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Arnold D. Margolin

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THE ELEMENT OF VENGEANCE IN PUNISHMENT

ARNOLD D. MARGOLIN¹

Almost all contemporaneous criminologists have abandoned the theories of the "bad will." The conviction that crime is a direct and natural result of definite conditions of heredity and environment is constantly becoming more firmly established. Penal statistics reveal an immediate causal connection between the economic factors of life on the one hand and the number and nature of crimes on the other. The significance of such factors as age, sex, climate and seasons of the year is also being more and more explored and many investigations have been undertaken to analyze and define the influence of other factors on crime. The *nature* of crime and the *person* of the criminal are today a scientific study and the deterministic point of view is being constantly applied by modern criminologists and sociologists in their endeavors to explain the origin and the roots of crime as a social phenomenon.

This last statement, unfortunately, does not apply to the methods and means used by the same criminologists with regard to the study of *punishment*. If freedom of will is denied those who commit crimes, it must with equal reason be denied those who determine the kind and measure of punishment, and those who inflict punishment. In reality, however, the field of scientific observation is limited to crime and the criminal. Few attempts have been made to determine the influence of the personal make-up of legislators and of their surrounding conditions on their legislative activities. Still less has been done with regard to investigating the factors which predestinate the views, beliefs and acts of judges. While we deny freedom of will in general, we seem to grant it to the bench and to the jury. It seems certain however, that the so-called inner conviction of the judge depends to a large degree on his views and feelings, and that these, in their turn, are dependent on his hereditary properties, inclinations and previous experiences. The individual characteristics of the judge play a tremendous role in his work, especially within the limits which are left to his discretion by the legislators.

Criminal statistics must not be one-sided. Their task cannot be limited to the study of crime alone. The real nature of punishment

¹Member of the Massachusetts Bar. Former Justice of the Supreme Court of the Ukraine.

must be explored with the same audacity and definiteness. There must be no inviolable regions, no holy or tabooed ground upon which scientists dare not tread. Every human being, criminal or non-criminal, must equally be considered a subject for scientific observation. It is indisputable that if such factors as climate, religion, and inborn traits leave their impress on a murderer or thief, they must also influence in one way or another the acts of non-criminals,—of so-called law-abiding citizens. The law of causation does not know exceptions; all are equal before this law.—For instance, it is known and corroborated by statistical data that jurymen are more inclined toward leniency and the recognition of attenuating circumstances than judges. Defense attorneys gradually acquire views and attitudes towards punishment totally different from the views and attitudes of prosecuting attorneys. It is evident that *recidivism* has an influence not only on criminals but also on judges. Parallel to the fundamental difference between professional criminals and criminals by accident, there exists a fundamental difference between the views and psychology of professional judges, and of jurymen.

An involuntary, or rather subconscious, pietism towards the position of powerful officials, judges and state prosecutors constitutes an unseen impediment or obstacle which diverts the observation of investigators from these upper classes of society, and directs their explorations more or less exclusively towards the world of crime, prostitution and pauperism. Criminologists must free themselves of this pietism. Like a student in the field of the exact sciences, criminologists must explore all the angles of their field, not only those which are labelled criminal or abnormal, but also those which are considered normal and sane.

Present-day punishment is a conglomeration of all kinds of historical strata. There is no doubt that the punishment of the future will be different from present-day punishment, just as punishment in our penal codes today differs from primitive forms of punishment in the embryonic periods of human society. This does not mean, however, that there is no stable, permanent element in punishment which always has been its very basis, its foundation. Such an ingredient, basic element can be usually found in all social institutions. Let us take marriage for an example. History knows many different social forms regulating the inter-relations of the sexes. There is an abyss dividing the Roman *confarreatio* or *coemptio* from the periods of primitive polyandry and polygamy. There also is an essential dif-

ference between the old Roman forms of marriage and our modern systems of marriage. It would be erroneous, however, to conclude that there is no essential element in present-day marriage which was not fundamental and indispensable in primitive forms of sexual interrelations. Marriage may evolve more and more in the direction of moral and ethical perfection. Nevertheless, its most essential feature is the element which creates its very existence, and this element always has been, is and will be the physical attraction of sexes. The law of domestic relations is nothing but the attempt to utilize and regulate this elemental trend towards sexual intercourse and reproduction in the interests of human society.

The same can be said about other social institutions. The law of property aims at the solution of the relations of human beings with respect to land, buildings, chattels. The very right of human beings to possess, use and dispose of all these immovables and movables cannot be justified, however, by logic; this right is accepted *a priori*, as something which always did exist and exists at the present time. This right was formulated in the earliest stages of Roman civilization in such a few words as "beati occupantes" and "beati possidentes". Similarly, the law of inheritance regulates the fate of the estates of deceased persons. Yet, the fundamental element of this law is the natural feeling of love of parents to children and other relatives, and the elemental urge of transmitting to them all the accumulated material wealth.

In studying the origin and foundation of punishment, one must inevitably and frankly conclude that the basic and most essential element of punishment during all stages of human history is the urge of vengeance on the part of the person or persons who suffered from the transgressor of the custom or of the law in question.

Historians of criminal law—Tonnisen, Tissault, Du-Bois, Loisseller and others,—all recognize that originally vengeance was the sole parent of punishment and that it remained so during the era preceding the legislation of Moses. On the other hand, the majority of these historians and of professional criminologists affirm that since the proclamation of the principle "an eye for an eye and a tooth for a tooth", *justice* has replaced vengeance as a foundation of punishment. Among the German philosophers, Zacharie was especially enthusiastic about the moral value of the principle of retaliation, and saw in it the embodiment of the idea of highest justice. The categorical imperative of Kant, the dialectic retaliation of Hegel, as well as the "aesthetic" demand for punishment of Herbart are also further identification of this principle of Mosaic law with the concept

of higher justice by these creators of the so-called *absolute theories* of punishment.

Naturally, it has to be admitted that the principle: "an eye for an eye" was the first limitation upon the unrestrained, unbridled thirst for vengeance. When punishments are, really, based on this principle, then the word "retaliation" seems to describe more exactly the character of such punishments than the word "vengeance". But, nevertheless, retaliation is not and should not be confused with the idea of absolute justice. The affirmation that this "retaliating justice" is the sole essence of punishment, has no justification in fact. History has proved that punishment as such is not a stable, unchangeable concept, but that it reflects in itself the movements and variations of intellectual and moral progress or atavistic regress in human civilization. Even a single influential thinker could cause the incorporations of his views and theories into a new penal code, as is illustrated by the Bavarian Penal Code of 1813. Feuerbach, its author adopted as the foundation of punishment in this Code his theory of intimidation. Feuerbach, however, was mistaken in his belief that he had eliminated from this Code all other concepts of punishment. He believed, erroneously, that more severe punishment was necessary for homicide than for larceny, in order to deter and restrain transgressors. Logic dictated to Feuerbach the thought that punishment must be utilitarian, that is, that the state must try to diminish the number of crimes by means of punishment. But what was it that caused Feuerbach to revert to this ancient standard of making the kind and measure of punishment correspond to the value of harm done? Feuerbach justified this system of kinds and grades of punishment by the assertion that intimidation can be effective only if the punishment in each case would threaten greater suffering to the criminal than that which would be caused to the victim of the crime, or, in other words, that the suffering which threatens the transgressor should be proportionally larger than the benefit the criminal might derive from the crime. This justification, however, was artificial, and was the result of the desire to explain by utilitarian reasons the old essence of punishment.

What motivated Feuerbach in his creation of his theory?

The truth is that Feuerbach, without his realization, followed the dictates of his own subconscious emotions or feelings. These emotions were the same as those which made the primitive man desire revenge in a measure proportionate to the harm inflicted upon him by the transgressor. Therefore, despite Feuerbach's assertion to the contrary, there can be no doubt that the fundamental element

of punishment in the Bavarian Code of 1813 was vengeance. In fact, Feuerbach exceeded the idea of retaliation, inasmuch as his Code threatened criminals with a greater measure of suffering than that which they might impose upon their victims. It is evident that not only Christian but even Mosaic principles failed to penetrate into the codes of Feuerbach's era, and that two eyes were to be taken for one eye, or three teeth for one tooth.

The utilitarian theory of Feuerbach is the first of the so-called *relative theories* of punishment, that is, of the theories which see the necessity of punishment not as some absolute, abstract principle of justice, but for the utility which it is supposed to achieve.

The utilitarian element, however, is present even in the reaction of primitive man who takes "justice" into his own hands when some other person or persons attack him or his property. This aspect of utilitarianism appears when the person attacked can still prevent the accomplishment of the transgressor's intention by making a counter-attack. Self-defense is the main motive of such reflexes. The element of vengeance becomes a secondary one during the period of the counter-attack. Only later, after the original attack is repulsed, the instinct of revenge becomes strong and justifies, in the eyes of the person who was attacked, the results of his self-defense. "You wanted to kill me, so I paid you for this attempt," is the thought and feeling of primitive man when he victoriously puts his foot on the body of the dead aggressor. At this moment, this is rather the voice of vengeance than the voice of self-defense. We see, in other words, two elements, both present as motives of the reflex of counter-attack: self-defense and revenge. This illustrates that the utilitarian ideas which are the basis of relative theories of punishment are not new, and were characteristic even of the caveman. There is nothing unnatural in this situation; the most primitive, savage person is moved in his acts not only by revengeful emotions or feelings but also by reason, by logic. The emotional part of organism dictates vengeance; on the other hand, reason dictates self-defense or the defense of one's own interests as the primary motive of the counter-attack.

When, however, punishment becomes a function performed by the state, replacing the individual, the utilitarian element of punishment becomes still more significant. Its influence on the work of the legislator can be found in the most ancient codes. Neither Greek and Roman utilitarian thinkers, nor Bentham, the father of scientific utilitarianism in the domain of criminal law, nor his followers, have proposed anything that was new or unknown to mankind. It is true

that they strengthened the utilitarian element in penal systems *as one of the elements of punishment*. Their assertions, however, that the essence and form of punishment are *entirely* based on utilitarian principles cannot withstand serious criticism. As has already been indicated, Feuerbach's Code fixed the kind and measure of punishment corresponding to the value of the attacked interest. Such a "proportional" interdependence between crime and punishment cannot be based on or explained by the one element of intimidation as the sole foundation of punishment.

The same can be said about another utilitarian idea—the idea of improving, or reforming the criminal by applying punishment to him. This theory of reformation is the second of the relative theories of punishment.

There is no logic, no reason in the assertion that a more severe punishment is necessary for the reformation of a murderer than it is for a thief. On the other hand, capital punishment which is preserved in most of our modern codes as the highest measure certainly has nothing to do with the idea of the *reformation*, of the *improvement* of the criminal. One can hardly say that one who has committed murder of the first degree for the first time in his life, cannot be reformed, whereas a recidivistic thief can be considered as a subject fit for reformation. The difference in the kinds and measures of punishment is derived not from logical, reasonable grounds, but rather reflects the different prices asked by vengeance for different grades of sufferings or losses caused to the victims of the crimes.

The third relative theory of punishment is the theory of isolating criminals from society. Its authors and adherents forget, however, that they themselves would not insist upon the application of isolation to *all* crimes and *all* criminals. What place has the fine, for example, in this idea? And how can *temporary* imprisonment be regarded as *isolation* for an inborn criminal or a professional recidivist?

The number of adherents to any single one of the utilitarian principles as the foundation of punishment becomes less and less. Contemporaneous representatives of the relative theories demand more and more that the penal system combine all three elements: intimidation, reformation, and isolation. We will discuss the views of these eclectics of utilitarian theories when we consider the anthropological and sociological schools of thought.

The so-called *mixed* theories of punishment attempted to pacify the extremes of the absolute and relative theories by combining them into theories which contain both absolute and relative elements

in their inter-relation one with another. They all ignored, however, the element of vengeance in their analysis and explanations of the true origin and essence of punishment.

A multitude of historical and philosophical investigations have proved that the existence of a permanent evolution is the essence and character of all social institutions. The bankruptcy of absolute theories naturally followed, and there are few representatives of these theories among modern criminologists. The most outstanding among them in the second half of the nineteenth century were the German jurists Berner and Binding, although contemporaneous criminologists consider them representatives of mixed theories. The overwhelming majority of present-day scholars in the field of criminal law are adherents of relative theories. A goodly number of them go even further and believe that all the elements of punishment will constantly change parallel to the evolution of ideas and foundations of our social life. Some of them repeat the old formula of the Greek philosopher: "all flows, nothing remains."

On the other hand, anthropological and sociological investigations gradually changed the attitude of criminologists towards this whole question of the foundation of punishment. These investigations diverted the attention of students of criminal law from the question of crime to the question of *the criminal*.

The head of the anthropological school, Lombroso, presented in his main, capital work: "Homo delinquente", the division of criminals into the following groups or categories: (a) inborn criminals; (b) criminals by habit or professional criminals; (c) criminals by accident; and (d) abnormal criminals, i.e. criminals with some organic or psychic defect. Although differing from Lombroso in minor details, all other representatives of the anthropological school accept Lombroso's basic classification.

The sociological school, in its turn, sought the causes of crime not so much in the person of the criminal as in the environment which surrounds him, in the conditions of his life. Montesquieu especially emphasized in his essays this influence of surrounding conditions upon the behavior and acts of any individual. The real creator and father of the sociological school in criminal law was, however, the eminent Belgian thinker and statistician, Kettle. The highest development and fullest bloom of this school was achieved with the appearance of the works of Ferri, Garofalo, Sighele, Tarde and other sociologists, during the end of the nineteenth century and the beginning of the twentieth century.

At the present time, most sociologists accept some views and conclusions of the anthropologists, in addition to their sociological beliefs. So, the prevailing school of our day is the anthropological-sociological. In accordance with the teachings of this school, modern criminologists seek ways and means to counteract not crime but the following phenomena: the inborn inclination to commit crimes; the acquired habit to commit crimes; coincidence of various circumstances conducive to and resulting in crimes; mental and physical diseases; over-population of cities and depopulation of rural communities and villages, pauperism and starvation, etcetera.

The measures for combatting all these phenomena are classified into two groups: repressive and preventive.

These are the repressive measures: absolute isolation—for inborn criminals; isolation, and partly-reformatory measures—for habitual criminals; reformation and, in certain cases, probation with suspended sentences—for accidental criminals; medical treatment—for mentally defective criminals. All these measures are but a combination of elements which were considered as the desirable foundation of punishment by the representatives of relative theories.

So far as the preventive measures are concerned, they have nothing immediately in common with punishment. A successful attempt to wipe out unemployment, pauperism or prostitution may considerably diminish the number of crimes. These prophylactic measures have a tremendous significance. But there is no necessity of analyzing them here.

As we have seen, the anthropological-sociological school did not bring any new elements into the foundation or essence of *punishment*. This school, however, threw much light upon the understanding of the origin of crime, pointing out diverse conditions which conduce to and create crimes.

Our brief review of the theories of the foundation of punishment has indicated that all these theories were based by their authors exclusively on the postulate of a reason, on logical grounds. These theories entirely ignored the existence of human instincts, emotions, passions. Naturally, such an attitude is purely abstract and is possible only in books or lectures. When the same theorist participated in the preparation of a penal code, he could not avoid the necessity of building the system of punishment upon the old basis. This basis was and remains the proportional correspondence between the value of the interests attacked by the criminal, on the one hand—

and the kind and measure of punishment, on the other hand. This means that, as legislator, the theorist had to take into account the urge for revenge which is felt by the majority of the population in any country of the world towards the transgressors of the established rules of political, economic or social life.

There have been, however, a few attempts on the part of legislators to eliminate this element of blind vengeance from some parts of penal codes. We will analyze one of these few exceptions, perhaps the most important and significant of them, with the purpose of demonstrating the futility and practical failure of such attempts by law-givers to go "against the current", to ignore the fundamental views and feelings of the average man and woman in their respective states of communities.

An attempt to commit a crime is punished less severely than an accomplished crime in almost all existing penal codes. The French "Code Pénal" is an exception to this rule; its Section 2 fixes the same kind and measure of punishment both for an attempt and for a completed crime. The result of the attempt is ignored by this section. The criminal bears full responsibility and is threatened by the full measure of punishment purely for the attempt to commit a crime which he *commenced* to fulfill, irrespective of the success or failure of his attempt. In other words, the French Code bases the measure of responsibility exclusively upon the *subjective* element, on the *bad will* or intention, entirely disregarding the *objective* element or the results of the attempt. Let us see, however, what is the reaction of French judges and jurymen when they face the necessity of applying this Section 2 in practice.

The "Code Pénal" has existed and has been applied for more than a century, and it can be stated that there is no other section of this Code which has been as much disobeyed and evaded by judges and jurymen as Section 2. Capital punishment has been frequently pronounced and applied when the premeditated intention to accomplish a murder resulted in the death of the victim. In every case, however, where death did not result from the attempt, the French jury always has found some way to *avoid* the dictates of law, not hesitating even to mutilate or alter the real facts, by denying the presence of premeditation, by rejecting some other aggravating circumstances or by creating the presence of some attenuating circumstances. In short, all measures have been undertaken with the purpose of mitigating the punishment for an unfulfilled attempt. On the other hand,

there is no such striking divergence between the views of legislators and judges in all other countries, where the law provides *different* measures of punishment for an attempt on the one hand, and an accomplished crime on the other hand.

It is evident that the average person will often disapprove the most logical concepts of the legislator, if the latter ignores the former's inborn instincts, emotions and natural reflexes.

The following two simple cases will illustrate this situation,

- (1) Peter, intending to kill Paul, thrusts a knife into him.
Paul dies.
- (2) Simon, intending to kill Saul, thrusts a knife into him.
Saul does not die.

Let us assume that Peter and Simon acted with the so-called premeditation, that the motives for their acts were identical, that the power of the strike and all other circumstances were exactly the same, and that Paul died, whereas Saul did not die, merely because of the remarkable vitality of Saul.

The French jury would be inclined to render a verdict of guilty, leading to capital punishment, in the case of Peter. The same jury however, would abhor the thought of giving a similar verdict in the case of Simon, and would invent some fiction to evade the direct dictates of Section 2, denying either premeditation on the part of Simon or some other actual, material fact.

This attitude of the jury is only human and natural and it reflects the views and feelings of the average man. An equal, identical punishment for Peter and Simon would arouse a feeling of dissatisfaction on the part of Paul's relatives and friends. The average person takes into account *the results* of the crime much more than *the intention* of the wrong-doer. Paul's father or wife would feel wronged if Peter and Simon were to receive the same measure of punishment, inasmuch as the neighbor's son or husband, Saul, had been only "scratched" whereas Paul, "his Paul" or "her Paul" had been killed.

Most legislators feel or know that the majority of human beings react differently to the attempt as compared with the accomplished crime. This explains why almost all penal codes establish a lesser punishment for the attempt than for the fulfilled crime. Legislators are inclined, however, to justify this difference by logical grounds. The representatives of the absolute theories say: The greater the harm done, the greater the retaliation for it. Due to this objective view, the adherents of absolute theories were also called

"objectivists." On the other hand, the pure utilitarians were called "subjectivists" because they claimed to take into consideration only the element of intention, i.e., the subjective element of the crime. The utilitarians can, indeed, find no justification for this difference between punishments for an attempt and for an accomplished crime.

The mistake of both objectivists and subjectivists is the same in this case as in their whole attitude toward the foundation of punishment: They ignore human feelings, instincts and emotions and seek to base punishment only upon metaphysical or utilitarian grounds.

The legislator, however, cannot ignore the wishes, inclinations and views of the majority of the population. Punishment became one of the functions of the state among many other functions which first had been performed by the individual involved or by members of his family, later by the tribe, and finally by the state. The state, therefore, represents the interests of the victim in criminal cases. The late German criminologist Binding said so well in his "Normen:" "Punishment is not so much the right of the state as it is its duty, and a very serious duty." From our point of view, the main essence of this state duty consists of the necessity of satisfying the thirst for revenge which is felt by the victim of the crime and by his relatives and friends and, though in a more remote way, by the majority of the population among whom the victim lived or lives. Where this necessity of satisfaction does not seem to be absolute and urgent in the victim, the state prefers to wait until he or she has asked the state to act in his or her behalf, that is, to prosecute and punish the transgressor. This hesitating attitude is taken by legislators toward those offenses which are supposed to cause a desire for revenge only among a small part of the population. Slander is an example of such a minor offense. Honor seems to have a greater value than life or property only among the minority of the population. There is no doubt that only a few would feel very indignant and revengeful if called "a fool" by some irresponsible or drunken person. The state, therefore, does not interfere in such petty cases of its own initiative, leaving the question of prosecution and punishment to the discretion of the victim of the offense.

The prosecution of the criminal by the state is also conditioned upon complaint by the victim in cases where the prosecution may become a double-edged sword, that is, may cause disagreeable results not only for the criminal but also for the victim. To this category of crimes belong rape and family theft. It is only to be expected

that a woman who has been raped will often prefer to leave the violator unpunished than to expose herself to the painful and disgraceful publicity. It often happens that a father does not want to prosecute and disgrace his son for the theft of his property. The state hastens to say to itself in such cases: "Hands off." This abstinence of the state is the result of doubt on the part of the legislator that the majority of the population would insist on punishing a petty offense, a doubt that most parents would be willing to disgrace their children for the commission of a domestic theft and a doubt that most victims of rape would be eager to prosecute their attackers and thus unavoidably expose the crime.

Vengeance is, evidently, not only the fundamental element of punishment, as stated in this article; *it is the dominating element* of punishment even at the present time. The state is willing to close its eyes to the crime and to display its disinterestedness when there is a ground for assuming that the victim does not care for the revenge or will injure himself by the revenge.

One may say, in objection to this statement, that there are some persons in every community who have no desire of being avenged for *serious* offenses, such as larceny, robbery or arson. The answer is that the state cannot make prosecution and punishment dependent upon the complaint of victims of those crimes which invoke the wrath of the overwhelming majority of the population and arouse their insistence upon revenge. The state *must* give satisfaction to these instincts and feelings of individuals, in order to prevent the "taking of justice in one's own hands" by the individuals or by the mob.

Another objection which may be raised against the assertion that vengeance plays the prevailing role and has the utmost significance in the institution of punishment is the fact that the state provides severe punishment for the so-called political crimes where there is often no place for the feeling of personal revenge on the part of an individual or individuals. The infringement of the interests of the state, of political or social interests, however, injures the feelings of the groups which support the state and the existing regime. These groups are composed of human beings, all of whom have human instincts and inclinations.

It would be erroneous, nevertheless, to come to the conclusion that the role of the state in the institution of punishment has been and is only a blind, obedient reproduction of the reflexes of an average person who happens to be the victim of the crime. Even

such an ancient system of punishment as is presented in the Mosaic law takes under its protection persons who committed homicides by their negligent behavior or by accident, without the "dolus" or intention of killing. Such persons found legal refuge; they were hidden by the state authorities in special locations, away from the ire and vengeance of the relatives of the victim who did not at that time distinguish a homicide by negligence or accident from an intentional homicide. On the other hand, murderers were not protected in this way, and were exposed to the "popular justice", to the most brutal execution by relatives of the murdered person or by the mob. Criminal codes contain many other examples of such attempts on the part of legislators to mollify the unrestrained brutal mob reactions and to bring the boiling torrent of instincts of vengeance into definite channels.

History and the constant evolution of social order give foundation for a hope that punishment will gradually become milder and milder and that legislators will give more and more consideration to the utilitarian aims which can be achieved by punishment. The main essence of punishment, however, will always be vengeance.

A frank recognition of the origin and essence of punishment would eliminate the problem of its artificial justification by all kinds of fictions, as raised by the determinists. The postulates and demands of revenge are even more understandable from the deterministic point of view than from the point of view of those who believe in the freedom of human will. Just as crime is the result of the inborn properties of criminals on the one hand and of surrounding environment on the other hand, so also punishment is the unavoidable reflection of the passions and instincts of the "avenging" majority of humankind on the one hand, and of the surrounding conditions of the social life on the other hand. Just as the "criminal" or "sick" or "abnormal" minority cannot restrain itself from committing crimes, so the "non-criminal", "sane", "normal" majority cannot restrain itself from the instinctive desire of avenging the transgressors for the harm or wrong done. This "avenging" majority will finally find its Kettle and Lombroso who will explain the genesis and character of punishment from the deterministic point of view just as Kettle and Lombroso and their successors explained the genesis and character of crime with regard to the "criminal" minority of mankind.