More than a century and a half ago, James Wilson, first Professor of Law at what is now the University of Pennsylvania, and Associate Justice of the United States Supreme Court, expressed views on punishment which are worthy of our attention today. As a professor of law he expounded an historical and philosophic basis of government and of law, and placed a considerable emphasis upon crime and punishment.¹

In the 1790's, when James Wilson was stating his views on punishment, the English common law and the criminal code of the newly established government of the United States both prescribed severe punishments. Wilson believed that the criminal codes of his day needed to be revised and modified.² He contended that the liberty and happiness of citizens depend chiefly on the quality of the criminal law.³ “To punish, and, by punishing, to prevent” criminal offenses, he said, “is or ought to be” the main objective of the criminal law.⁴ In opening a charge to the Grand Jury in the Circuit Court of the United States for the District of Virginia in May, 1791, he used the following words⁵:

To prevent crimes is the noblest end and aim of criminal jurisprudence. To punish them is one of the means necessary for the accomplishment of this noble end and

¹ Today our concept of treatment for the offender is considerably broader than that of mere punishment. It includes specific medical and psychiatric aid, educational and vocational guidance, and other social services. Such features, or some of them, may have been implied vaguely by James Wilson in his statements on punishment, but certainly were not enumerated by him.

² See The Works of the Honourable James Wilson, L.L.D., Late one of the Associate Justices of the Supreme Court of the United States, and Professor of Law in the College of Philadelphia, published under the direction of his son Bird Wilson, Esquire (Philadelphia, 1804), I, 49, and III, 15; hereafter cited as Works.

³ Works, I, xi.

⁴ Works, I, 294. Italics ours.

⁵ A Charge Delivered By The Hon. James Wilson, Esq. One Of The Associate Justices Of The Supreme Court Of The United States, To The Grand Jury, Impannelled For The Circuit Court
aim. The impunity of an offender encourages him to repeat his offences. The witnesses of his impunity are tempted to become his disciples in his guilt. These considerations form the strongest—some view them as the sole argument for the infliction of punishments by human laws.

There are, in punishments, three qualities, which render them the fit preventives of crimes. The first is their moderation. The second is their speediness. The third is their certainty.

Probably no city in modern times has contributed more to both thought and experiment in the field of criminal law over a period of many years than Philadelphia. James Wilson’s writings indicate that he was familiar with some of the theories of the ancients, and of Beccaria and others on the subject of punishment. In Philadelphia Wilson was rubbing shoulders with friends and political opponents who held definite theories of punishment. He had an opportunity to observe at first hand a severe penal code, a modification of that code, and to move about in an atmosphere of much progressive thinking on the problem of “punishment,” which today would more properly be termed correctional treatment. He was not the first to raise his voice in behalf of reforms in the method of dealing with those who commit crime, but he must be given credit for advocating clearly and forcefully certain reforms in the field of criminal jurisprudence.

1. Nature and worth of Wilson’s writings. A remarkable thing about Wilson’s writings is the familiarity they show with the works of classical jurists, philosophers, and historians. In his writings, which consist mainly of his law lectures, miscellaneous essays, and speeches, James Wilson indicates an acquaintance with the history of government in many nations—Egypt, Greece, Carthage and Rome of the ancient world, and England, France, Spain and Prussia.

Many times in his writings, in dealing with a fundamental principle, Wilson traces it to its source, which takes him back to Sir William Blackstone, Lord Coke, Lord Shaftesbury and Richard Hooker of England, Emeric de Vattel of Switzerland, Baron Montesquieu of France, to the German Samuel von Pufendorf, to the Dutch Hugo Grotius, to Plato and Aristotle of ancient Greece, and others, and results in his citing those authorities. When discussing the views

Of The United States, Holden For The Middle-Circuit At The Capitol, In The City Of Richmond, And District Of Virginia, On Monday, the 23d Day of May, 1791 (Richmond, 1791), preserved in the Rare Book Division of the Library of Congress. This Charge is reprinted in Works, III, 357-393.
of writers other than himself he rather consistently cites the source of his material.

Wilson said right principles must be sought. When he did not agree with the traditional view, as for instance Blackstone's definition of law, he voiced his dissent and gave his reasons.

In a number of respects Wilson's writings reflect views similar to those of Thomas Aquinas, the scholastic philosopher of the thirteenth century, and of Richard Hooker (1553–1600), who wrote an important work over a period of years, entitled *Laws of Ecclesiastical Polity*. In one place Wilson states: "Let us listen to the judicious and excellent Hooker: what he says always conveys instruction."

In many instances James Wilson illustrates his thoughts very clearly, as is shown in the following example concerning causes of free action. "Every free action has two causes, which cooperate in its production. One is moral; the other is physical: the former is the will, which determines the action; the latter is the power, which carries it into execution. A paralytic may will to run: a person able to run, may be unwilling: from the want of will in one, and the want of power in the other, each remains in his place." However, large parts of his *Lectures on Law* lack a captivating sparkle from the standpoint of readability, although they are not laborious to read. His best written speeches flow in more entertaining style than many

---

6 The following statement of Wilson's is in point. "We now see, how necessary it is to lay the foundation of knowledge deep and solid. If we wish to build upon the foundations laid by another, we see how necessary it is cautiously and minutely to examine them. If they are unsound, we see how necessary it is to remove them, however venerable they may have become by reputation; whatever regard may have been diffused over them by those who laid them, by those who built on them, and by those who have supported them." *Works*, I, 67.

7 *Works*, I, 102. On page 56, *Ibid.*, Wilson speaks of the "sublime language of the excellent Hooker." To a certain extent Wilson's thinking was the product of his environment. John Locke's *Two Treatises on Government* (c. 1690), was an influential work in America at about the time of the outbreak of the Revolution and at a time when Wilson began his public career. Montesquieu's *Esprit des Lois* (1748), had a great influence on American political theory. Burlamaqui and Vattel of Switzerland and Pufendorf, the German, were writers on politics frequently mentioned in America at about the time of the outbreak of the Revolution. Pufendorf's *Law of Nature and Nations* was available in English. As to what Americans were reading during the years immediately prior to the Revolution, see Evarts Boutell Greene, *The Revolutionary Generation, 1763-1790* (New York, 1943), chapter VI, "Prerevolutionary Culture," particularly pages 126-140.

8 *Works*, I, 253.

9 Wilson's *Lectures on Law* were delivered in 1790–1791 at the College of Philadelphia, now the University of Pennsylvania, and are found in his *Works*. 
parts of his *Lectures on Law*. In the speeches the reader is carried along pleasantly with a series of concise statements. When reading Wilson’s speeches today one can virtually see the crowds of the 1780’s following his words with rapt attention.\footnote{Take for instance the closing paragraph of his speech of July 4, 1788, at the procession formed at Philadelphia to celebrate the adoption of the United States Constitution. In eloquent words he pictured the condition and immediate future of the new nation as follows: “The commencement of our government has been eminently glorious: let our progress in every excellence be proportionably great. It will—it must be so. What an enrapturing prospect opens on the United States! Placid husbandry walks in front, attended by the venerable plough. Lowing herds adorn our vallies: bleating flocks spread over our hills: verdant meadows, enamelled pastures, yellow harvests, bending orchards, rise in rapid succession from east to west. Plenty, with her copious horn, sits easy smiling, and, in conscious complacency, enjoys and presides over the scenes. Commerce next advances in all her splendid and embellished forms. The rivers, and lakes, and seas, are crowded with ships. Their shores are covered with cities. The cities are filled with inhabitants. The arts, decked with elegance, yet with simplicity, appear in beautiful variety, and well adjusted arrangement. Around them are diffused, in rich abundance, the necessaries, the decencies, and the ornaments of life. With heartfelt contentment, industry beholds his honest labours flourishing and secure. Peace walks serene and unalarmed over all the unmolested regions—while liberty, virtue, and religion go hand in hand, harmoniously, protecting, enlivening, and exalting all! Happy country! May thy happiness be perpetual!” *Works*, III, 310–311.}

One finds a considerable amount of repetition in James Wilson’s writings.\footnote{For example, entire parts of his *Charge* to the Federal Grand Jury at Richmond in May, 1791, published in that year, are to be found in almost identical form in the chapter, “Of The Nature Of Crimes; And The Necessity And Proportion Of Punishments,” *Works*, III. Compare pages 32–37 of the *Charge* with *Works*, III, 358–363.} This repetition may signify a path of least resistance in writing or a re-emphasis of his views.

2. Wilson’s philosophic and legal basis for punishment. Today we are inclined to take government, law, and punishment for granted. James Wilson and those who preceded him by two or three generations lived in a period of much abstract political thinking. Jurists such as Pufendorf and Blackstone and philosophers such as Hobbes, Locke, and Rousseau were spending a considerable amount of time explaining the social contract and sovereignty, and defining law. Wilson himself was an abstract political thinker as his writings attest. However, he was also a man of action in the field of political theory and law. His service in the Continental Congress and his part in shaping the United States Constitution and Pennsylvania’s Constitution of 1790 indicate this fact.

Through much of Wilson’s writings there is a philosophic justifica-
tion for government and law, and its corollary, punishment for violation of the law. In order to understand his theories of punishment it is necessary to understand his philosophy of law. He expressed a belief that society should organize governments and enact positive law, but stated that positive law (human law) must be in accord with natural law,\textsuperscript{12} must be based on consent,\textsuperscript{13} and must not be any more extensive than necessary.\textsuperscript{14} After these conditions are met, all living under the law are obliged to abide by it or to suffer the punishment it prescribes for violation.\textsuperscript{15} Wilson emphasized that the criminal codes of his day needed revising,\textsuperscript{16} that criminal codes must be reduced to just those laws necessary to protect the public, that they must provide mild and moderate rather than severe punishment and that the law must be enforced speedily. He took a long range view of punishment—a view that looks to reform rather than to savage treatment of the offender.

On Saturday, November 24, 1787, in the Pennsylvania Convention called to deliberate on the constitution for the United States, James Wilson, in an eloquent and well-received speech, touched on the nature and principles of civil society, as follows\textsuperscript{17}:

> Our wants, imperfections, and weakness, Mr. President, naturally incline us to society; but it is certain, society cannot exist without some restraints. In a state of nature each individual has a right, uncontrolled, to act as his pleasure or his interest may prevail, but it must be observed that this license extends to every individual, and hence the state of nature is rendered insupportable, by the interfering claims and the consequent animosities of men, who are independent of every power and influence but their passions and their will. On the other hand, in entering into the social compact, though the individual parts with a portion of his natural rights, yet it is evident that he gains more by the limitation of the liberty of others, than he loses by the limitation of his own,—so that in truth, the aggregate of liberty is more in society, than it is in a state of nature.

> It is then, Sir, a fundamental principle of society, that the welfare of the whole shall be pursued and not of a part, and the measures necessary to the good of the community must consequently be binding upon the individuals that compose it.

\textsuperscript{12} Works, I, 104–105.
\textsuperscript{13} Works, I, 99.
\textsuperscript{14} Works, II, 442–443 and 177.
\textsuperscript{15} Works, II, 312–313.
\textsuperscript{16} Works, III, 15.
\textsuperscript{17} John B. McMaster and Frederick D. Stone, Pennsylvania and the Federal Constitution (Lancaster, Pa., 1888), 224–225.
In this speech in the Pennsylvania Convention Wilson specifically stated that “no government . . . can exist, unless private and individual rights are subservient to the public.”

Two days later, November 26, 1787, in the same Convention, Wilson delivered a speech containing some very similar remarks on government and its authority over the individual. He said: “Our wants, our talents, our affections, our passions, all tell us that we were made for a state of society. But a state of society could not be supported long or happily without some civil restraint. It is true that, in a state of nature, any one individual may act uncontrolled by others; but it is equally true, that, in such a state, every other individual may act uncontrolled by him. Amidst this universal independence, the dissensions and animosities between interfering members of the society would be numerous and ungovernable. The consequence would be, that each member, in such a natural state, would enjoy less liberty, and suffer more interruption, than he would in a regulated society. Hence the universal introduction of governments of some kind or other into the social state. The liberty of every member is increased by this introduction, for each gains more by the limitation of the freedom of every other member, than he loses by the limitation of his own. The result is, that civil government is necessary to the perfection and happiness of man. In forming this government, and carrying it into execution, it is essential that the interest and authority of the whole community should be binding on every part of it.”

Further on in this speech of November 26, Wilson speaks of civil liberty under law, stating that “civil government is necessary to the perfection of society: . . . civil liberty is necessary to the perfection of civil government. Civil liberty is natural liberty itself, devested only of that part, which, placed in the government, produces more good and happiness to the community, than if it had remained in the individual. Hence it follows, that civil liberty, while it resigns a part of natural liberty, retains the free and generous exercise of all the human faculties, so far as it is compatible with the publick welfare.”

18 Ibid., 226–227.
19 Works, III, 284.
In his opinion in Chisholm v. Georgia, James Wilson repeats some statements that he made in earlier writings, especially in his Lectures on Law. In the opinion, he particularly emphasizes the dignity and worth of the individual, the need for government, the necessity for retaining sovereignty in the people and the obligation of obedience to law. He points out that states and governments were made for man, but that frequently they oppress rather than serve him. He writes that “Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.” Yet, of all “human contrivances,” he thought it to be “certainly most transcendently excellent.” “Let a State be considered as subordinate to the People: But let every thing else be subordinate to the State. The latter part of this position is equally necessary with the former. For in the practice, and even at length, in the science of politics there has very frequently been a strong current against the natural order of things, and an inconsiderate or an interested disposition to sacrifice the end to the means. As the State has claimed precedence of the people; so, in the same inverted course of things, the Government has often claimed precedence of the State; and to this perversion in the second degree, many of the volumes of confusion concerning sovereignty owe their existence. The ministers, dignified very properly by the appellation of the magistrates, have wished, and have succeeded in their wish, to be considered as the soveraigns of the State. This second degree of perversion is confined to the old world, and begins to diminish even there: but the first degree is still too prevalent, even in the several States, of which our union is composed. By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations.”

Judge Wilson, in this famous opinion in Chisholm v. Georgia, 1793, continues, “The only reason, I believe, why a free man is bound by
human laws, is, _that he binds himself_. Upon the same principles, upon which he becomes bound _by the laws_, he becomes amenable to the _Courts of Justice_, which are formed and authorized by those laws."

Sovereignty resides in the people. As a matter of justice laws must be based on the consent of those who are required to obey them. And, again speaking of the dignity and worth of the individual, he writes, "A _State_ I cheerfully admit, is the noblest work of _Man_. But, _Man himself_, free and honest, is, I speak as to this world, the noblest work of _God_." Near the close of his opinion he makes the point that it would be superfluous to make laws without enforcing them.

In his opinion in _Ware, Administrator of Jones, Plaintiff in Error, v. Hylton et al._, in 1796, Judge Wilson said that "a law does nothing more than express the will of a nation."

In his chapter on law and obligation, in his _Lectures on Law_, James Wilson held that law carries with it an obligation of obedience, but that human law must be based on divine law, which requires that no injury be done, and that lawful engagements be faithfully fulfilled when made voluntarily. In his chapter on the law of nature, he writes that "Where a supreme right to give laws exists, on one side, and a perfect obligation to obey them exists, on the other side; this relation, of itself, suggests the probability that laws will be made."

It was difficult for the University of Pennsylvania's first Professor of Law to conceive of a social order without a structure of law to govern its conduct. He writes: "When we view the inanimate and irrational creation around and above us, and contemplate the beautiful order observed in all its motions and appearances; is not the supposition unnatural and improbable—that the rational and moral world should be abandoned to the frolicks of chance, or to the ravage of disorder? _What would be the fate of man and of society, was every one at full liberty to do as he listed, without any fixed rule or principle_

---

26 2 Dallas, 456.
27 2 Dallas, 458. Wilson repeats this idea many times in his writings.
28 2 Dallas, 458.
29 2 Dallas, 462-463.
30 2 Dallas, 464-465.
31 3 Dallas, 281.
32 _Works_, I, 61.
33 _Works_, I, 104-105.
34 _Works_, I, 113.
of conduct, without a helm to steer him—a sport of the fierce gusts of passion, and the fluctuating billows of caprice?"\(^{35}\)

Wilson continues: "To be without law is not agreeable to our nature; because, if we were without law, we should find many of our talents and powers hanging upon us like useless incumbrances. Why should we be illuminated by reason, were we only made to obey the impulse of irrational instinct? Why should we have the power of deliberating, and of balancing our determinations, if we were made to yield implicitly and unavoidably to the influence of the first impressions? Of what service to us would reflection be, if, after reflection, we were to be carried away irresistibly by the force of blind and impetuous appetites?"\(^{38}\)

Then he asks, "Without laws, what would be the state of society? The more ingenious and artful the two-legged animal, man, is, the more dangerous he would become to his equals: his ingenuity would degenerate into cunning; and his art would be employed for the purposes of malice. He would be deprived of all the benefits and pleasures of peaceful and social life: he would become a prey to all the distractions of licentiousness and war."\(^{37}\)

Judge Wilson looked on man as author and subject of law, and pointed out that man is \textit{accountable} for his own conduct and capable of directing the conduct of himself and others.\(^{38}\) He stated that a complete right to punish is vested in society, and a full obligation to be amenable to punishment is laid on the individual who offends.\(^{39}\) Wilson shows that in the social contract one injured by another transfers to the public his right of punishment and that the wrong-doer agrees to be judged by the public.\(^{40}\)

In the following words Wilson explains the right of the state to punish criminals.\(^{41}\)

Before the formation of society, the right of punishment, or, to speak with more propriety, \textit{the right of preventing the repetition of crimes}, belonged to him who had

\(^{35}\) \textit{Works}, I, 113-114. Italics ours. Here Wilson, of course, implies punishment as a result of violating the law.

\(^{36}\) \textit{Works}, I, 114.

\(^{37}\) \textit{Ibid.}

\(^{38}\) \textit{Works}, I, 232.

\(^{39}\) \textit{Works}, II, 312-313.

\(^{40}\) \textit{Works}, II, 350.

\(^{41}\) \textit{Works}, II, 312-313. Italics ours. This denotes Wilson's long range point of view—prevention.
suffered the injury, arising from the crime which was committed. In a society formed and well constituted, the right of him who has suffered the injury is transferred to the community. To the community, therefore, instead of the injured individual, he who committed the injury is now to answer. To answer to the community for his conduct, was a part of the social contract, which, by becoming a member, he tacitly and voluntarily made. In this manner, a complete right is vested in the society to punish; and a full obligation is laid on the individual offending, to be amenable to punishment. . . .

The punishment of a crime in regulated society presupposes two things. 1. The crime must be authenticated. 2. The penalty must be ascertained . . . each of those two prerequisites to punishment must be equally the act of the society—of the whole society.

Is one’s safety endangered or freedom infringed by obedience to laws? Wilson’s answer is that obedience to laws democratic and wise brings security, and as near as humanly possible, perfect freedom. He raises the question, “Is the dignity of man degraded by observing a law?” His answer is, “The Supreme of Being!—he himself worketh not without a rule!” and states that obedience to the laws is the first duty of every member of a free and well-constituted government.

In opening the third volume of his Lectures on Law Wilson states:

Hitherto, we have considered the rights of men, of citizens, of publick officers, and of publick bodies: we must now turn our eyes to objects less pleasing—the violations of those rights must be brought under our view. Man is sometimes unjust: sometimes he is even criminal: injuries and crimes must, therefore, find their place in every legal system, calculated for man. One consolatory reflection, however, will greatly support us in our progress through this uninviting part of our journey: we shall be richly compensated when we reach its conclusion. The end of criminal jurisprudence is the prevention of crimes.

3. Favored mild punishment. The opening chapter of Lectures on Law, Volume III, is entitled “Of The Nature Of Crimes; And The Necessity And Proportion Of Punishments.” In this chapter Wilson goes into a discourse on what constitutes crime and on how crime should be punished. In the discourse he cites the views of the Marquis of Beccaria, Sir William Blackstone, and others now less well known—Selden, Paley, Eden and Dagge. Wilson states that a crime is an “injury, so atrocious in its nature, or so dangerous in its example, that, besides the loss which it occasions to the individual

42 Works, II, 436.
43 Ibid.
44 Works, III, 3. The italics are Wilson’s.
who suffers by it, it affects, in its immediate operation or in its con-
sequences, the interest, the peace, the dignity, or the security of the
publick," and that "a crime against the publick has its foundation
in an injury against an individual."

Wilson expressed himself as being in favor of mild punishment for
crime. He indicated his belief that severe criminal codes prescribing
unreasonable punishment do not lessen the number of crimes—that
severe punishment cannot be relied upon to be a deterrent. The
frequent use of rigorous penalties produces a hardened insensibility
among citizens, he stated. He took the view that harsh criminal
codes develop an aversion to the laws and a public sympathy for the
accused and so result in improper enforcement of the law. This, in
turn, leads the criminal to repeat his crime "under the expectation
that the impunity also will be repeated," and to develop criminal
habits to the point where he will "engage in some desperate attempt;"
and then another.

In a somewhat contradictory vein, Wilson states that continued
use of rigorous penalties develops a hardened insensibility of the type
which sanctions still more rigorous penalties, until a nation descends
to barbarity. In Wilson's words:

True it is, that, on some emergencies, excesses of a temporary nature may receive
a sudden check from rigorous penalties: but their continuance and their frequency
introduce and diffuse a hardened insensibility among the citizens; and this insensi-
bility, in its turn, gives occasion or pretence to the farther extension and multiplica-
tion of those penalties. Thus one degree of severity opens and smooths the way for
another, till, at length, under the specious appearance of necessary justice, a system
of cruelty is established by law.

Such a system is calculated to eradicate all the manly sentiments of the soul, and
to substitute, in their place, dispositions of the most depraved and degrading kind.
It is the parent of pusillanimity. A nation broke to cruel punishments becomes
dastardly and contemptible. For, in nations, as well as individuals, cruelty is al-
ways attended by cowardice. It is the parent of slavery. In every government, we
find the genius of freedom depressed in proportion to the sanguinary spirit of the
laws. It is hostile to the prosperity of nations, as well as to the dignity and virtue
of men. The laws, which Draco framed for Athens, are said emphatically to have
been written in blood. What did they produce? An aggravation of those very

45 Works, III, 4.
46 Works, III, 8.
47 Works, III, 34.
48 Works, III, 32-33.
49 Works, III, 359-360.
calamities, which they were intended to remove. A scene of the greatest and most complicated distress was accordingly exhibited by the miserable Athenians, till they found relief in the wisdom and moderation of Solon. It is a standing observation in China—and China has enjoyed a very long experience—that in proportion as the punishments of criminals are increased, the empire approaches to a new revolution.

Frequently, in his Lectures on Law, James Wilson complained of the inadequacy of the criminal codes of Europe. The criminal law, he said, “Instead of being, as it ought to be, an emanation from the law of nature and morality; it has too often been avowedly and systematically the reverse. It has been a combination of the strong against the weak, of the rich against the poor, of pride and interest against justice and humanity. Unfortunate, indeed, it is, that this has been the case; for we may truly say, that on the excellence of the criminal law, the liberty and the happiness of the people chiefly depend.”

Without mincing words, Wilson stated that the criminal law of his day needed much improvement, but, in a more hopeful vein, that “In the United States, the seeds of reformation are sown.”

In his charge delivered to the Grand Jury in the Circuit Court of the United States for the District of Virginia, in May, 1791, Wilson discussed the crimes and punishments under the Federal Constitution, Federal Statutes, and applicable common law. In this charge he compared the criminal code of the United States with the then much more rigid and severe criminal code of England. In summarizing federal crimes and punishments for the Virginia Grand Jury, James Wilson stated that “It deserves to be remarked, that, in every instance of punishment by fine, imprisonment, or whipping, limits are fixed on the side of severity; none, on the side of mercy.”

Wilson stated that in penal law it would be inhuman to have the letter of the law carried beyond the spirit of the law, and that a penal law “may certainly be carried by the letter beyond the spirit, if judges and juries are prohibited, in construing it, from considering the spirit as well as the letter.”

Wilson comments briefly on ex post facto laws, expressing the view that any ex post facto instruments “claiming the title and character

50 Works, III, 15. Italics ours.
51 Works, I, 49, and III, 15.
52 Works, III, 357-393.
53 Works, III, 380.
54 Works, II, 196.
of laws" are impostors, and that in criminal jurisprudence a "Janus statute, with one face looking backward, and another looking forward, is a monster indeed." 55

And, of course, Wilson believed that only the criminal should be punished for the crime. 56 He was opposed to the practice of forfeiture of property to the crown and of corruption of blood for crime. 57 Under the former children could receive no property from a convicted parent, and under the latter the attainted could not inherit or transmit lands. As to forfeitures to the crown, Wilson said that instead of preventing public crimes and dangers they "may have the strongest tendency to multiply and perpetuate both," for they punish the innocent and, in turn, may cause a deadly resentment against the state and its citizens. 58 Corruption of blood he referred to as an unnatural principle, and said that it "still continues to disgrace the criminal jurisprudence of England." 59

Having been both a lawyer and a judge, Wilson probably had a rather clear insight into the plight of prisoners, as well as familiarity with criminal codes. He writes 60:

It should never be forgotten, that imprisonment, though often necessary for the safe custody of the person accused, is, nevertheless, in itself a punishment—a punishment galling to some of the finest feelings of the heart—a punishment, too, which, as it precedes conviction, may be as undeserved as it is distressing.

In speaking of imprisonment "in the publick gaol" awaiting trial, Wilson indicates his consideration for the accused. "This imprisonment, it ought to be remembered, is for the purpose only of keeping, not for that of punishing the prisoner: he ought, for this reason, to be treated with every degree of tenderness, of which his safe custody will possibly admit. In particular, a gaoler is not justified, by the law, in fettering a prisoner, unless where he is unruly, or where it is absolutely necessary to prevent an escape." 61

In his Lectures on Law Wilson contended that severity of punish-

55 Works, I, 65.
56 Works, III, 37.
57 Works, III, 37-44.
59 Works, III, 43.
60 Works, III, 34-35.
61 Works, III, 142.
ments does not lessen the number of crimes. His statement in this connection is as follows:

*Punishments ought unquestionably to be moderate and mild. I know the opinion advanced by some writers, that the number of crimes is diminished by the severity of punishments: I know, that if we inspect the greatest part of the criminal codes, their unwieldy size and their ensanguined hue will force us to acknowledge, that the opinion has been general and prevalent. On accurate and unbiased examination, however, it will appear to be an opinion unfounded and pernicious, inconsistent with the principles of our nature, and, by a necessary consequence, with those of wise and good government.*

In his charge to the Virginia Grand Jury in May, 1791, Wilson again pointed out that the belief that “the number of crimes is unquestionably diminished by the severity of punishments” is an unwarranted and harmful one.

The following statement by James Wilson seems to be somewhat of the nature of wishful thinking. “When, on the other hand, punishments are moderate and mild, every one will, from a sense of interest and of duty, take his proper part in detecting, in exposing, in trying, and in passing sentence on crimes. The consequence will be, that criminals will seldom elude the vigilance, or baffle the energy of publick justice.”

Concerning the degree of punishment for crime Wilson writes: “As the punishment ought to be confined to the criminal; so it ought to bear a proportion, it ought, if possible, to bear even an analogy, to the crime. . . . To a scale of crimes, a corresponding scale of punishments should be added, *each of which ought to be modified, as far as possible*, according to the nature, the kind, and the degree of the crime, to which it is annexed.”

Wilson is not very clear as to what he means by having punishment bear an analogy to the crime, yet he states: “To select, where it can be done, a punishment analogous to the crime, is an excellent method to strengthen that association of ideas, which it is very

---

62 *Works*, III, 32. Italics ours.
63 *Works*, III, 357–358.
64 *Works*, III, 33–34, and 359.
65 *Works*, III, 44. Italics ours.
important to establish between them.” He did not seem to infer an indeterminate prison sentence.

As to the scale of crimes and corresponding scale of punishments, he realized that it would be impossible to secure complete accuracy in these scales and the relative adjustment between them due to the numerous shades of both crimes and punishments. However, he suggested that certain leading rules could be established and that proper legislation could indicate principal categories.

Since every crime includes an injury, Wilson thought that reparation for the injury ought to be made to the person injured when the crime is punished. In other words, payment of damages should be made by the offender to the person he injures. This Wilson considered a “leading maxim in the doctrine of punishments.”

4. Punishment of crime must be speedy and vigorous. James Wilson must have had a strong feeling in favor of speedy as well as mild punishment. In his writings he mentions that punishment should be dealt out quickly following commission of the offense, in order that crime and punishment will be tied closely together. He states:

The principles both of utility and of Justice require, that the commission of a crime should be followed by a speedy infliction of its punishment.

The association of ideas has vast power over the sentiments, the passions, and the conduct of men. When a penalty marches close in the rear of the offence, against which it is denounced, an association, strong and striking, is produced between them, and they are viewed in the inseparable relation of cause and effect. When, on the contrary, the punishment is procrastinated to a remote period, this connexion is considered as weak and precarious, and the execution of the law is beheld and suffered as a detached instance of severity, warranted by no cogent reason, and springing from no laudable motive.

It is just, as well as useful, that the punishment should be inflicted soon after the commission of the crime.

66 Ibid.
67 The indeterminate sentence, in varying form, is used in a number of states. Under this method of sentencing, the length of time an inmate spends in prison depends largely upon the rapidity with which he develops an acceptable attitude toward society and an apparent capacity to take care of himself in a normal community, without violating the law.
68 Works, III, 45.
69 Works, III, 29–31. To explain this view Wilson cites the case of the father of a large family, dependent on the results of his labor, being murdered by the order of an opulent and powerful neighbor. The criminal forfeits his property, but no funds remain for the dependent family. This is a very extreme illustration. Today a large percentage of the persons convicted of crime in the United States have practically no material wealth. In addition a large proportion have family responsibilities.
70 Works, III, 34. See also Ibid., I, 393 (laws should be carried into execution vigorously), and III, 35–37 and 360–363.
As to an inferior offense, the punishment should be meted out “with much expedition” after conviction, Wilson states.\textsuperscript{71}

However, where prejudices arise or are fomented against the crime or the accused, Wilson suggests that a delay be made, in order that prejudices may lessen and that judges and jurors can hear the case calmly and impartially. Also, he would permit sufficient time to prepare both the prosecution and the defense, acknowledging that this amount of time would vary “according to different persons, different crimes, and different situations.”\textsuperscript{72}

Wilson held the view that laxity in enforcement of the law has more influence on a person contemplating crime than does mild punishment. To use Wilson’s words\textsuperscript{73}:

> The certainty of punishments is a quality of the greatest importance. This quality is, in its operation, most merciful as well as most powerful. When a criminal determines on the commission of a crime, he is not so much influenced by the lenity of the punishment, as by the expectation, that, in some way or other, he may be fortunate enough to avoid it. This is particularly the case with him, when this expectation is cherished by the example or by the experience of impunity.

Wilson emphasized that the strict execution of all criminal law is essential—a matter of both humanity and wisdom,\textsuperscript{74} and stated, almost as one might today, that strict enforcement (execution) “is greatly promoted by accuracy in the publick police, by vigilance and activity in the ministerial officers of justice, by a prompt and regular communication of intelligence, and by a proper distribution of rewards for the discovery and apprehension of criminals.”\textsuperscript{75}

James Wilson expressed the opinion that grand juries hold the most distinguished place among all plans and establishments devised to secure wise and uniform enforcement of criminal laws.\textsuperscript{76} He maintained that no other institution ever was as well adapted to avoid “all the inconveniences and abuses, which would otherwise arise from malice, from rigour, from negligence, or from partiality in the prosecution of crimes.”\textsuperscript{77}

\textsuperscript{71}Works, III, 36 and 362.
\textsuperscript{72}Works, III, 35-36.
\textsuperscript{73}Works, III, 36-37.
\textsuperscript{74}Works, III, 37 and 363.
\textsuperscript{75}Works, III, 363.
\textsuperscript{76}Ibid.
\textsuperscript{77}Works, III, 364.
5. *Capital punishment.* This writer has not been able to find any clear-cut statement of Wilson's on capital punishment. At one place in his writings Wilson infers rather vaguely that as punishment for crime the state may take the life of an offender by orderly process.\(^7^8\)

At another place Wilson states that a quality of Saxon criminal jurisprudence “deserves our attention—I add, our imitation: they inflicted very few capital punishments.”\(^7^9\) He referred to Sabacos, an Egyptian legislator, who abolished capital punishments “and ordained, that such criminals as were judged worthy of death should be employed in the publick works. Egypt, he [Sabacos] thought, would derive more advantage from this kind of punishment; which, being imposed for life, appeared equally adapted to punish and to repress crimes.”\(^8^0\)

In his next paragraph Wilson tells us that punishments “ought unquestionably to be moderate and mild.”\(^8^1\)

He points out that the Porcian law prohibited capital punishment for Roman citizens, and that under the Porcian law the “common-wealth grew and flourished. Severe punishments were established by the emperours. Under the emperours, Rome declined and fell.”\(^8^2\)

Frequently speaking of speedy punishment for crime, Wilson states at one place that in the event of a death penalty the punishment should be delayed—the interval to be such “as will render the language of political expediency consonant to the language of religion.”\(^8^3\)

One other comment of Wilson’s throws light on his attitude toward capital punishment. He mentions that wilful and premeditated murder is punished with death in England, the United States, and throughout most of the world, and adds, “Indeed it seems agreed by all, that, if a capital punishment ought to be inflicted for any crimes, this is unquestionably a crime for which it ought to be inflicted.”\(^8^4\)

It is reasonable to assume that Wilson saw no particular advantage in capital punishment.

\(^7^8\) *Works*, II, 350-351.
\(^7^9\) *Works*, III, 31.
\(^8^0\) *Works*, III, 32.
\(^8^1\) *Ibid.*
\(^8^2\) *Works*, III, 360.
\(^8^3\) *Works*, III, 36.
\(^8^4\) *Works*, III, 92.
6. *Pardons for offenders.* Although advocating the strict execution of every criminal law, James Wilson seemed much interested in seeing justice done when punishments are meted out. On September 15, 1787, in the Federal Constitutional Convention in Philadelphia, he stated that the pardoning power is necessary for cases of treason and that in such cases this power can best be placed in the hands of the executive. If the executive is also a party to the guilt, Wilson pointed out, then the executive can be impeached and prosecuted.\(^{85}\)

A few years later, in his *Lectures on Law*, he elaborated on his views as to the pardoning power. He stated that some condemned citizens may be more unfortunate than criminal and that it will be necessary to provide the power to pardon offenses, regardless of how mild a criminal code may be. The “proper exercise” of the pardoning power “may arise from the possible circumstances of every conviction.”\(^{86}\) Further on in his *Lectures on Law*, he wrote: “I mean not to exclude the pardoning power from my system of criminal jurisprudence. That power ought to continue till the system and the proceedings under it become absolutely perfect—in other words—it ought to continue while laws are made and administered by men.”\(^{87}\) However, he would extend the pardoning power only to exceptional cases.\(^{88}\)

7. *International punishment of offenders.* James Wilson may not have had “global” views of government, but he certainly did have an international viewpoint. He had an international as well as a national concept of punishment. In his essay entitled *Of Man, As A Member Of The Great Commonwealth Of Nations*, he points out that offenders are to be found in every country, that they must be punished, but in such a way as not to create international friction. Wilson writes that\(^{89}\)

in every state, wicked and disorderly citizens are unhappily to be found: let such be held responsible for the consequences of their crimes and disorders.

\(^{85}\) Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, Conn., 1911), II, 626. Wilson had successfully defended Tories accused of treason. No doubt the reason he spoke of pardon only in connection with treason on September 15, 1787, was the fact that the Federal Convention proposed very little criminal jurisdiction for the central government, and the fact that charges of treason can take on the nature of political retaliation.

\(^{86}\) *Works*, II, 196.

\(^{87}\) *Works*, III, 37.

\(^{88}\) Ibid.

\(^{89}\) This essay is printed in *Works*, I, chap. IX. The above quotation is taken from pages 371-372. The essay is also reprinted in Randolph G. Adams’ *Selected Political Essays of James Wilson* (New York, 1930), with a few editorial notes.
This doctrine is certainly reasonable and just; but if a nation wishes not to be involved in the punishment of her citizens, she should sedulously avoid the impropriety and the offence of becoming an accomplice in their injuries and crimes. In their injuries and crimes she becomes an accomplice, when she approves or ratifies them, and when she affords protection and security to those, who have committed them. In such cases, the nation may justly be considered as even the author, and the citizens are only the instruments, of the wrong or outrage which has been done.

When the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made; should punish him according to the measure of his offence; or, when the nature and the circumstances of the case require it, deliver him up to the offended state to meet his doom there.

In this essay Wilson makes an eloquent plea for the administration of international law through courts, suggesting that in the United States it be administered by the federal judiciary.

8. Conclusion. Wilson’s theories of punishment are summed up fairly well in the following quotation taken from his charge to the Virginia Grand Jury in May, 1791:

Crimes may be prevented by the genius as well as by the execution of the criminal laws. Let them be few: let them be clear: let them be simple: let them be concise: let them be consummately accurate. Let the punishment be proportioned—let it be analogous—to the crime. Let the reformation as well as the punishment of offenders be kept constantly and steadily in view: and, while the dignity of the nation is vindicated, let reparation be made to those, who have received injury. Above all, let the wisdom, the purity, and the benignity of the civil code supersede, for they are well calculated to supersede, the severity of criminal legislation. Let the law diffuse peace and happiness; and innocence will walk in their train.

Not all of James Wilson’s theories of punishment, formulated in the earliest years of our national government, may apply to present-day conditions. However, we may well ponder his thoughts today in developing a long range plan of punishment and correctional treatment with the objective of lessening crime and “cleansing” those who do violate the law.

Washington, D. C.                       Homer T. Rosenberger

90 In Works, I, 377, Wilson states: “Individuals unite in civil society, and institute judges with authority to decide, and with authority also to carry their decisions into full and adequate execution, that justice may be done and war may be prevented. Are states too wise or too proud to receive a lesson from individuals? Is the idea of a common judge between nations less admissible than that of a common judge between men?”

91 Of this suggestion he states in his Works, I, 380: “This deduction, if properly founded, places the government of the United States in an aspect, new, indeed, but very conspicuous. It is vested with the exalted power of administering judicially the law of nations, which we have formerly seen to be the law of sovereigns.”

92 Works, III, 392.