

1910

## Anglo-American Philosophies of Penal Law

Westel Woodbury Willoughby

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Westel Woodbury Willoughby, Anglo-American Philosophies of Penal Law, 1 J. Am. Inst. Crim. L. & Criminology 354 (May 1910 to March 1911)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## ANGLO-AMERICAN PHILOSOPHIES OF PENAL LAW. II.<sup>1</sup>

### PUNITIVE JUSTICE.

BY WESTEL WOODBURY WILLOUGHBY.<sup>2</sup>

Few subjects there are either in ethical or political science which approach in importance that of crime. The cost to society of crime in all its degrees and phases is enormous. The figures of the federal census for 1890 showed nearly eighty thousand inmates of our prisons and reformatories, and this number, following the estimate given us by experts that at any one time probably not one-third of the total number of criminals are in imprisonment, gave us then a total criminal population of two hundred and fifty thousand. To the loss arising from the destruction of life and property by the illegal acts of this vast army, must be added the expenses of preventing, detecting, and punishing crime. . . .

Examining the theories which have been brought forward by ethicists in justification of punishment, we find that they may be described as: (1) retributive, (2) deterrent, (3) preventive, and (4) reformatory, respectively. In determining the value of these theories it will be necessary, as was the case in reference to the theories of justice as applied to the distribution of rewards, to consider them not only from the standpoint of abstract justice, but as to the possibility of realizing them in practice.

**THE RETRIBUTIVE THEORY.**—Beginning with the retributive, or, as it may also be called, the vindictive, or expiative, theory, it is to be observed first of all that, in the strict sense of the word, only

---

<sup>1</sup>In this series of articles will be presented, from time to time, representative passages from the writings of those English and American thinkers who have advanced a philosophy of penal law. Only those authors will be selected who stand eminent in philosophical science and have treated penal law as a part of their general philosophical system.

The series will be edited by Mr. Longwell, instructor in philosophy, Mr. Kocourek, lecturer on jurisprudence, and Mr. Wigmore, professor of law in Northwestern University.—THE EDITORS.

<sup>2</sup>The author is Professor of Political Science in Johns Hopkins University, and is managing editor of the *American Political Science Review*. He is one of the few political philosophers in America, and his writings are marked by broad range, lucid statement, and creative speculation. His principal works are: "The Nature of the State," "Rights and Duties of American Citizenship," "Political Theories of the Ancient World," "The American Constitutional System" and a work on "Constitutional Law," now in press.

The passage here extracted is the greater part of Chapter X, entitled "Punitive Justice," in his work on "Social Justice" (New York, Macmillan Co., 1900).

that pain may be spoken of as punishment which is imposed simply and solely for the sake of the pain to be felt by the one punished. According to the retributive theory, through punishment the offender expiates his offense, suffers retribution for the evil which has been done, and thus is vindicated the principle of justice which has been violated. Thus says Godwin, in his *Political Justice*,

"Punishment is generally used to signify the voluntary infliction of evil upon a vicious being, not merely because the public good demands it, but because there is apprehended to be a certain fitness and propriety in the nature of things that render suffering abstractly, from the benefit to result, the suitable concomitant of vice."<sup>2</sup>

Accepting this definition which Godwin gives us as the true meaning of punishment, it is necessary to hold that in so far as a penalty is imposed for any other than a vindictive object, as, for example, for the sake of deterrence, prevention, reformation, or social protection, it ceases to be punishment at all; for all of these other objects have a reference to some good that is to be secured in the future, whereas the retributive theory, by its very nature, looks wholly to the past. According to it, pain is inflicted, not in order that some advantage may accrue in the future, but because some wrong has been done in the past. We have, then, to ascertain the circumstances, if any there be, under which it is ethically allowable for one not only to determine for another the propriety of his acts, but to visit upon such a one punishment in case he commits acts that have been declared *mala prohibita*.

The idea of retribution or expiation, can apply only as between rational beings. It is true that Great Nature (*Natura Naturans*) is often spoken of as inflicting punishment and even as destroying those who violate her laws. But such language cannot be considered strictly correct. Indeed, the very idea of violating a law of nature is an improper one. The so-called laws of nature are but statements of uniformities of experience in the phenomenal world. As such they are not in any true sense commands, and are not possible of violation by men. Certain results, so far as our experience goes, are known to follow from certain causes. That is all. There is no law-giver to be offended. There is not necessarily present any idea of wickedness, nor do the elements of intention and moral responsibility necessarily play a part when, as a consequence of a certain state of facts, certain results, disagreeable or otherwise, are experienced by particular individuals or communi-

---

<sup>2</sup>Op. cit., p. 230.

ties. But in order that the retributive theory may have standing at all, these elements must appear. According to the theory, one is punished because he is supposed to have done a moral wrong, that is, to have committed not simply a formal or legal wrong, but to have sinned in the sight of the power that punishes him. But only that one can be said to have sinned who has freely committed the reprobated act, and who, furthermore, at the time of its commission has been mentally qualified to judge regarding the character of the act committed and, being so qualified, actually intended to commit it.

Having defined now what is meant by punishment in its proper retributive or expiative sense, we come to the vital question whether a true system of ethics requires, or even permits, the existence of a right to inflict pain for this purpose. In short, can there be stated any rational ground for declaring that justice demands, under any conceivable conditions, that pain should be inflicted when no possible future good can result? If we answer "No," we of course deny that the idea of punishment, in its proper sense, should play any part whatsoever in our system of ethics.

Among English writers Godwin has perhaps most strongly asserted the invalidity, and in fact the absolute cruelty, of the retributive view of punishment. After calling attention to the idea sometimes held that Nature herself teaches us that suffering should be annexed to vice, he continues:

"Arguments of this sort must be listened to with great caution. It was by reasonings of a similar nature that our ancestors justified the practice of religious persecution. 'Heretics and unbelievers are the objects of God's indignation; it must therefore be meritorious in us to maltreat those whom God has cursed.' We know too little of the universe, are too liable to error respecting it, and see too small a portion of the whole, to entitle us to form our moral principles upon an imitation of what we conceive to be the course of nature."

In truth, as Godwin says, the fact is that in general we call that vicious to which the laws of nature annex suffering, and thus the viciousness attaches because of the consequential pain, rather than vice versa. . . .

The remarkable declaration which Godwin makes, that, "accurately speaking, there is no such thing as desert," requires some explanation. This assertion is based upon Godwin's deterministic ethics, according to which freedom of the will and moral responsibility in the agent are flatly denied. On the page preceding that from which our quotation is taken he says, "The assassin cannot help the murder any more than the dagger with which the deed is com-

mitted." If this be so, if the individual be the helpless prey of circumstances, then of course no such thing as ethical desert is possible. And if, as Godwin believes, the greatest happiness is the greatest good, no distribution either of rewards or penalties is justified except as it tends to advance the realization of that good.

That philosopher who, among modern writers, has defended most absolutely the retributive theory of punishment, is Kant. His views upon this point are to be found in his *Rechtslehre*.<sup>4</sup> . . . The vindictive theory is accepted by Kant not only as furnishing the motive for punishment, but as dictating the character of the penalty to be imposed in each case. The doctrine *lex talionis* is to be applied without reservation.

Let us see now what theoretical justification Kant offers for his theory. It is, in short, that the criminal by the deliberate commission of his deed has, in effect, accepted as valid the principle involved in the deed. Therefore, says Kant, if that same principle be applied by society to him, he is in reality but subjected to a rule of conduct which, by his own conduct, he has declared to be a valid one. Thus, in answer to the argument made by Beccaria against the rightfulness of capital punishment, that it cannot be conceived that in the original civil compact the individual could or would have consented thus to dispose of his own life, Kant replies:

"No one undergoes punishment because he has willed to be punished, but because he has willed a punishable action; for it is, in fact, no punishment when one experiences what he wills; and it is impossible for anyone to will to be punished. To say, 'I will to be punished, if I murder anyone,' can mean nothing more than 'I submit myself along with all the other citizens to the laws;' and if there are any criminals among the people, these laws will include criminal laws . . . For if the right to punish must be founded upon a promise to the wrong-doer, whereby he is to be regarded as being willing to be punished, it ought also to be left to him to find himself deserving of the punishment; and the criminal would thus be his own judge. The chief error of this sophistry consists in regarding the judgment of the criminal himself, necessarily determined by his reason, that he is under obligation to undergo the loss of his life, as a judgment that must be founded on a resolution of his will to take it away himself; and thus the execution of the right in question is represented as united in one and the same person with the adjudication of the right."<sup>5</sup>

What validity is there in this reasoning of Kant? Only this much, we think. It furnishes a satisfactory answer to that school

<sup>4</sup>Translated by Hastie, under the title "Philosophy of Law."

<sup>5</sup>Op. cit., pp. 201-202. Mr. F. N. Bradley, in his *Ethical Studies*, published in 1876, assumes very clearly the retributive theory of punishment. . . . Writing nearly twenty years later, however, Mr. Bradley substantially modifies this view, though he does not admit it, in an article entitled "Some Remarks on Punishment," contributed to the *International Journal of Ethics* (Vol. IV, p. 269).

of thinkers who, having not yet thoroughly rid themselves of the social-compact and natural-right theories, declare that all social or political control over the individual needs, for its justification, the consent of the individual. It is correct to say that in the commission of any given deed, the criminal logically accepts as a valid rule of conduct the principle involved in his act, and therefore that he cannot justly complain if society see fit to subject him to the operation of the same rule that he has already applied in his conduct toward others. But this is all. Kant's reasoning does not have any bearing upon the arguments of those who hold the views which we have accepted in this work. Kant says: "Man ought never to be dealt with merely as a means subservient to the purpose of another. . . . Against such treatment his inborn personality has a right to protect him." This principle is a very true one, and in fact constitutes, as we know, the fundamental fact of social justice, but it does not mean that the infliction of an evil upon a person, in order that some future social good may be achieved, is necessarily a contravention of it.

Kant says that a person should never be treated merely as a means. But a person is treated merely as a means only when his right to be considered as an end is wholly ignored. Now, when it becomes necessary in the interest of society to inflict an evil upon an individual, that individual is *qua hoc* treated as an end, if in estimating the social good his individual good is considered, and in the selection of him for punishment the choice has been controlled by empiric facts which make it productive of more good that he, rather than anyone or no one else, should be punished. Thus, just as, according to this interpretation of the sanctity of human personality, guiltiness of crime cannot of itself justify the infliction of pain; so, conversely, when the social good demands, innocence from wrongdoing cannot always relieve one from the duty of subjecting himself to, or release society from, the obligation of imposing an evil which in extreme cases may amount even to death. . . .

The incorrectness of the retributive theory of punishment becomes manifest when we consider the results to which an attempt to apply it in practice would necessarily lead. In the first place, it would render impossible any penal law whatever, for it would never be possible for courts to gain that knowledge which the theory demands for the just apportioning of penalties. When reduced to their proper meaning, the words retribution, expiation, or vindication, mean the bringing home to the criminal the legitimate consequences of his conduct, that is, legitimate from the ethical stand-

point. But this, of course, involves the determination of the degree of his moral responsibility, a task that is an impossibility for any legal tribunal. Conditions of knowledge, of heredity, of training, of opportunities for moral development, of social environment generally, and of motive have to be searched out, which are beyond even the ability of the criminal himself to determine,—far less of others,—before even an approximate estimate can be made of the simplest act. But even could this be done, there would be no possible standard by which to estimate the amount of physical pain to be imposed as a punishment for a given degree of moral guilt. For how measure a moral wrong by a physical suffering? Or, granting what is inconceivable, that such an equivalence could be fixed upon, how would it be possible to inflict upon the culprit just that amount of pain which he might deserve? Individuals differ physically and mentally, and these differences are widened by training and methods of life until it is impossible to determine the degree of discomfort or pain that a given penalty will cause a given individual. The fear of death itself varies widely with different individuals, and the same is true as to the estimation in which all other forms of evil are held. So far, therefore, from there being any certainty that two individuals will be equally punished who are subjected to the same penitential treatment, there is, in fact, almost a certainty that they will not be.

This question of the moral responsibility in the criminal which the retributive theory necessarily predicates, has been rendered doubly embarrassing by the results recently obtained by the new school of criminologists, who term themselves Criminal Anthropologists. By following entirely new methods this school has arrived at conclusions as to nature and causes of crime differing radically from those which have been formerly held, and which, if they be proved true, must result in almost revolutionary changes in our present penal methods.

Reversing former methods, this school has studied the criminal rather than the crime, and the result of the investigations carried on along this line has been to bring into prominence the conception of the criminal as a being physically and psychically degenerate. Every crime, no matter by whom committed, or under what circumstances, is to be explained in but two ways: either as the act of the individual's free will, or as the natural effect and as the necessary result of social and physical causes. Our present methods of punishment are based upon the idea that a crime is the free act of a person who, actuated by motives of gain or passion, deliberately

contravenes the law. Now and then is raised in our courts the plea of insanity or temporary aberration of mind or kleptomania, but in the vast majority of cases the criminal is considered as not differing in body or mentality from honest men. He is considered as wholly responsible for his own act and is punished accordingly.

According to the new school of criminal anthropology, this theory of crime and its punishment is radically wrong. Crime, its members say, is in the great majority of cases due to disease, to a mental state of the criminal which predisposes him to the commission of illegal acts. The study that has been made of the brain and mental peculiarities of those convicted of criminal offenses clearly proves this, they say, to be so. This being so, our penal methods should look primarily to the cure of the criminal and not to his punishment. No man, whatever his offense, should be discharged from restraint except upon reasonable evidence that he is morally, intellectually, and physically capable of leading an honest life. It may sound strange, but it is alleged that it is correct to say that it is as natural for some people to commit crime when under provocation or temptation as it is for a dyspeptic to have indigestion after overeating, or a rheumatic to suffer from the result of exposure. Crime, in short, is due to some fault in his organization which renders the individual less able to withstand temptation or to control improper desires. Whenever in anyone's mental outfit there is any maladjustment (and the doctors tell us that none of us are sound in every particular), there is present a tendency to peculiarities that affect our motives and actions. The criminal is, therefore, to be judged as one whose mental peculiarities are such as to make the commission of crime more easy to him than it is to others. Between the violently insane, the idiot, and the one whose moral faculties are merely blunted, and the sense of right and wrong indistinct, there are all grades of criminality. On the border line of lunacy lie the criminal populations. . . .

The conception of crime as due to defective mental organization of the criminal, explain to us many of the points that have hitherto perplexed us. In the first place, it gives us a reason for the repeated instances in which we find persons committing crimes where there seems to be no sufficient motive, and when it must be apparent to the ones committing them that immediate discovery and severe punishment are to be the sure result. Murders are frequently committed upon the most trivial grounds, and nothing is more common than to find prisoners who seem to take a genuine delight in thieving, even though not in want. Secondly, the defini-



tion of the criminal as one of defective organization, who is on a lower plane of civilization than that on which he is actually living, explains the increase of crime in the face of an advancing civilization and a widening diffusion of wealth and education.

With the instincts of a savage, the criminal is forced to live among civilized people. "Criminality, like insanity, waits upon civilization," says Ellis. With the growth of society in complexity and delicacy, the demands upon the social nature of the individual become greatly increased. Organized as modern society is, the duties of the individual to his fellow-man and to society at large are immensely greater than they are in savage countries where there exists no mutual rights and duties outside of the family; where law, if it may be so called, covers only a few points, and each one lives only for himself, and his actions do not conflict with the rights of others. So far, then, as society has within its bounds members who are mentally unfit to meet the requirements of its civilization, it will have violators against its laws, and these it will have no matter what its economic prosperity or the severity of the punishment meted out to the offender. The increase, then, in crime which, as we shall presently see, is asserted by some, may be said to be due to the fact that, as the demands of civilization have increased, the chances of having members of the state who are not able to meet these standards have increased; and this increase our penal methods, aiming at punishment rather than at cure, have not been able to check. Modern civilization represents the last and final efforts of the wisest, and with its development there is an increasing need of proper treatment of, and assistance to, those who are by organization unqualified to keep pace with it on its onward march.

Again, the conception of crime as due to pathological condition explains the difficulty of reforming criminals. It explains also why our methods of punishment seem to have so little deterrent effect. It is because they have no power to reform the diseased condition of the prisoner's mind, and are not imposed for that purpose. As showing how little really deterrent effect even the severest punishments have, Rev. W. Roberts, chaplain of Bristol jail, says that out of 167 attended by him under sentence of death, 164 had witnessed hangings. George III added 156 crimes to the list of 67 which had already been made capital crimes, with a result that from 1806 to 1819, during which time this code remained unchanged, the number of indictable offenses increased threefold. "If deterrence enters as an element into the calculation of habitual criminals," says Mr.

Dugdale, "it acts chiefly as a stimulant for contriving new methods by which the penalty may be avoided."

Finally, the hereditary nature of criminality shows its character as a disease. The investigations of experts leave no room for doubt upon this point. Mr. Morrison states that the statistics that he has collected show that more than one-fourth of criminals have received a defective organization from their ancestry; and further, that between forty and fifty per cent of convictions for murder are cases in which the murderer is either insane or mentally infirm. The most startling and conclusive proofs of the inheritability of criminal tendencies have been furnished by the American investigators—Mr. Dugdale, in his famous study *The Jukes*, and Mr. McCulloch, in his book upon *The Tribe of Ishmael*. The results of these two investigators have become so well known as not to need repetition here.

With what success modern criminal anthropologists have succeeded in discovering and describing distinct criminal types, is a matter open to controversy.<sup>6</sup> But one point they do appear to have established, and this is that physical and mental abnormalities are far more frequently discovered in the habitual criminal than in the ordinary man.

The point which is of special interest to us in all this is that just to the extent to which the thesis is maintained that crime is due to disease, in corresponding degree should, according to the retributive theory, the severity of punishment be relaxed; and where the will is discovered entirely impotent to restrain the instincts and desires of a diseased mind and body, punishment should be wholly remitted. If, then, to the amount of irresponsibility traceable to this source, we should join that which is directly traceable to improper social environment (for which society is itself largely responsible), we would find, according to the retributive theory, that it would be practically impossible definitely to determine even the presence, much less the degree, of that moral responsibility upon which the right to punish is founded. And thus there would logically arise the necessity of declaring the non-amenability to punishment (though not to treatment) of that most dangerous of all social types the "instinctive criminal."

Another objection to the retributive theory is the point which Fichte makes, that in attempting the punishment of crimes as sins, men are arrogating to themselves the ability and the right to deter-

---

<sup>6</sup>For a very able criticism of this school, see the work of Proal, *Le Crime et la Peine*.

mine for others not simply what, as a matter of fact, society or the state will allow them to do, but what is for them morally right or wrong.

"The question is not at all whether the murderer suffers unjustly when he also loses his life in a violent manner,"

says Fichte,

"but the question is: Whence does any other mortal derive the right to personify this moral rule of the world, and to punish the criminal according to his deserts? A system which asserts the supreme ruler of a state to have this right is undoubtedly compelled to say that the title to it is beyond demonstration, and hence to call it a right given by God. Such a system is, therefore, bound to consider the monarch as the visible representative of God in this world, and to consider all government as a theocracy. In the Jewish theocracy the doctrine was, therefore, eye for eye, tooth for tooth, and very properly."

That, as Fichte says, there is hidden in the retributive theory the premise that those in authority are endowed with the right not only to pass moral judgment upon the conduct of those subject to its authority, but to act as the instruments for visiting upon sinners that evil which by divine order should be attached to moral wrong, becomes very evident in the doctrine as declared by the Rt. Hon. Sir E. Fry,<sup>8</sup> and as repeated by Mr. Justice Kennedy of the King's Bench, England.<sup>9</sup>

One final proof of the invalidity of the retributive theory may be mentioned, and that is that, when accepted as an absolute principle, no possible room is left for the idea of forgiveness. If it be right that a sin should be punished simply and solely because it is

---

<sup>8</sup>Science of Rights (translation of Kroeger), p. 371. Fichte in this takes a ground radically different from that assumed by Kant, and in fact, except where he is influenced by his conception of a social compact, approaches very nearly our own views. "Punishment," he says, "is not an absolute end. In fact, the proposition that punishment is an end for itself, as is, for instance, involved in the expression 'He who has killed must die,' is positively meaningless. Punishment is merely a means for the end of the state 'to maintain public security,' and the only intention in providing punishment is to prevent by threats transgressions of the law. The end of all penal laws is that they may not be applied."

Fichte, to be sure, goes on to hold that the punishment should, as far as possible, be made equal to the crime,—*poena talionis*,—but he does so not upon vindictive grounds, but upon the simple utilitarian theory that thus the penal law exercises its greatest deterrent effect. . . . For a further discussion of the retributive theory, see Vidal, *Principes fondamentaux de la Penalite dans les systemes les plus modernes*, pp. 264-293; Franck, *Philosophie du droit penal*, Part I, Chapters VI and VII; and Fouillee, *Science sociale contemporaine*, Book IV, Chapter III.

<sup>9</sup>"Inequality in Punishment," *Nineteenth Century*, 1883, p. 517.

<sup>9</sup>Address before the American Bar Association, August, 1899. Reprinted in *American Law Review*, Vol. XXXIII, p. 731.

a sin, then forgiveness or remission of punishment can never be other than a violation of that moral law.<sup>10</sup> . . . This difficulty vanishes, however, when we frankly accept the principle that pain, when bestowed, should ever be for the purpose of obtaining some future good. For then we can recognize that when a greater good will be secured by forgiveness than by punishment, it is right that the forgiveness should be extended. . . .

Before leaving the criticism of the retributive theory, one other point is to be noticed. This is, that the acceptance of the retributive idea has undoubtedly been influential in dictating to legislators and courts those extraordinary severities of punishments which have unfortunately so characterized the administration of criminal justice in the past. Where it is looked upon as the law's province to mete out punishments equivalent to the moral offense committed, almost no physical suffering can in theory be deemed excessive. For how measure in temporal terms the quantity of a violation, however slight, of the Almighty's will? It was, in fact, by expressly calling back the criminal law to simple utilitarian ends that such writers as Beccaria, Montesquieu, and Bentham were able, by their influence, to put a stop to that vast amount of needless suffering which was the result from the administration of the criminal laws of a hundred years ago.

REVENGE.—It will undoubtedly be asked as an objection to repudiating absolutely the retributive idea of punishment, "Is not indignation at a wrong done a righteous feeling; and is it not right to embody this indignation in concrete, effective form in our criminal laws? Is it not right that we should feel a certain satisfaction, and recognize a certain fitness in the suffering of one who has done an intentional wrong? Shall the murderer go unscathed, and the adulterer be freed from the penalty for his crime?"

To these questions we answer that it is right, indeed that it is morally obligatory upon us to feel indignant at a wrong done. But it is not right that we should wish evil to the offender save as possible good can come from that evil. The two feelings are wholly distinct. The one is a feeling of moral revulsion and is directed at the crime. The other is a desire for vengeance, and is directed at the criminal. Now it is true that in the lower stages of culture vengeance has played a socially necessary part. . . . Furthermore, in an historical sense, our present criminal law is founded upon the idea of vengeance. . . .

---

<sup>10</sup>This point has been well made by Mr. Rashdall in his article, "The Ethics of Forgiveness," in the *International Journal of Ethics*, January, 1900.

The punitive power of the state once asserted and recognized, its growth in influence and authority is constant, until the old idea of a crime being but a matter involving the private interests of two or more individuals, if not absolutely destroyed, is at least nearly lost sight of in the doctrine that a violation of an established right is primarily an offense against the state, and to be punished as such.

The point which we wish to make, however, is that this change of view, when properly interpreted, represents not simply the idea that the state takes the place of the individual for the purpose of avenging the original wrong, but that the very idea as to nature of, and the very purpose for which, the penalties of the criminal law are imposed, is changed. Punishment is inflicted no longer because of the simple desire that the offender shall suffer pain, but in order that either he or society may derive some benefit therefrom. Thus that personal spirit of malevolence, which is of the essence of revenge, is entirely absent, and in its place is the impartial, unimpassioned voice of the law. Or, to use the more metaphysical expression, the universal will is substituted for the particular will. The subjective element is destroyed. To revenge oneself is, in truth, but to add another evil to that which has already been done. . . .

There are few who in modern times assert the abstract rightfulness of a desire for vengeance, but among these few is to be found the eminent writer upon criminal law, the late Justice Fitzjames Stephen.<sup>11</sup> The statement of his position upon this point is in the following emphatic terms:

"The infliction of punishment by law gives definite expression and a solemn ratification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I am of opinion," he continues, "that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

To the declaration that it is natural and right that we should hate the criminal, if by that is meant that we detest his crime and are indignant at him for committing it, no objection can be made.

---

<sup>11</sup>See his *History of the Criminal Law of England*, Chapter XVII.

## PUNITIVE JUSTICE.

Nor can any be made to the assertion that it is well that this hatred should find expression in the law, if by this is meant that a moral influence is exerted by the fact that thus there is stamped in plain and unmistakable terms the disapproval of the sovereign power of the reprobated acts. This we may term the educative service of penal law. It is a truth, unfortunate though it may be, that in every community a very considerable number of the people derive in large measure their conceptions of right and wrong from the commands and prohibitions of the law. Upon all such, the fact that the sovereign authority of the state has declared a given act to merit a more or less severe punishment, is not without its influence. It is desirable, therefore, aside from any other services that the criminal law may perform, that, as Stephen, says, the criminal law should be so drawn as to express the true detestation in which immoral acts should be held. But Stephen, in the sentences which follow those already quoted, seems to go much further, and to defend revenge pure and simple.

"These views" (which we have just quoted), he says, "are regarded by many persons as being wicked, because it is supposed that we ought never to hate, or wish to be revenged upon anyone. The doctrine that hatred and vengeance are wicked in themselves appears to me to contradict plain facts, and to be unsupported by any argument deserving of attention. Love and hatred, gratitude for benefits, and the desire for vengeance for injuries, imply each other as much as convex and concave. Butler vindicated resentment, which cannot be distinguished from revenge and hatred except by name, and Bentham included the pleasures of malevolence amongst the fifteen which, as he said, constitute all our motives of action. The unqualified manner in which they have been denounced is in itself a proof that they are deeply rooted in human nature. No doubt they are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement; but unqualified denunciations of them are as ill judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice, as the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other."

Here it is quite plain that, if we accept the literal meaning of the words used, Justice Stephen defends as ethically proper, under certain circumstances, the desire for vengeance. If, however, we examine carefully the thought, we think it will be found that that which Stephen really has in mind is, after all, that feeling of indignation which we may properly feel at the commission of a wrong, rather than the idea of revenge pure and simple. . . .

Hegel has often but incorrectly been interpreted as advocating the retributive theory of punishment. The true ground upon which

he justifies the deliberate infliction of suffering upon a wrongdoer is that this suffering at least tends to have upon the criminal himself the educative effect of which we have been speaking.<sup>12</sup> Hegel uses the word retribution, but, as the context shows, it is as having this educative sense, and not that of revenge.

"In the sphere of direct right," says Hegel, "the suppression of crime takes in the first instance the form of revenge. This in its content is just, so far as it is retribution; but in its form it is the act of a subjective will, which may put into an injury an infinite or unpardonable wrong. Hence its justice is a matter of accident, and for others means only private satisfaction. As revenge is only the positive act of a particular will, it is a new injury. Through this contradiction it becomes an infinite process, the insult being inherited without end from generation to generation. Wherever crime is punished not as *crimina publica*, but as *privata*, it still has attached to it a remnant of revenge."<sup>13</sup> "The injury which the criminal experiences is inherently just because it expresses his own inherent will; it is a visible proof of his freedom and is his right. But more than that, the injury is a right of the criminal himself, and is implied in his realized will or act. In his act, the act of a rational being, is involved a universal element which by the act is set up as the law. This law he has recognized in his act, and has consented to be placed under it as under his right."<sup>14</sup> The matter is, however, put in a nutshell when Hegel says that in his idea of retribution there is implied no pleasure for the objective will, such as is involved in the idea of revenge, but simply the "turning back of crime against itself. The Eumenides sleep, but crime wakes them. So it is the criminal's own deed which judges itself."<sup>15</sup> Hegel does not deny that the criminal law may be made to serve other purposes than that of awakening the criminal to a true comprehension of the nature of his deed, but this last should ever, he thinks, furnish the fundamental motive. . . .

It is scarcely necessary to point out that in abandoning the theory of revenge, Hegel definitely places himself upon the ground that the purpose of punishment should be utilitarian; that is, that its imposition should be for the attainment of some present or future good. His theory, in fact, very much resembles what is generally known as the Reformatory Theory. It differs from that theory, however, in one important respect. While those who accept the reformatory theory desire that one of the aims of our penitential systems should be to awaken the conscience and change the disposition of the criminal, the aim which Hegel has in mind is rather to arouse the comprehension of the wrongdoer to the true nature of his act. The object is thus to stimulate his cognitive faculties,

<sup>12</sup>Cf. an article by McTaggart entitled, "Hegel's Theory of Punishment," in the *International Journal of Ethics*, Vol. VI, p. 479.

<sup>13</sup>"The Philosophy of Right," translated by Dyde, 102.

<sup>14</sup>Idem, 100.

<sup>15</sup>Idem, 101.

## PUNITIVE JUSTICE.

rather than to increase his sense of moral obligation; to show what is right and what is wrong rather than to teach him that he should do what is right and avoid doing what is wrong. For this reason we have preferred to call Hegel's theory Educative rather than Reformatory.

Hegel has in mind solely the possible educative value of punishment upon the criminal himself. Logically, however, the theory includes the educative influence that it may have upon the community at large. In actual effect, indeed, this may easily be much the more important part of the educational influence exercised by it.

How far it is possible either to educate or reform the criminal by punishment, is a matter upon which persons will naturally differ. Personally we are inclined to believe that it can reform him only as it educates him. With the true nature of his act clearly brought home to him, the conscience of the criminal, so far as it is not already blunted, will then exercise its controlling power to prevent a repetition of the same or similar conduct. But directly to awaken the conscience by a series of pains, if not impossible, is certainly difficult. As Hudibras has said, "No thief e'er felt the halter draw with just opinion of the law;" and as George Eliot in her *Felix Holt* declares, "Men do not become penitent and learn to abhor themselves by having their backs cut open with the lash; rather they learn to abhor the lash."

Perhaps, however, it will be said this does injustice to the reformatory theory. It may be said that those who emphasize the reformatory element in the administration of penal justice maintain, not that the punishment which is inflicted has, or can be made to have, a reforming influence, but that the state should seek to reform the criminals while punishing them.<sup>16</sup> But if this be so, then the theory is not one of punishment at all. For the reformation, if it comes at all, is then the result from the discipline that the prisoner receives, not from the incarceration which is imposed as punishment. Furthermore, the deterrent element in punishment is not to be confused with the idea of reformation. An experience of the painful consequences of crime may deter a criminal from again violating the

---

<sup>16</sup>See on this point the excellent paper of Mr. McTaggart, in the *International Journal of Ethics*, already quoted, and that of Mr. Rashdall in the same journal (II, 20), entitled "The Theory of Punishment." "When a man is induced to abstain from crime," says Rashdall, "by the possibility of a better life being brought home to him through the ministrations of a prison chaplain, through education, through a book from the prison library, or the efforts of a Discharged Prisoners' Aid Society, he is not reformed by punishment at all."



law, not because it shows him the immorality of his conduct, but because it demonstrates its inexpediency.

UTILITARIAN THEORIES OF PUNISHMENT.—To a very considerable extent we have already presented the grounds upon which the other than retributive theories of punishment are based. The retributive theory stands *sui generis* in that it alone looks wholly to the past and rejects as unessential to, if not inconsistent with, itself all utilitarian considerations. In rejecting the retributive theory, therefore, we necessarily accept the utilitarian theory that punishment, to be justly imposed, must have for its aim the realization of some future good. These utilitarian theories differ from each other according to the nature of the good sought. Thus we have: (1) The Deterrent Theory, according to which punishments are inflicted in order that other would-be law-breakers may be dissuaded from crime; (2) The Preventive Theory, the aim of which, as its name implies, is to prevent the repetition of the offense by the surveillance, imprisonment, or execution of the criminal; (3) The Reformatory Theory, the object of which is the moral reformation of the delinquent; and (4) The Educative Theory, of which we have already spoken.

A point to be noticed about these theories is that they are not mutually exclusive. There is no reason why, the utilitarian idea being once accepted, we should not strive to reach in our penitential systems beneficial results in all four of the directions mentioned. It is therefore possible to speak of a given law being founded on one or the other of these ideas only in so far as deterrence, prevention, education, or reformation, as the case may be, is placed in the foreground as the chief end to be realized.

But we may go further than simply to declare that these theories are not mutually exclusive. We may assert that it is rationally impossible to select any one aim and to declare that in any system of penal justice that one should furnish the sole motive for its enactment and enforcement. It may be possible to pass particular laws the aim of which is solely in one or the other of these directions; but to attempt the establishment of an entire criminal code with but a single aim would inevitably lead to absurdities and injustices. If absolute prevention were the sole aim, capital punishment or lifelong imprisonment would be the normal punishment called for; for in no other way could there be furnished a guarantee against a repetition of the offense by the convicted one. If reformation were the sole aim sought, then, not to mention other absurdities, it would be necessary for a court to release from all punishment

## PUNITIVE JUSTICE.

those hardened and habitual criminals regarding whom experience had demonstrated penal law to be without a reformatory influence. If deterrence were accepted as the absolute canon, we would be obliged to abandon all attempts at reformation, and by the strictness and severity of our punishments give ourselves up to an appeal simply to the fears of mankind. Finally, if the educative theory were to be solely relied upon, we would not be able to modify the character and severity of our punishments so as best to meet threatened invasions of social or political order. This would mean that in times of greatest need the state would find itself powerless. Thus, for example, should a grievous pestilence be threatened, necessity would demand that violations of quarantine and other health ordinances should be prevented at all hazards, and hence that extraordinarily severe penalties should be attached to their violation. Or again, in a time of great political unrest and disorder, when the very life of the state is threatened, martial law would be demanded. But if we accept any but the deterrent theory as absolutely sufficient in itself, such measures would be unjustifiable.

As we have seen, the retributive theory rests under the embarrassment of predicating as a ground for the right to punish a motive which logically necessitates that the character and degree of the punishments which are inflicted should correspond with the degree of moral guilt of the offenders, whereas the determination of this degree of guilt is inherently beyond the power of any criminal court. From this difficulty the utilitarian theory is free. We have spoken of the ideas of deterrence, reformation, education, and prevention as distinct from one another, and so they are. Yet when viewed in their proper light, they are all but different phases of one supreme idea, the social welfare. The aim of the criminal law, like that of the civil law, and indeed of all laws and principles of conduct, is the general weal. Therefore, in passing upon the propriety of emphasizing in a given piece of legislation anyone of these ideas, whether of reformation, education, prevention, or deterrence, it is ever necessary to consider the matter in its social and not in its individual light. There may thus be cases in which, as to the particular criminal or criminals concerned, a remission of punishment would exercise a more beneficial influence than its imposition, but in which social considerations demand a satisfaction of the law's full severity.

The bearing of this upon the question of justly apportioning penalties is that it makes it no longer necessary to attempt the impossible task of making the punishment correspond to the degree of the criminal's guilt, but leaves it open to the laws and to the courts

to arrange their judgments according to the practical exigencies of each case as determined by the social need.

Vidal, in his "Principes fondamentaux de la Penalite," denies the validity of the social-defense theory, on the ground that it justifies the treatment of the individual criminal as a mere means to social welfare; that it improperly divorces the ideas of punishment and desert, and reduces the whole question to one of simple-convenience.

The objections of M. Vidal to the social-defense or social-welfare theory disappear when we point out that, as has been before said, a criminal is not treated merely as a means when his good is given equal consideration with the good of others in determining the general welfare, and when we call attention to the fact that the term "social welfare" is not to be understood as connoting mere material welfare, but the highest ethical good possibly attainable. One often sees the social-defense theory justified by comparing it with that instinctive right of self-defense which every living organism exercises. While as a simple analogy this is not inapt, it is yet misleading in that it apparently reduces the right to one of simple defense against loss or physical injury, whereas it should be justified upon higher ethical grounds.

LAW AND MORALITY.—To what extent, it may be asked, does either the theory or practice of our criminal law conform to the principle which we have established that the idea of retribution or expiation should be repudiated? Very little, one is, at first thought, inclined to answer. Indeed, if we were to ask the ordinary individual to define the relation between law and morality, the answer we should almost certainly get would be that legal rights and duties are such moral rights and duties as are recognized and enforced by the state; that the law, so far as it extends, occupies the same sphere as morality, and exists in the main for the same purpose.

As a matter of fact such a description is not correct. Legal rights and duties and moral rights and duties are never distinguishable simply by the fact for the one the sanction of the state is supplied, and for the other not. It is true that very many legal rights and duties are also moral rights and duties, but they are recognized by the law not, primarily, because they are such, but for another reason, namely, because their enforcement is deemed advantageous to the state. That is to say, we maintain that an act is prohibited by the law, not because it is considered sinful, as tested by some moral standard, but because the safety or welfare of society demands it.

. . . The true reason why the criminal law does not attempt the

punishment of moral guilt is, therefore, not because it does not have the means at its disposal for discovering and correctly measuring it, but because that is not the purpose for which it exists. In short, the criminal law would not punish sin, *qua sin*, if it could.

It may be replied, however, that such ideas as malice, motive, and extenuating circumstances are found playing prominent parts in the definition of crimes, and in the administration of criminal justice. In a certain sense they do; but not in such a sense as to invalidate the position that we have assumed. Let us see how this is.

First of all we must distinguish between the ideas of intent and motive. Intent has reference to the will of the agent, and when present indicates that the agent desires the result which is the consequence of his act. Amos defines it as that "foresight or . . . attitude of mind, of a person about to act, toward the immediate consequences of his act."<sup>17</sup> Motive, on the other hand, has reference to the ground or reason upon which intent is founded. Thus, when one man shoots another, the intention is exhibited by the fact that the slayer, knowing the nature and necessary consequences of his act, freely wills to pull the trigger, because he desires the death of his victim. The motive, however, for the act lies in the anger, jealousy, cupidity, or fear which has aroused the desire.

It does not need be said that, while the intent must be present in order to create moral responsibility, it is the character of the motive which in ethics constitutes the main factor in estimating the degree of guilt. In law, on the other hand, the motive is almost never considered, and even the intent may or may not be actually present; for though in general the law punishes only intentional acts, yet, under certain circumstances, it will presume an intent, and not allow this presumption to be rebutted by the defendant. Thus if a man of sane mind fire a loaded pistol upon a crowded street, he may be held criminally responsible for the consequence of his deed even though he intended no harm. He will not be allowed even to produce evidence that he was without evil intent, except in answer to the charge of murder. This doctrine of the law is founded upon the conception of an average man, and every individual is called upon, at his peril, to show that discretion in his conduct which becomes such an average individual. This is clearly a repudiation of the idea that punishment should be apportioned according to actual moral guilt. For, as a matter of fact, the individual may be in intelligence below the standard of the average man, but, unless this deficiency is so marked as to fall within the exceptions based on

<sup>17</sup>Science of Law, p. 103.

infancy or madness, it is disregarded by the law. Criminal liability, says Holmes,

"is founded in the conception of the average man, the man of ordinary intelligence and reasonable prudence. Liability is said to arise out of such conduct as would be blameworthy in him. But he is an ideal being, represented by the jury when they are appealed to, and this conduct is an external or objective standard when applied to any given individual. That individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness."<sup>28</sup> . . . .

Another though less important fact than the one we have just been considering, is that in ethics if an evil act be attempted, but thwarted by some outside circumstance, the guilt in the individual is none the less. In law, however, mere intent to commit, without an actual beginning of the act, is never punished. Thus, if a burglar go to rob a house, and be frightened off by a policeman, no legal offense has been committed; whereas in ethics, the sin is manifest. The crime of criminal conspiracy appears at first to be an exception to this principle, for here the parties conspiring either to reach a lawful end by unlawful means, or to attain an unlawful end by lawful means, are held criminally responsible, even though no overt act in pursuance of this purpose be committed. The mere fact that they have so conspired is held sufficient. In truth, however, this is no exception to the principle we have stated, for by its very definition, criminal conspiracy consists in the conspiring and not in any unlawful acts which may be the outcome of the conspiracy. And thus, when unlawful acts are committed by conspirators, such conspirators may be held criminally liable for two distinct crimes: the conspiracy, and the unlawful act or acts committed in pursuance thereof.

But while the law does not punish mere intent, it does punish attempt. Thus, where an overt act is committed which is plainly but preliminary to the commission of a crime, as, for instance, where a man strikes a match to fire a house but blows it out when he perceives himself detected, he is criminally liable.

Also, though the intent itself is not punished, it is yet taken into consideration in determining the criminal nature of an overt act. Thus a simple assault to injure, an assault to kill, and an assault with intent to rape are different crimes and differently punished. Thus, also, an accidental homicide becomes murder when it results from an act otherwise illegal; as, for instance, where a man is re-

---

<sup>28</sup>O. W. Holmes, 12, *The Common Law*, p. 51.

sisting an officer of the law, or is firing at a neighbor's fowls and accidentally kills an unseen man.

What most clearly appears to be contradictory to the position we have taken as to our relation between law and morality is the fact that mitigating or extenuating circumstances are often brought forward in criminal trials to secure a lessening of punishment in those cases where there is a discretion allowed by the law, either to the judge or to the jury, as to the severity of the penalty to be imposed. Here at first thought, it does seem that the idea is present that the conditions that modify moral guilt should have an influence in determining the measure of punishment imposed. In a certain sense, this is true. At the same time we think when the matter is carefully examined it will be found that purely utilitarian considerations will be found sufficient to support this discretion in almost if not in every case in which it is allowed. Thus, for instance, it may be recognized that justice will be more reformatory when tempered in certain cases by mercy, or that its educative influence upon the moral thought of the people will be greater when the courts of law are seen to give weight to those same considerations which enter into the estimation of moral desert. Therefore, in order to secure these beneficial results, those who allow the discretion, and the judges who exercise it, may be willing to suffer what little the law may lose in its deterrent effect. That such utilitarian considerations are at the basis of that discretion given to judges and juries in fixing amounts of punishment, is made evident by the fact that where deterrence is especially needed, the law does not hesitate to disregard extenuating circumstances. Thus, under ordinary conditions a judge or jury is inclined to look leniently upon the man who, after vainly seeking work or alms, steals bread for his starving children; but let a famine arise, so that there are thousands in want, and the law will quickly recognize the need for severity and, so far from admitting absolute want, however undeserved as an excuse for theft, will even increase the penalties ordinarily inflicted.<sup>19</sup>

The most apparent exception to the doctrine that goodness of motive will not render innocent an otherwise criminal act, is the fact that homicide when committed in self-defense, or defense of the life of another, is justified by the law. When, however, this matter is closely examined, it is found that there are reasons other than those of moral responsibility which are fully adequate to explain the attitude of the state in this respect.

---

<sup>19</sup>Cf. Green, "Political Obligation," 194, 5, 6, and Bosanquet, "Philosophical Theory of the State," p. 231.

Upon purely utilitarian grounds, therefore, the law is justified in excusing injuries done in legitimate self-defense.

Sufficient has been said to show that in the administration of criminal law the idea of crime is kept wholly distinct from that of sin; the idea of legal wrongdoing from that of wickedness. When, however, we turn from the administration of the law to its enactment, the conditions are changed. In determining what acts shall be declared *mala prohibita*, legislators are necessarily controlled, not only by considerations of social safety and expediency, but by motives of morality. That is to say, laws are enacted to prevent not simply such acts as are counter to public safety and material welfare, but such as are wicked when judged by the moral canons of the legislators. There are, to be sure, a school of thinkers who, accepting the doctrines put forward by J. S. Mill in his *Essay on Liberty*, maintain that the power of the state should never be extended so as to cover acts not matters of social expediency. The invalidity of the reasoning upon which such an absolute principle is founded we have, however, elsewhere shown.

This attempt on the part of the criminal code to advance morality by punishments which it threatens is, however, by no means an acceptance of the idea that punishment should be inflicted in a retributive sense. Certain acts are prohibited solely because they are deemed wicked, or immoral, and punishment is inflicted upon those who disregard the prohibitions; but, and here is the point, such punishments are inflicted not simply because it is desired that the offenders shall suffer pain, but in the hope, either that others will thereby be deterred from sinning, or that some reformatory or educational influence will be exercised by it.

It may thus be said in conclusion, that when we assert that law and morality occupy distinct fields, it is meant, not that the law never attempts to advance morality or to suppress vice, but that it never makes moral guilt a test for determining, or a standard for measuring, legal guilt; and, as a necessary consequence, that it never inflicts punishment except for the sake of some future good to be reached by it. . . .

CONCLUSION.—In the face of an increasing material prosperity, a rising standard of comfort for the working classes, a widening diffusion of knowledge, and a general elevation of moral standards, not to speak of the strenuous and expansive efforts made by civilized states to prevent crime, a rapid decrease in criminality would naturally be expected, while an actual increase would seem impossible. Nevertheless, opinion seems to be divided as to whether or not there

## PUNITIVE JUSTICE.

can, in fact, be traced during recent years a relative decrease in crime as compared with the increase of population. . . .

Without attempting to harmonize or to decide between these views, we may draw one conclusion as common to both. This is that, however looked at, the strenuous efforts which societies have made to check crime have at the most done little more than prevent its increase. This means, then, that little success has been reached either in the reformatory, educative, or deterrent directions. As a matter of fact, so far as regards the reformatory idea, there would probably be a consensus of opinion that, upon the whole, criminal law, as it has actually been administered in the past, has been far more corrupting than elevating to the individuals punished. And for the future the most sanguine are not inclined to believe that it will be possible, even with the most approved methods, to make the reformation obtained more than balance the inevitable corruption that punishment brings by the evil associations it necessitates, and the blow to pride and self-respect it gives. As for the educative value of punishment, this is in the highest degree problematical, and many there are who would reduce its possible influence to a very small maximum. How far penal laws have been deterrent it is impossible to say; but at the most, as we have seen, they have been efficient only to the extent of preventing an increase of crime. As regards, finally, the preventive idea, except where the punishment of death or imprisonment for life is imposed, little is accomplished.

The one lesson, then, which all these facts teach us is that, for a solution of the problem of crime, the real effort must be to abolish the causes of crime, in so far as they are dependent upon conditions within our control. This means, in truth, entire social regeneration; for wherever there is injustice, there will be crime. Not all crime, it is true, may be ascribed to social causes. Some of it is undoubtedly due to the deliberate choice of evil minds or to the promptings of the passions. But with social justice everywhere realized, with economic and social relations properly regulated, and with true education, mental and moral, technical and academic, adequately applied, a long step will have been taken toward the solution of the grave evil we have been discussing. Though possibly exaggerated, there is yet substantial truth in the declaration of Ferri that "the least measure of progress with reforms which prevent crime, is a hundred times more useful and profitable than the publication of an entire penal code."<sup>20</sup>

---

<sup>20</sup>"Criminal Sociology," p. 135.



A deterrent penalty only becomes operative in those cases where it has failed of effect. A reformatory discipline is only applicable where the subject of it has already been corrupted. An educative law presupposes an ignorant or biased mind. In very large measure the necessity for the enforcement of penal laws is a demonstration that proper preventive measures have not been taken. Fundamentally, then, any penal system is unjust in so far as the necessity for it might have been avoided by proper social conduct. Thus, as Green has said, "The justice of the punishment depends on the justice of the general systems of rights; not merely on the propriety with reference to social well-being of maintaining this or that particular right which the crime punished violates, but on the question whether the social organism in which a criminal has lived and acted is one that has given him a fair chance of not being a criminal."<sup>21</sup>

---

<sup>21</sup>"Principles of Political Obligation," 189.