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978-1-108-00492-3 - An Inquiry, Whether Crime and Misery are Produced or Prevented, by our Present System of Prison Discipline

Thomas Fowell Buxton

Excerpt

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AN  
I N Q U I R Y,  
&c.

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MAGNA CHARTA declares that no freeman shall be taken or imprisoned, but by *the lawful judgment of his equals*, or the *law of the land*.

When a prisoner is convicted by the “lawful judgment of his equals,” imprisonment is sometimes a part, and sometimes the whole of the penalty awarded against him; and evidently with the strictest justice, because it is proved that he has been guilty of an offence, and this is the appointed punishment.

But the “law of the land” finds it necessary to depart from this rigid rule of equity, which would abridge only that man of his freedom, who had been pronounced a delinquent by the verdict of his peers. The security of the whole demands, that the liberty of some should be suspended for a certain period. Persons are accused of crimes—they may be innocent, or they may be guilty: but their detention is necessary until the time arrives in which one or the other can be established; yet, they are innocent in the eye of the law, till their guilt is proved; and in this case imprisonment is not imposed as a penalty, it is merely permitted as the

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only method of insuring the appearance of the person suspected, on the day of trial.

So far does the law carry its reluctance to impose confinement before conviction, that it allows the accused, where the imputed offence is not of an heinous description, to be at large on giving bail for his appearance; \* it does not do so in cases of greater enormity, because the man who has committed a capital offence, and therefore anticipates the loss of his life, as well as of his property, will not be deterred from making his escape by any securities he may have given. The ancient law displayed even still more tenderness towards the liberty of the subject, for “ by it, in all cases of felony, if the party accused could find sufficient securities, he was not to be committed to prison, *quia carcer est mala Mansio*. † It soon appears however, that one exception was allowed to this rule, Glanvil ‡ says, in all charges of felony the accused is admitted to bail, except for the death of a man, where, for terror's sake, it is otherwise determined. The law, says Lord Coke on Magna Charta, favouring the liberty and freedom of a man from imprisonment (though it were for the most odious cause, the death of a man) and that he should not be detained in prison until the Justices in eyre should come, provides that he might sue out a writ of inquisition directed to

\* Commitment for trial being only for safe custody ; wheresoever bail will answer the same intention, it ought to be taken. Book iv. chap. 22. *Blackstone*.

† Coke 2 Inst. chap. xv. p. 185. note 5.

‡ Lib. xiv. chap. 1.

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the Sheriff; \* and the 3rd of Edward the 1st, chap. 15, after pointing out by many and careful restrictions the cases in which alone bail can be refused,—declares if any withhold prisoners replevisable after they have offered sufficient security, he shall pay a grievous amercement to the King.”

In short, to use the expressive words of Lord Coke, “ the Law did highly hate the long imprisonment of any man” before trial:

Now it is not to be believed that our ancestors, feeling so much solicitude for the conservation of the freedom of the untried, were unconcerned about their state, when the public welfare demanded their confinement. It is as evident by the law of the land, as it is by plain reason and the palpable rules of justice, that the man whom it is found expedient to confine, should be treated with the utmost possible lenity,—that suffering some degree of necessary hardship by the privation of his liberty before trial; that privation should be rendered as mild and as little galling as possible, by every reasonable indulgence compatible with his safe custody. All beyond this, every act which produces needless restriction or suffering, is an act of wrong and of oppression.—Laws may be as severe against crime as were the laws of Draco, with some colour of justice: Mistaken legislators may imagine that this merciless system may alarm mankind into innocence; but no principle of justice can defend the infliction of any severities on the unconvicted. A man can avoid

\* Coke on Magna Charta, chap. 26.

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the penalties of crime, by avoiding all criminality; but no man is secure against false accusation; and to condemn him who is only suspected, to any thing beyond mere confinement, is to commence his punishment when his crime is uncertain.

Lord Coke says, with his usual quaintness, “The philosophical poet doth notably describe the damnable and damned proceedings of the judge of Hell.—

*Gnossius hic Rhadamanthus habet durissima regna,  
Castigatque, auditque dolos.—*

“First he punisheth, and then he heareth; but good judges and justices abhor these courses.”\*

There is another description of persons who are deprived of their liberty by the law of the land, namely, those in debt.—The debtor may have been guilty of improvidence, of desperate speculations, or of fraudulent wastefulness; but he may have been reduced to his inability to satisfy his creditor by the visitation of God,—by disease, by personal accidents, by the failure of reasonable projects, by the largeness or the helplessness of his family. His substance and the substance of his creditor, may have perished together in the flames, or in the waters. Human foresight cannot always avert, and human industry cannot always repair the calamities to which our nature is subjected;—surely these are entitled to some compassion. The Committee of Aldermen appointed to visit various prisons, are of a different opinion: they think, “that on no consideration ought indulgence to be carried so far in a prison, as that it shall cease to punish as a prison;” and

\* 2nd Inst. c. 29, on Magna Charta.

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they give this reason:—"we should fee. that we wanted compassion for the industrious and injured creditors of this city, many of whom earn their daily bread by labour, from the rising to the setting sun; were we so far to contemplate the situation of these debtors, as to place them within the walls of a prison with greater comparative comforts than the families of the citizens, whom they have not only wronged, but upon whom by their habits of idleness and dissipation, they have, in many instances, entailed absolute ruin; and who have been induced by their specious appearances and artful means, to improvidently trust them."

Surely it cannot have escaped these gentlemen, that this very paragraph confutes their presumption, that prisoners for debt are always fraudulent; because it produces an instance in which insolvency is not a fraud. Let us follow their own picture of a citizen:—He earns his daily bread by labour, from the rising to the setting sun; he is imposed upon by the specious appearances and artful means of the idle and the dissipated; he is unable to discharge the demands against him, and a jail is his fate. Thus, the very man for whom so much tenderness is expressed, may become their victim.—To punish him, by a sweeping declaration that prisons ought always to punish, is to scourge misfortune with those rigors which guilt alone can deserve.

The law of the land, however, appoints imprisonment for debt; and it is not my present purpose to inquire, whether in this instance that law is too rigorous; but that it is not too lenient, is evident by

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universal confession, and by the various contradictory, and often unjust expedients to which the legislature has resorted, to abate the severity of its own enactments.

Imprisonment is then the legal consequence of debt: but it is only imprisonment, and it must not be accompanied with unnecessary and often fatal concomitants. Not an act in the statute book is to be found, which by any mode of construction can be distorted into a justification of any, even the slightest severity upon the debtor, beyond his imprisonment. With respect then to the untried debtors, confinement is adjudged by law; but whatever goes beyond mere confinement, whatever has a tendency to impart moral or physical evil, to disgust or to irritate their feelings, is injustice;—and injustice the more dreadful, because it is inflicted on a class of men who are already too often weighed down by misfortune—because it is inflicted in places where the public eye does not penetrate, where therefore, public compassion is not excited; but whether it be more or less dreadful, is not so much the question. This, I conceive, is certain, that any unnecessary severity to the prisoner who has not been tried, or the prisoner for debt, is injustice.

I am ready to admit, that the hardship of loading the convicted delinquent with rigors which are not required for his safe custody, is less evident. On the first view of the subject, we are apt to imagine that this is a part of his punishment; but it is not so in the contemplation of the law.—That law ascertains the nature, and in some cases the Judge deter-

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mines the quantum of the punishment, according to the aggravations of the crimes ; but the penalty thus pronounced, is all that is to be inflicted : where the law, therefore, condemns a man simply to be committed to jail, the suspension of his personal liberty is the utmost which he ought to suffer ; and to embitter his confinement by circumstances often much worse than the loss of liberty itself, is to aggravate and distort the law, and to annex severities which are not awarded by its sentence. I am well aware that the law itself, in certain cases, renders imprisonment more rigorous by express provisions :— In cases of murder, “ the offender shall be fed with bread and water only, and confined in a cell apart from the other prisoners ;” but this peculiar severity appointed in certain cases, implies that it is not to be exercised in others where no such appointment is made.

It is therefore evident, I conceive, that where the law condemns a man to jail, and is silent as to his treatment there, it intends merely that he should be amerced of his freedom, *not that he should be subjected to any useless severities*. This is the whole of his sentence, and ought therefore to be the whole of his suffering.

If any one should be disposed to hesitate in the adoption of this opinion, and should still cling to the idea, that prisons ought to be, not merely places of restraint, but of restraint coupled with deep and intense misery ; let him consider the injustice, and irresistible difficulties which would result from such a system. If misery is to be inflicted at all in pri-

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sons, it ought surely to be inflicted with some proportion to the crime of the offender; for no one could desire to visit very different degrees of guilt with the same measure of punishment. Now this is utterly impracticable. Our prisons are so constructed, as in many instances to prevent the possibility of any separation at all, even between the tried and the untried, the criminal and the debtor, the insane, the sick, and the healthy. If it be difficult to separate those amongst whom the difference is so broad and palpable, how would it be possible to relax or to aggravate imprisonment according to the varying circumstances of each case? There must be as many distinctions as crimes, and almost as many yards as prisoners. And who is to apportion this variety of wretchedness? The Judge who knows nothing of the interior of the jail, or the jailer who knows nothing of the transactions of the Court? The law can easily suit its penalties to the circumstances of the case. It can adjudge to one offender imprisonment for one day; to another, for twenty years; but what ingenuity would be sufficient to devise, and what discretion could be trusted to inflict modes of imprisonment with similar variations?

In fact, prisons must always, certainly under our present modes of policy they must, contain masses of offenders, with very different shades and distinctions of guilt; and we must either make imprisonment as bitter as possible, and thus involve the comparatively innocent, in those hardships which we impose upon delinquency of the deepest hue,



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confounding all notions of equity; or we must come to the conclusion that imprisonment is nothing more than privation of liberty, and ought therefore to be attended with as little of what is vexatious, and as little of what is hurtful as possible. Let no one apprehend that he is called upon to embrace any new opinion; the doctrine is older than the statute book—it existed, when the existence of the House of Commons is a matter of conjecture. Bracton says, that fetters and all such things are forbidden by law; because a prison is a place of retention, and not of punishment, lib. iii. folio 105. Fleta says, l. i. c. 26, jailers shall not increase the punishment of those committed to their care, nor shall they torture them; but all severity being avoided, and all mercy being exercised, they shall duly execute their sentences. Lord Coke says, all the said ancient authors are against any pain or torture being inflicted upon a prisoner before attainder; nor after the attainder, but according to the judgment.

Taking along with us the principle which has here been stated, we must next consider particularly the treatment which a prisoner should receive; and the equitable principle seems to be, that he should suffer no damage either in mind or body, which is not found in his sentence; that his situation should not be worse than it was before his commitment, with the single exception of the loss of liberty. This can only be done by general rules. You cannot exactly adapt his treatment in prison to his preceding circumstances; but by the establishment of equitable and liberal regulations, you may guard

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against any violent infraction of justice; and if you err at all it will be on the side on which we should all wish to err—the side of humanity.

Let us then follow a prisoner from his first commitment, always remembering that as yet his guilt is unproved. You have no right to march him along the streets in chains, or to make him a spectacle of public ignominy, perhaps on the very spot, and amongst the very people with whom he has hitherto held a fair character.—Infamy may be the penalty for crime, but it should never be the consequence of suspicion: you should, therefore, conduct him to his jail with every possible attention to his feelings; with decency and secrecy. When he is entered within its walls, you have no right to load him with irons; you have no right to subject him to bodily pain from their weight, or to that agony of mind, which must result from such symbols of degradation to a man of yet unblunted feelings; and you have no right to conclude that he is not such. And here I must observe in the language of Blackstone,\* “The law will not justify jailers in fettering a prisoner, unless where he is unruly, or has attempted an escape.” It would be tedious to the generality of my readers to confirm so high an opinion by additional authorities: it is sufficient to say that such are to be found in the Myrror,† in Coke,‡ and in Bracton; the latter, indeed, goes so far§ as to intimate, that a sentence condemning a man to be confined in irons, is illégal.

\* Book iv. c. 22. † C. 5. § 1–54. ‡ Ins. 3–34. § L. 3–105.