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State's Authority to Punish Crime

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THE STATE'S AUTHORITY TO PUNISH CRIME.[1]

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Historically, punishment has been developed from the instinct of revenge or retaliation. This instinct is expressed in its simplest form by a movement which is directed towards the quarter from which a strong and painful impression has been received. * * * * The essential thing is to give vent to the inward distress and pain—what objects are made to suffer, and how much they are made to suffer plays no part.

The development which the instinct of revenge undergoes during the development of the life of society and culture consists partly in that the object of the revenging action is individualized, so that no one is hit by it except just the one from whom the act started—partly in that the force and kind of revenging reaction is decided by relation to the force and kind of act, and by the degree of consciousnss with which the act was committed—partly in that regard is also taken to the further results the avenging action causes to the individual who is hit by it and to society as a whole. All this presupposes that the instinct is checked in its course; that an interval is produced between the action and the reaction, this interval which is generally so important in the development of consciousness, and especially in the development of the will; and, finally, that the reaction is not the affair of the single individual or tribe, but of the state. It is only by this series of radical changes that revenge becomes punishment. We will examine more closely some of these points.

At the primitive stage of culture the single individual is not regarded as isolated, either so far as rights or duties are concerned. It is the family and the tribe, not independent individuals, who stand opposed to each other. Revenge is practiced, therefore, by *every* member of the tribe to which the injured individual belongs. Blood must flow when blood has flowed; that is the main thing; *whose* blood is a subordinate matter. * * * * It is due to the progressive emancipation of the individuals that gradually the idea of the limitation of the guilt to the single individual is developed.[2]

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[1]From the Author's Work on Ethics, the third Danish edition of 1905.

[1½]Translated and contributed by Samuel C. Eastman, of the Concord, N. H., bar and member of the Committee on the Organization of Courts of the American Institute of Criminal Law and Criminology.

[2]Comp. as to this Spencer: Political Institutions, p. 514 and fol.

Just as originally there was little distinction between the acting individual and his whole tribe, so there was equally little distinction made between the external act and the will which was brought to light by it. They clung to the effect of the act. The instinct of revenge does not give time to examine into the condition of the actor; moreover, the capacity for it is also lacking. The fact is adhered to that a painful effect has come from the offender, that he is a being who inflicts pain; one does not trouble himself to know anything more about him. No distinction is made between intentional and unintentional injuries, between the harm which is committed deliberately (dolus) and that which is due to indifference and negligence (culpa). * * * *

When it became known that the contending individuals and tribes belong to one social entity, which suffers by their strife, and when they themselves feel the injuries from these endless battles of revenge, the interval above spoken of may make its appearance. There is a possibility for deliberation before the call to the act of retaliation. The first judgment seat was the seat of the mediator. When the guilty man was found and a reconciliation could not be brought about, he was left to the vengeance of the person injured. * * * * If the injured person did not succeed in avenging himself, society aided him. That the interference of the power of the state was not relatively considered as on interference of the last resort is seen by this: that he who was not satisfied with the judgment, in France (before the reform of law by Louis the Holy), had the right to challenge the judge to single combat; it was an appeal from the judgment of man to "the judgment of God by the sword" (jugement de Dieu par l'epee). The next step is that society itself takes the whole matter of retaliation into its own hands. It must then control sufficient physical force both to keep back the instinct of revenge and to execute its judgment. This power naturally coincides with that which is exerted against external enemies, so that the authority which maintains the law and which furnishes protection naturally comes to act in the same hand.[3] It was, indeed, not merely the reason of expediency which caused this transfer of the right of revenge from individuals and tribes to the highest power of society. The personal interest of the authorities, their influence and their income, were increased by their taking up the controversial questions and acting as mediators and judges, and by the fines

[3]Maine: Early Law and Custom, p. 170 and fol. Spencer: Political Institutions, p. 618 and fol. The transfer of the authority to punish to the power of the state is shown in an interesting manner in the history of France in the Middle Ages, especially in the reform of law by Louis the Holy. Henri Martin: Histoire de France, 4th ed., pp. 290 and 303.

—one of the most important means of atonement—which fell into their hands. But, as so often in history, that which was mainly due to egotistical motives became here the element of an essential advance in ethical-social respects. Now a trial at law, with reason and evidence, could replace the trial with bare weapons. The whole matter was now considered from a higher stage. It came to turn on something more than mere satisfaction of individual instincts. Society wanted to maintain its peace and its security—one of the first conditions of life—and to this consideration both the person injured and the one committing the injury—both the avenger and the aggressor—must submit. Customs and laws of punishment, which regulate retaliation, now make their appearance. * * * *

There is now a possibility that one may cast a glance beyond the momentary satisfaction of the collective or individual thirst for vengeance. One can consider whether the suffering which is inflicted is actually necessary, and whether, when it is inflicted for the same end, as the need of retaliation demands, it does not entail chances of wrong which are greater than the wrongs which are inherent in the demand for vengeance. We are accustomed to consider the whole matter from the point of view of society and to adhere to the importance which the suffering inflicted on the aggressor has for the whole society—the aggressor himself included. We discover that the stronger the power of the state is the milder its punishments can be, without the peace and security of society suffering thereby; that, on the other hand, cruel punishments arouse and nourish wildness and brutality in the minds of the people and thereby may become dangerous to the peace of society—and that it even depends quite as much on the inevitableness of punishment as on its severity. We recognize that because a man is accused of crime he is not thereby deprived of his human rights, and we take care that his cause may be placed in the most favorable light.

The original starting point of the necessity for revenge is hereby definitely abandoned. The suffering which is inflicted on the aggressor is the thing aimed at, instead of the necessity for revenge and the doctrine of retaliation. The punishment is desired for its own sake, and reflection does not take into account that which lies beyond the moment when the retribution has reached its object. By limiting the cry for vengeance and retaliation, real justice, which is something other and more than mere "like for like," can be controlled. The main emphasis is not now laid on the instinct which demands satisfaction, but on how the good of society requires that the aggressor (who himself continues to belong to society) shall be treated. That which the primitive in-

stinct wholly turned away from now becomes the leading point of view. It will appear, also, that only thereby is it possible to give an ethical basis for the authority of the state to punish.

When the question is stated, on what is the authority of the state to punish founded, the relation developed in the foregoing between society and the state, on the one side, and the individual, on the other, will be a guide for our decision.

It is the task of the state to maintain the rules of law as one of the fundamental elements for the development of human society. Without security and peace neither the single individual nor the society of free culture can flourish. Therefore, the state uses its power of compulsion when an individual refuses to fulfill the duties which, according to the existing rule of law, rest upon him. And where the individual at some point or other breaks the rules of law, the power of the state comes in to uphold it. This cannot be done by merely stopping and repelling the attack. In the breach of the rules of law a will is manifested which, if it were allowed to go on consistently as it was begun in the act committed, would wreck the society of the state. Therefore, society subjects the offender to such a treatment that the relation between his will and the rules of law may become a harmonious relation, and not, as in the act committed, a discordant one. It imposes upon him an education by which he may be in a condition to keep himself within the limits the rules of law prescribe. He is exercised in self-control and he is made acquainted with labor. It does not thereby appear to him as a wholly strange power. He must not for a moment forget that he is himself a member of the tribe and of the society. It treats him not as a *mere* means for its ends; does not sacrifice him for the sake of society. What is aimed at is, as far as possible, to get the interests of society and of the transgressor to coincide so that the social security and order are maintained through an education which is to the advantage of the one who has injured it.

When the state, as the vindicator of the rules of law, arraigns an individual who has broken those rules, there are then really two ethical systems which oppose each other. Grotius in his celebrated work has justly represented this condition as a condition of war—a war between the individual and society in analogy to the wars between individuals and between societies. Principle stands opposed to principle, and no negotiation is possible as long as the individual adheres to the propositions which led to the breach of the law. Where a collision between different principles and systems takes place, practical psychological action is the only means which can lead to an understanding. It relates to a change of the

psychological foundation, such a change as all education aims at. Before the education is complete the individual naturally cannot recognize the justification of the treatment to which he is subjected. But the justification of the state depends on its making him fit to live in the society.

The education to which the individual is subjected is primarily a political and juridical education in law. The individual learns that he fares best by conducting himself according to law, whatever he may think. It is the interest of self-preservation which is first appealed to. By the elementary demands which the rules of law make it only comes to an external act when things go wrong. But there is no reason why the state in its treatment of the individual who has offended should always stop at the outward, juridical education. This ought to be decisive of the kind and duration of the punishment. But by that it is not meant that we must not attempt to affect the individual ethically in order to tear out the evil by the roots. It is only when the whole disposition and mode of thought of the individual is so developed that not only from egotistical interest, but from inner conviction, he submits to the rules of law, that the law is completely reëstablished from the breach; and more than reëstablished, since, instead of an enemy, it has found a friend. Labor is the most important means of education. When the breach of the rules of law, as is very often the case, springs from bodily or mental defects, much will be accomplished by the individual—perhaps for the first time in his life—coming in contact with men in whom he feels that he can have full confidence. This will at once, without much moralizing or dogmatizing, be able to bring about important ethical changes in his nature. It is true this ethical education depends more on the way in which the punishment is carried out than on the punishment itself. It can occur only when the individual shows himself to be receptive, or even feels a need of the influence in the direction spoken of. Some have even wished to reject the right of the state to interfere with the ethical development of the individual, because no man has the right to make himself the judge of the inward disposition of others, and the state has no right to use power in order to make the mature citizen better. But from the point of view of social ethics there is no reason to distinguish so sharply between punishment and the execution of punishment, as on technical grounds is, perhaps, necessary in the science of law. He who is sentenced to punishment is sentenced also to the execution of the punishment and to all that goes with it, and in many cases the ethical improvement is either a natural continuation or a necessary element of the juridical. It appears to be impossible to maintain a sharp distinction between them. The relation between the juridical and the ethical element

in the illegal act itself is also different in every individual case. In some breaches of the law (like political crimes and police offenses) the ethical element may be almost wholly wanting, or perhaps there even exists one of the conflicts between morals and law which could not be avoided. The greatest and most vital breach of the rules of law thus need not be the most doubtful in ethical respects. "The intricacy of the circumstances," says A. S. Oersted, "may often lead a man who is far from being dead to the good and noble to the most dangerous and pernicious crimes, while a crime of trifling, unimportant results may betray a disposition thoroughly depraved. Who will contend that murder or high treason unqualifiedly constitute greater moral degradation than fraud?" To this question of Oersted's, according to the experience of many experts, it must be answered that murderers often stand morally higher than other criminals. Therefore, we cannot establish the right of the state to punish without asking that the punishment be individualized as much as possible. It is especially the perpetual dissension between the juridical and the ethical elementary positions which makes this demand necessary. Without individualizing, the individual who is punished is treated as mere means for the need of society to restore its rule of law. But by the individualizing education which we demand there is no point where the means by which the rule of law is maintained is not also a pedagogical labor in behalf of the individual who has transgressed. The effort of the state to punish receives its greatest ethical basis and right the more it approaches to this ideal. The right of the state to subject the transgressor to an education which makes him fit to fulfill the elementary conditions of social life with others in an orderly society rests essentially on the same basis as the right to provide for the education and instruction of children. In both cases the state sets up the level below which its members must not sink and tries to help those up who have not yet reached it or who have sunk down below it.

The basis of the authority of the state to punish, which relies on the *pedagogical* effect of the *punishment,* has its great importance in its presentation of the ideal to which the adjustment of the nature of the punishment is striving to approximate. It is no objection to this that this ideal is not actually reached—nay, that the so-called houses of reformation are very often institutions of deterioration. This only shows that an ideal is needed which may serve as a standard and show the direction in which work is to be done. And objections cannot be raised against the consideration on which this argument rests, namely, that the individual is and continues to be a member of society even if he

does harm to the laws of that society, just as the sick and persons unable to labor belong to society. The individual who breaks the rules of law exists and has been developed within society. His character and whole mode of thought have been largely decided by the spirit which prevailed in the society and by the conditions which that society had established for him. In the breach of law we can often see a simple effect of irregularities and imperfections in society. By condemning the offender society just so far condemns itself. When, in the breach of the law, thus in a larger or smaller part society must see its own work, its own fault, the right to educate the transgressor is changed to a duty and the necessity of the individualizing mode of treatment becomes so much the more evident. Only a view which regards the individual as an absolute point of departure for all his actions would be able to assert that he, by overstepping the rule of law, wholly separates himself from society so that it no longer has any duty to him. Still, it is not merely the indeterminists who arrive at this result. The so-called Italian school of criminology (Lombroso and his school), which explains habitual criminals as atavistic renewals of a type of man which civilized society has essentially left behind, also thinks that it could maintain that society does not have any share in the guilt of criminals or duty to them. Yet it is clear that it is actually a sign of imperfection of society that hereditary dispositions constantly persist and only wait for a good opportunity to become a reality. It seems that the spirit of society is not really able to penetrate the nature of the single individual and that education and social conditions are not what they ought to be.

The more receptive we are to the influence of society on the character and mode of action of the individual the less shall we expect great effects from the system of punishment alone. It must be regarded as a link in the whole of the great process of education to which the race is subjected through the institutions of society. As in the customary education of children, an indirect and transitory influence in the social education will also more and more take the place of the direct interference by which the attempt is made by punishment to make amends for the harm which has been done. Sir Thomas More in his "Utopia" long ago made the complaint against society that it first made thieves and then punished them. Hygiene and prophylactics in jurisprudence, as in medicine, will ultimately take the place of the cure, which can only be used when the misfortune has happened, and is thus often used in vain.

The pedagogic theory of punishment gives the most ideal basis for the authority of the state to punish. But it is not sufficient. When it

emphasizes only the fact that the single individual grows out of society and ever continues to be a member of it, it overlooks the fact that he who breaks the law of society acts as an enemy of society and presents a pattern which may easily find imitators. Crime establishes a condition of war between the individual and society and thereby imposes on society another task besides the merely educating one—that is, the maintenance of the rules of law and the prevention of the particular breach becoming a precedent. Therefore, the relation of opposition between society and the single individual must also be emphasized. This consideration is placed at the foundation of the *theories of determent and threatened punishment.* Here the end of punishment is seen to have a deterrent effect, because an example is set, just as when a crow is tied to a stake, or the matter is so conceived that the power of the state in its laws of punishment utters threats against those who perform certain acts, and that the punishment which is meted out to the individual criminal is a proof that the threats are meant seriously. The right to deter and to threaten is deduced from the right of the state to exist, from its importance to human welfare.

The deterrent theory, which is especially favored by jurists and statesman (among philosophers by Schöpenhauer), stands in an interesting relation to the theory of retaliation and the theory of education. It does not lay any stress on the degree of consciousness with which the transgression of the law has taken place; the decisive point of view is the dangerousness of the act, which makes it necessary, through fear, to put a stop to all attempts in a similar direction. As far as its actual effects are concerned, it has this in common with the theory of education: that it is not absolutely borne out by experience. Although it is easier to produce fear than to effect a real change of character, yet experience shows that crimes are very often committed by individuals who have been punished many times, and that the criminological problem lies just in the great number of backsliders. Not even the punishment, which must especially be supposed to have a deterrent effect on others—the punishment of death—has this effect in reality.

But the theory of education and the deterrent theory are both directed to the end which must necessarily be aimed at in relation to transgressors of the law. Both must be united in a perfect theory of punishment. The punishment will then at once be effective in changing the character of him who is punished and be an example of the fact that the rules of law must not be broken. The individual who is punished will thus appear at once as end and as means. To carry out such a

conception there will certainly be needed an art and a knowledge of human nature which is not yet at our disposal. It is only in more recent years that we have begun to study prisoners and imprisonment in a scientific way. But *the decisive standard for the perfection or imperfection of the essence of punishment will yet be obtained from the degree in which success has been reached in combining education and determent.* This standard is only a special use of the principle of free personality, and the theory is thus in harmony with the fundamental thoughts of ethics. *A philosophical theory of punishment cannot give anything more and other than such a standard agreeing with the fundamental thoughts of ethics for use in the valuing of the actually existing essence of punishment.* Experience shows, also, it becomes more and more the principle of the exact combination of education and determent which determines our judgment as it presents itself at a given place and time. Now education and now determent gains the upper hand as the leading point of view. In opposition to the prevailing theory of retaliation and the deterrent theory, the philanthropists of the eighteenth century asserted the pedagogic theory. They demanded a humane treatment of those who were to be punished and made their improvement the end of the punishment. Even if this philanthropic movement often had a sentimental character and often led to apathy and to untimely lenity in the essence of punishment, it is unquestionable that it did a good work by maintaining the rights of the punished individual. It appealed to a higher idea of justice than the earlier view knew—an idea of justice which it very surely did not succeed in presenting in clear and definite forms. In the most recent times there is a tendency to bring forward again the point of view of prevention; but since the philanthropic movement led to putting imprisonment in place of corporal punishment, so frequent earlier, and since the imprisonments, especially those of short duration, did not prove to be sufficiently deterrent, they stood in the presence of great practical and theoretical difficulties. The criminal-anthropological investigations also have begun to furnish an insight into the nature of criminals, and have especially proved that there are great differences between individuals who transgress the laws of the state, so that the treatment which they receive must be different also and cannot be determined merely by the transgression itself as an external fact. The theory of retaliation, the deterrent theory, and the theory of reformation overlook the individual differences and are inclined to regard men as alike. Very recently an attempt has been made to pay attention to the individual differences by introducing suspended sentences—that is, such as are only to be

executed when the individual again offends—and indefinite sentences—that is, when the length of the sentence depends on how the character of the individual appears and develops during the term of punishment. We have even become more and more convinced that crime is a social phenomenon which is in harmony with many other social phenomena. The criminological problem is not isolated, but is in close connection with other social problems. We thereby come to the conception already spoken of: punishment as a means of fighting against crime regarded as a social evil. "The International Association of Criminology" has placed at the foundation, and even emphasized, the idea that punishment must not be disconnected from union with other means of fighting, especially of preventing crime. The indefinite expression, *"fighting,"* is thus put in the place of the more definite expressions of the older theories, *reformation, determent, retaliation.* The political criminology takes the place of the theory of punishment. It becomes the business of future experience to determine how much can be gained by the prevention plan, especially by improvement of the educational system and of economical conditions, and how much can be gained by the addition of the suffering of punishment only. We shall certainly come to make greater demands on society when account is taken of the whole range of transgressors of the law than when we allow ourselves to be contented—as soon as a transgression of the law is thought to be decided—with putting the one concerned in a cell, or in the galleys, or cutting off his head. Still the standard for the valuing of the way in which the criminals are to be treated will always be in what degree the particular individual comes to stand as end and not as means. In one form or another the contest between the theories of retaliation, prevention and reformation will continually crop out anew.

According to the conception here developed, punishment is inflicted not only because a transgression has taken place, but also in order that no transgression shall take place (not only quia peccatum est, but also ne peccatur). It is the future, not the past, which makes the punishment necessary.

By the supposition that punishment must serve an end and not have its validity "in itself" the developed conception is in definite opposition to the theory of retaliation, according to which it would be a degradation both of the right of punishment and of the person who is punished, if the punishment is regarded as a means.

It might seem as if the principle of retaliation was excellently adapted to be used for the measurement of punishment. It seems to be a clear and reasonable thought that anyone shall be treated just as he

treats others. It is found to be self-evident that he who has killed another should himself be put to death. But one will at once (at our present stage of ethical development) hesitate to take out the eye from him who has destroyed the eye of another. And how shall he who has committed rape be punished according to the principle of retaliation? Kant thought by castration. But that is at once a great departure from the principle of like for like. It cannot be carried out, and where it seems as if it could be used, it is rather a kind of a symbol which is used than a real, wise connection between act and punishment. To carry out the principle of retaliation consistently we must go just as far as some uncivilized races. A Basuto negro, for example, whose son was wounded in the head by a blow from a stick, would have seized the man who did the deed in order to strike him with the same stick at the same place on his head while standing on the same plat of ground on which the act had been committed. Only then did he feel that he was entirely compensated.

The doctrine of retaliation cannot be founded on the actions which have their origin in malice (dolus) being punished more severely than those having their origin in negligence (culpa). It is the act which is to be avenged; how can the retaliation be different, according to whether the act is performed wilfully or from negligence? It would be absurd if we should expose him who by negligence had caused the death of another to a danger like that in which he had placed the other! We must, then, take care that it also caused death. The retaliation still would not be complete, since the death would not be caused by negligence. But if we cannot pay attention to the difference between wilful and negligent action, it then becomes clear that retaliation is in reality the outburst of a blind instinct which lets us strike without investigating the conditions. It is a wonderful fate for such a highly strained ethical view as the doctrine of retaliation, which likes to look down with contempt on "utilitarianism" and "humanity."

The theory of retaliation finally cannot show what the most of the more recent penal laws point out as to the extinction of guilt. According to the right to punish given above, it is a natural consequence that breaches of the law which lie far back in time and are only now discovered are not punished. The motive which sets the punishing power in motion is wanting here. Just as ethics looks forward and only looks backward in order to see forward better, so the state has not to do with the past, but with the present and the future; the action performed far back in time is neither any sure criterion of how the character of the one who did it is *now* constituted, nor does it contain any danger for the

existing rules of law. The practical interest has disappeared. But for the doctrine of retaliation there must be a blank here in the arrangement of the world and no lapse of ever so long time can prove that punishment is not to be administered. Why should blood cease to call?

In the train of the proof of the right of punishment, as given above, there is a two-sided end to be attained by the punishment: the restoration of the rule of law and the change of the character of the perpetrator. By no mode of punishment must these two considerations be changed. Of the punishments which are used to-day there are two which are at variance with this, namely, capital punishment and imprisonment for life. They cannot, therefore, be justified; and we find, also, that they are used more and more rarely. Only one-fifth part of the death sentences in Europe are carried into execution. These punishments are an expression of the fact that we still stand on a barbarian stage of development. We live in a condition of war which causes the point of prevention to play a greater part than, ethically considered, can be defended. But the reason is also specially this: that we are still so extremely backward in the psychology and pedagogy of punishment. Therefore, we are not yet able to influence the character of the transgressor so that the punishment can be completed without ending in death. To let him who is to be educated "be kept in" for his lifetime is a wonderful pedagogic method, and not the less wonderful is it to take away his life in order to have an effect on his character. It is easy enough to declare a man to be incorrigible; but where do you get the proof that all means are exhausted? We are not yet so advanced in psychological insight and pedagogical practice that we dare to utter such a declaration of outlawry. Many experiences show that murderers sentenced to death and pardoned have afterwards led lives free from guilt. In some cases it was, perhaps, because bad examples and opportunity were kept from them; but in other cases it was certainly because a change of character had taken place.

There is no reason to enter upon the question of the "freedom of the will" at this point. If ethics can be reconciled with determinism, jurisprudence can, also. But, therefore—just according to the basis here given for criminal law—it will, nevertheless, be of great importance that the subjective condition of the will in those to whom punishment is to be administered should be the object of attention. In the first place, it depends on how far the act is actually willed, how far it is the fruit of the individual's clear consideration and conscious conclusion, or has only been the object of intention, but not of real determination, or has been committed by

the individual only by the want of attention and meditation, or, finally, has been performed in a condition of unusual excitement. In these different cases there is a very different degree of discord between the will of the individual and the rules of law, and the punishment ought necessarily to be varied accordingly. Still, too great weight has often been laid on the degree of consciousness and premeditation with which the act has been committed. A long and conscious meditation may have been caused by there having been great obstacles to be overcome in the mind of the individual before the criminal determination could exist. In such cases the meditation is a reason for mildness. A character which only after the vanquishing of inward opposition can commit an act stands above the character which feels no hesitation at all at such an act. In the second place, the punishment should impress the will of the individual as a thing which has shown itself to be necessary. The individual is to be educated. But that depends upon whether the individual is normal, so that the impressions to which he is subjected can have any influence. If the individual is decidedly insane, the educating influence in the customary form will be useless and even injurious; it may then indicate a hospital for the insane. If the individual is not insane, in the ordinary meaning of the word, but (even if the act which brings him before the court is comparatively unimportant) manifests strong and dangerous tendencies in his nature, which he will probably not be able to overcome by the capacity for self-control he is master of, he may be turned over to a "prison asylum," an intermediate form between a prison and hospital for the insane. And the more the nature of such individuals is studied the more such intermediate forms will be called for. A continual border war is carried on on this point between jurists and physicians, and it is not to be wondered at, as long as there are jurists who not only assert that responsibility and irresponsibility, the normal and the abnormal, are separated by a sharp and definite boundary, but also that "the moral capacity to keep illegal tendencies repressed is an invariable quantity which must be decided to be present in a normal degree in all men, without regard to their individual aptitude." If so little psychological insight is frequent in juridical circles, it is no wonder that the use of the right to punish is still far from its ideal.