing European language but ours, is the same word in use to be employed to denote the real and the fictitious entity; not in the ancient Latin, nor in any of the modern languages derived from it; not in the ancient German, nor in any of the modern languages derived from it.

Behold here the source of the deception. But in the mind of any man, by whom this warning has been received, no deception will it produce, unless in this instance impos-

ture be more acceptable to him than truth. In the article *a*—in the single letter *a*—he has an Ithuriel's spear; by the touch of it he may as often as he pleases, lay bare the imposture. *A Statute Law*, yes; *a Common Law*, no; no such thing to be found.

Be it a reality—be it a mere fiction—what is but too undeniable, and too severely felt, a something all this while there is, with which you are ever and anon perplexed and plagued, under the name of *Common Law*.

Yes, says our lawyer; and, *allowing to you that in* Common Law *there is no such thing as* a Law, *yet what you will not deny—and what will equally suit my purpose is—that such things there are—yes, and in no small abundance—such things there are as rules of law.* So much for our lawyer.

Rules? yes, say I; *Rules of law?* no. These rules, whom are they made by? To this question to find any positive answer is possible or not, as it may happen. But what is not only always possible, but always true is, that the person or persons by whom these *rules*, whatever they are, are made, is or are, in every instance, without exception, a person or persons who, in respect of any part he or they may take, or be supposed to take, in the laying down of any such rules, have not any title to make law, or to join in making law.

The sort of person whose case, among those who have not a title to make law, comes nearest to the case of those who have, is *a Judge*. But no law does any Judge, as such, ever so much as pretend to make, or to bear any part in making.

What, if pressed, he would take upon him to say he does is—to *declare* law; to declare what, in the instance in question, is law, to declare that a discourse, composed of such or such a set of words, is *a rule of law*. Thus speaking, he would be speaking the words put into his mouth by Blackstone.

Meantime—be it or be it not a *rule of law*—here at any rate is a rule, which having been made, must have been

made by somebody. What is more, not only has it been made, but by some judge whose duty it is to give to real laws the effect of law—the effect of a law, as if it were a real law, has been given to it. The effect? and what effect? exactly the same as if the words which it is composed of were so many words, constituting the whole or a part of some really existing law.

In the words in question, the rule in question, was it then ever declared before? If *not*, then in truth and effect, though not in words, the Judge by whom this rule is declared to be a rule of law, does, in so declaring it, and acting upon it, take upon himself to make a law; to make *a* law; and this is the pretended law he takes upon him to make.

If it *was* declared before, then not having been made by a legislator it must have had for its maker some person, be he who he may, of whom thus much is known, viz: that in the matter in question no right had he to make law; for its maker, either some Judge—that is, a man who does not pretend to have any right to make law, or some other man who was still further from having any such right than a Judge is. At any rate, not having been made by any one of your respective legislatures, this thing then, which, by your Judges and your other lawyers, is passed off upon you as and for *a rule of law*, viz: of English Common Law—if not by a Judge by whom, then, was it made? for *laws* do not make themselves any more than *snares* or *scourges*.

Of all persons, who, on the making of it, can be supposed to have had a part, the only individual in relation to whom you can have any complete assurance of his having had a part in the making of it is a *printer*: the *printer* by whom the first printed book in which it was to be found was printed.

But, though it is not without example for the man by whom a book is printed to have been himself the author of it, examples of this sort are comparatively rare. In the case, then, here you have *two* persons who have each of

them borne a part in the making of this discourse which is palmed upon you for law: two persons, who to you, let it never be forgotten, are both foreigners.

This book, then, on what ground is it that the author and the printer together can have thus taken upon them to pass it off—to pass it off in the first place upon *us*, in the next place (such as your goodness) upon *you* as and for a book of law.

First or last, the ground—at any rate the most plausible ground that can be made, comes to this: A portion of discourse, said to have been uttered by some Judge—by some Judge on the occasion of some decision pronounced by him in the course of a suit at law. Of this description, take it at the best, was, or in the book was said to have been this pretended *rule of law*—a pretended rule of law made, or pretended to have been made, by a functionary, who, as such, neither had, nor (as you have seen) could so much as have pretended to have, any right or title to make law, or so much as to bear any part in the making of any one law.

Yet, in relation to law, be he who he may, this Judge not only claimed a right to do, but has an indisputable right to do something. What is this something? Take, in the first place, to render the matter intelligible, the cause of the only real sort of law, *Statute Law*, and suppose *that* the sort of law under which the Judge is acting. What in this case is it that, in relation to this same law, he has to do? By some person—say a *plaintiff*—the Judge has been called upon to do something at his instance: something at the charge of some other person who, if he opposes what is thus called for, becomes thereby a *defendant*. *Why is it that I am to do this, which you are thus calling upon me to do? says the Judge. Because* (says the plaintiff) *a law there is which, in the event of your being called upon by a person circumstanced as I am, has ordained that, at the charge of a person circumstanced as the defendant is, a person circumstanced as you are, shall so do. This law says so and so:* look at it here if you have need: *it is a discourse* which is in print; and to which, at

such or such a time, by the constituted authorities, whose undisputed right it was to do so, was given the name and force of law.

Hearing this, or to this effect, the Judge (the facts on which the plaintiff grounds himself being regarded as proved)—the Judge, does he do that which by the plaintiff he is thus called upon to do? What he thereupon and thereby declares—declares expressly, or by necessary implication, is—that the portion of law, in virtue of which the plaintiff called upon him so to do, is a portion of law made and endued with the force of law, by an authority competent so to do; and that of this discourse the true sense is the very sense which the plaintiff, on the occasion of the application so made by him, has been ascribing to it.

Thus doing, what is it that, in current language, the Judge is said to have been doing? *Answer: pronouncing a decision*: a judicial decision: in particular a judgment, or a decree. Sometimes it is called by the one name, sometimes by the other: whereupon in virtue, and in pursuance of this decision, if need be, out goes moreover in his name an *order—a writ—a rule*:—sometimes it is called by one of these names, sometimes by another:—but if it be a *rule*, nothing more than a *particular* rule, bearing upon the individual persons and things in question: at any rate, ordering the defendant to do so and so, or ordering or empowering somebody else to do so and so, at his charge.

That you may see the more clearly what is done under sham law, herein above then you have an account of what takes place under real law. Well, now, suppose *Statute Law* out of the case, what is done is done, then, in the name of *the Common Law*. In this case, then, observe what there is of reality, and what there is of fiction. What, in this case, supposing the matter contested really has place, *a decision:* a decision pronounced by a Judge: say by the same Judge: a decision by which expression is given to an act of his *judgment*, followed by an *order*, or what is equivalent, by which expression is given to an act of his will. The *order* is but *particular:* the *decision* is in the same case.

But to justify him in the pronouncing of this decision, something which men are prepared to receive as law is necessary. *Real law*, by the supposition there is none; fictitious law must, therefore, be feigned for the purpose. What does he then? As above, under the name of *a rule of law*, either he makes for the purpose a piece of law of his own, or, as above, he refers to and adopts, and employs for his justification, a piece of law already made, or said to have been already made, by some other Judge or Judges.

What must all this while be acknowledged is—that, setting aside the question of its propriety and utility in other respects—if, so far as regards *certainty*, viz.: on the part of the decision, *certainty*, and, on the part of those persons whose lot depends on it, the faculty of being *assured* beforehand what it will eventually be—a decision grounded on this sham law were upon a par with a decision grounded on Statute Law, thus far, at least, it would come to the same thing, and it would be a matter of indifference whether the rule acted upon were put into the state of *Statute Law*, or kept in the state of *Common Law*. In that case, for determining the utility of the proposed operation called *Codification*, the only question might be—as between the two sorts of law—which of the two, their respective *sources* considered, afforded, generally speaking, the fairest promise of being most conducive to the universal interest? That which, at the present time, in contemplation of the exigencies of the present time, would have for its authors citizens of the State, mostly natives of the country—chosen by the rest of the citizens, in like manner mostly natives—or that which, in the course of several hundred years, was made at different times by from one to five persons, every one of them appointed by a Monarch—by a Monarch, under a constitution of which even in its most improved state, the yoke was found by you to be so grievous that, at the imminent peril of your lives and fortunes, and by the actual sacrifice of them to no small extent, you resolved to shake it off, and shook it off accordingly."

COMMISSIONERS.

A SEMI-OFFICIAL opinion has recently been obtained from the Lord Chancellor upon a matter of professional practice, or etiquette not provided for in the Rules of Court. In answer to an inquiry whether solicitors might take declarations made by their clients in conveyancing matters in which they were acting, the Incorporated Law Society were informed by the Lord Chancellor 'that, although Order XXXVIII., rule 16, of the Rules of the Supreme Court does not appear to refer to business done otherwise than in a cause or matter, the principle applies to all cases, and a solicitor should not act as a commissioner in any case in which he is directly or indirectly interested, or in which he is acting.' This seems obviously a correct view of the proprieties of the case.—*Law Journal* (*Eng.*)

JUDICIAL CAPACITY.

It is a common thing for the remark to be made about a deceased judge, "He was not a great lawyer." The critic then proceeds to allude to the strong common sense or other qualification which to some minds compensates for the absence of legal knowledge in a judge. The fact is undoubted that with the abolition of what is called technicality, but what may be more properly termed a strict adherence to rules of law and procedure, learning has declined. It is a delightful thing for a flabby intellect to be able to "brush aside" technicalities, and decide cases by the pure light of reason and common sense. A vast amount of thought is spared, research, or its equivalent knowledge, is dispensed with; but the result is too apt to be uncertainty and diversity in decision. This is supposed to be one of the reasons why the Law Reports are giving up reporting decisions except in the Court of Appeal and the House of Lords.—*Law Times.*