

Fall 1937

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N. S. Timasheff

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Recommended Citation

N. S. Timasheff, *Retributive Structure of Punishment*, 28 *Am. Inst. Crim. L. & Criminology* 396 (1937-1938)

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THE RETRIBUTIVE STRUCTURE OF PUNISHMENT

N. S. TIMASHEFF*

A Crime is committed. A social reaction follows. Punishment is the name historically associated with this reaction.

The sequence Crime—Punishment seems to be as natural and necessary as the sequence Stimulus—Response in an individual reflex. We might well speak of a Socio-Cultural Reflex of Punishment, the term “Socio-Cultural Reflex” being an abbreviation for a sequence of acts of different individuals insofar as the previous acts of the ones generally tend to provoke the subsequent acts of the others.

In doing so, we must remember that the similarity is only superficial. In a sequence of the types studied neither stimuli nor responses are established by Nature, but are socially determined; the link between them is formed not by natural, but by social forces; coordinated dispositions of human wills based upon social interaction must exist in order to effectuate the social response.

What is socially determined in the sequence Crime—Punishment? First of all, the punitive reaction. The nature and the aims of the acts composing this reaction are in generally socially preestablished and not left to the good pleasure of individuals: there are customary or legal rules determining the response of Society to Crime.

Crime is also socially determined: customary or legal rules trace the limit of punishable behavior, shape the “behavior-content” of Criminal Law.¹ Many criminologists are unaware of this obvious fact. The idea has been frequently expressed that Crime is determined in a “normative” way and that this hinders its causative study. Consequently, some authors tried to discover a natural concept of Crime, which would be independent of Positive Law.² This idea is, of course, erroneous: for Custom and Law are social phenomena; and the determination, by Custom or Law, of the limits of punishable behavior is therefore a social process also.

* Harvard University.

¹ Michael, J. and M. Adler, *Crime, Law and Social Science*, New York, 1933, p. 20.

² First of all, R. Garofalo, *Criminologia* (first Italian edition 1885; pp. 1-52 of the fifth French edition, Paris, 1905).

In the case of an inborn individual reflex, maladjustment between stimulus and response is impossible. It is already possible within an acquired or conditional reflex: in certain cases the stimulus may be a false signal calling forth a response without biological utility. Still more frequent are cases of maladjustment within a socio-cultural reflex. In order to investigate the causes of possible maladjustment within the sequence Crime—Punishment we have to distinguish between its basic structure and very complex super-structures. A structure is basic if it is closely related to natural tendencies of human behavior. Primitive structures, in which Nature plays a larger role than Culture, are generally also basic structures; but basic structures are, of course, to be discovered in the midst of the later complex structures: for Nature cannot be exterminated by Culture but may only be remoulded by it.

The basic structure of our sequence is the following one. Enduring interaction of individuals in social groups results in creating an ethical group-conviction. The existence of such a conviction is expressed in individual recognition of certain rules on the part of group-members. It is not necessary that a rule should be recognized by every group-member: the recognition by a majority is sufficient, for it induces other group-members to act with a "concern"³ for the "common" recognition.

When a group-member recognizes an ethical rule, he adjusts his behavior to its contents and tries to influence other group-members to have their behavior adjusted to the rule. Such a will-disposition is the essence of the recognition.

If an ethical rule has been transgressed or if a transgression has become threatening, a hostile attitude of group-members follows: this attitude forms a part of the behavior-complex of recognition.⁴ In the early stages of development, before the formation of the Socio-Cultural Reflex we are studying, the hostile attitude usually resulted in individual hostile acts of the revenge type. The replacement of the individual reaction by a corporate one, the creation of the socio-cultural reflex of Punishment, has been one of the most decisive steps in the development of Culture. The primitive, entirely egoistic motivation has been purified, sublimated, transformed into a social one.

³ T. N. Whitehead, *Leadership in Free Society*, Cambridge (Harvard University Press), 1936, p. 9.

⁴ G. Humphrey, "The Conditioned Reflexes and the Elementary Social Reactions," *Journal of Abnormal Psychology and Social Psychology*, XVII (1922), 113-119.

In spite of this transformation, transgression of recognized ethical rules results in hostile attitudes; the sequence may be understood as a bundle of individual reflexes in which a single act (the perpetration of a Crime) forms the stimulus and the hostile attitude of an indeterminate number of group-members is the response. These hostile attitudes would naturally tend to produce individual hostile actions; but this tendency is inhibited by the expectancy of corporate reaction. There exists a state of excitement, dissatisfaction.

The same act (crime) which has become the stimulus in the first bundle of individual reflexes, plays the part of stimulus in a complex behavior-system on the part of individuals who have to act as "officials," executors of the corporate will (for a corporate action is impossible without some organization). These sequences of acts are regulated by customary or legal norms of conduct; generally they result in inflicting on the offender the pain which according to the socio-ethical conviction has been "merited" by him.

The knowledge of the activity of the officials tending towards punishing the offender, and still more the knowledge that this purpose has been completely carried out, produces a state of relaxation, satisfaction among group-members whose initial hostile attitude had been inhibited by the expectation of the corporate action. These hostile attitudes have been extinguished as well as if they had resulted in individual hostile acts. We might speak of a further bundle of individual reflexes, in which the knowledge of the punitive acts of the officials form the stimulus, and conduct signifying the recovery of confidence, of peace and quiet—the response.

All these reflex-bundles consist of acquired, or conditioned, rather than of inborn, or unconditioned reflexes. According to the laws of conditioned reflexes, a complete expression of the reflex implies its reinforcement, whereas non-expression would mean inhibition or even destruction. One of the elements in our chain has been a hostile attitude towards the author of a Crime: but the hostile reaction is nothing more than one of the elements in the recognition, which means, from the individual point of view, the same as the ethical group-conviction from the social one. Therefore, the realization of the complex reflex-system we are studying results in reinforcing the ethical group-conviction: the ethical group-conviction forms in it the alpha and omega. We are in the presence of a system of socio-cultural "circular reflexes," analogous to individual circular reflexes

studied by social psychology.⁵ The basic structure of the sequence Crime—Punishment may be called the retributive structure.⁶

Not every time when the transgression of an ethical rule has been followed by the infliction of a pain, is a circular reflex of the above type produced. There is a natural law of adequacy, according to which the circular reflex is carried out and the ethical group-conviction reinforced only if a certain proportion between the evil of the deed and the evil of the reaction has been present.

It depends upon the ethical group-conviction which viewpoints are to be taken into consideration in comparing the two evils. In the very beginning proportionality or adequacy was understood in the most primitive way: objective equality between the former deed and the later fate of the offender was required. This is the rule of *material retaliation* ("an eye for an eye, a life for a life"). Later on material retaliation was replaced by ideal retaliation: not only the objective value offended by the Crime, but also the intention of offender was to be taken into consideration.⁷ On the other hand, objective equality between the two evils was no longer exacted, but only their similar position on the two scales of ethical values and of the pains inflicted by society: offenses against higher values should be retaliated by higher pains, offenses against minor values by minor pains. Such is the principle of *ideal retaliation*. Many and various degrees of development may be observed within this ideal-retributive structure; contemporary criminal law belongs, of course, to the most refined of them. A further evolution towards replacing ideal retribution by a teleological one, i. e., by treating offenders in proportion to their social dangerousness, might follow and is, perhaps, already indicated by the modern reform movement in Criminology. But this is, of course, only a possibility, not yet an actuality.

How do we know all this? By studying Criminal Codes from the earliest times down to our own days.⁸ All of them are constructed in the form of catalogues of possible crimes and of social

⁵ T. H. Allport, *Social Psychology*, 1924, p. 39.

⁶ The retributive structure of punishment has been passionately studied in modern German science, cf. especially: R. Schmidt, *Aufgaben der Strafrechtspflege*, Freiburg 1895; E. Beling, *Die Vergeltung und ihre Bedeutung im Strafrechte*, Tübingen 1908; J. Nagler, *Die Strafe*, Vol. I, Leipzig 1918; A. Baumgarten, "Das grundsätzlich Neue im schweizer Strafgesetzentwurfe." *Schweizer Zeitschrift für Strafrecht*, vol. 43 (1929); H. Drost, *Das Ermessen des Richters*, Berlin 1930.

⁷ J. Makariewicz, *Einführung in die Philosophie des Strafrechts*, Stuttgart, 1906, pp. 338-437.

⁸ Historical evidence for Egyptian, Hebrew, Greek, Roman, German and Arab Law in L. Günther, *Die Idee der Wiedervergeltung*, I (1899) 24, 43, 78, 65, 109.

reactions against them: the higher the socio-ethical value injured by a crime, the stronger the social reaction. Some modern criminologists deny universality to this basic structure, but in doing so, they are confusing two viewpoints: that of what really exists in Positive Law and that of what should exist. When antagonists of the retributive structure are proceeding fairly, they must agree that this structure plays at least a very important part in modern criminal law.⁹

In actuality, no other explanation of Criminal Codes than the "retributive" one is possible: they were and still are constructed in accordance with the idea of retributive punishment. Another explanation would perhaps be that of balancing, by differentiated pains, various expectations of pleasure which might follow the commitment of crimes. But there is no reason to imagine that the satisfaction following the most "atrocious" (most severely punishable) crimes would be the highest, or *vice versa*; the distribution of pains would have to have been very different from that effectuated by Criminal Codes to have made this theory defensible.

In actuality the idea of counterbalancing by pains the temptation of Crime always results in increasing immeasurably the severity of punishment. Such was the Bavarian Code of 1813, created by A. von Feuerbach, a protagonist of the theory of "psychological coercion" (of potential criminals);¹⁰ such were the criminal laws of the Sixteenth to the Eighteenth Centuries, when the idea of terrorizing people by punishment was adopted by governments and threatened to undermine the basic reflex of punishment. This was an aberration in development; aberrations are unavoidable insofar as social development is effected by the trial-and-error method, and that is, of course, the case in the developing of punishment. The penal philosophy of the Eighteenth Century (Beccaria) and the adjustment of penal legislation to it¹¹ have reestablished the dominance of the basic structure.

The very possibility of overcoming the retributive structure of punishment is doubtful. First of all, as has already been said, the concrete rules of adequacy are changeable, and a new "teleological retaliation" is imaginable, realizing, in a certain degree, the aspirations of the reformers. Secondly, recent events have testified that

⁹ J. Michael and M. Adler, *op. cit.* p. 374.

¹⁰ Cf. G. Radbruch, P. J. A. Feuerbach. *Ein Juristenleben*, Vienna 1934; S. Blohm, *Feuerbach und das Reichsstrafgesetzbuch*, Breslau 1935.

¹¹ Penal codes of Toscana 1786, of Austria 1787, of France 1791, of Prussia (in the Allgemeines Landrecht, in force since 1794).

even the boldest reformers dare not break completely with the tradition based upon retaliation.

In 1921 in Italy a Draft Criminal Code was published, produced by the leaders of the "positive" school, who are horrified by the very idea of retaliation.¹² It was only the general part, dealing with crime and punishment in general; the special part, which, normally, consists of the above mentioned catalogues, has never appeared; but many clauses of the general part have permitted the assumption that, in the mind of the reformers, the special part was to have consisted of a catalogue of the normal type: only under this assumption may the detailed and complex rules of the Draft concerning the increase and decrease of normal punishment be understood.

In 1930 in Russia a Draft Criminal Code was elaborated by Krylenko, now Federal Commissar for Justice.¹³ This Draft completely eliminated the principles of adequacy and retribution: the catalogue of punishable acts no longer included sanctions corresponding to each of them; social reaction had to be determined merely from the viewpoint of the social dangerousness of the offender. But this Draft was never enacted, and it is very improbable that it would be enacted now when many concessions to tradition have already been made by the Communist Government.

Rules concerning adequacy might vary and replace one another. But the general law of adequacy remains immutably in force. It is a kind of natural law; attempts to avoid it result in socio-pathological phenomena. If in general, repression does not follow Crime or if Punishment is obviously below the degree indicated by the rule of adequacy (with regard to the socio-ethical evaluations of the epoch), a tendency towards restoring private individual reaction appears: this is the root of "Lynch Justice." If repression becomes obviously too severe as compared with that demanded by the socio-ethical evaluations punishment does not result in reinforcing the ethical group conviction, but, on the contrary, it produces collective sentiments which rather undermine it: offenders are considered "victims" and governmental agents applying punishment tyrants.¹⁴

¹² Cf. Sh. Glueck, "Principles of a Rational Penal Code," 41 *Harvard Law Review* 453 ff. 1 (1928).

¹³ The Draft has been published in "Sovetskaia Justitsia," 1930 No. 19. Cf. N. Timasheff, "L'Evolutione del diritto penale sovietico" in *Rivista Italiana di diritto penale*, Vol. 4 (1932) pp. 188-9; Müller, "Die Entwicklung des sowjetrussischen Strafrechts," *Archiv für Criminalpsychologie und Strafrechtsreform*, Vol. 21 (1930), pp. 650-2.

¹⁴ In Russia, where, until the middle of the Nineteenth Century, the criminal law remained extremely severe, the common name for convicts was "unfor-

In the early stages of development there are no causes for lack of adjustment within the Crime—Punishment sequence. With the advance of social evolution the primary structure is complicated by certain superstructures, and this sometimes results in maladjustment within the circular reflex.

Applying punishment to transgressions of ethical rules becomes one of the functions of political power. In the beginning political power proceeded rather by means of selection: only rules already created and recognized by unorganized social interaction were given the sanction of legal punishment; legislation, if there was any, was nothing more than a corroboration and a clarification of the often unprecise group-conviction.

A second process was soon added to selection: that of assimilation. The primitive political power possessed already a defense-system, which consisted of displaying naked power against every person who offended against the interests of the power or endangered them. Gradually this informal defense-system was transformed into a complex of rules of the same type as those constituting the ethical group-conviction and endowed with the same sanctions.¹⁵ In this way certain rules have been "assimilated" to those which have been created by primary interaction. Later on, with the development of the state and of its functions, the number of assimilated rules has tremendously increased; now they constitute the major part of all the rules endowed with punitive sanctions. With regard to the primary structure, these rules are merely the amplification of the command to obey established authorities. This fact is generally expressed in the following incorrect form: legal rules only partially correspond to ethical rules; a certain number of them are neutral from the ethical point of view; in extreme cases they are even opposed to moral rules.

What is the game of the political power when it tries to assimilate new rules to the original ones? It is introducing new rules into the circular reflex of Crime-Punishment and in this way reinforcing them. Punishment, within the basic structure, is a symptom of social disapproval of the deed committed by the punished individual; the connection between crime and punishment, within the basic structure, is so narrow, that social repulsion is often transferred from the offender to the punished: it is well known how difficult it

tunates." Cf. N. D. Sergeievsky, *Russian Criminal Law* (in Russian). St. Petersburg 1911, pp. 87, 173.

¹⁵ Nowhere has the evolution been so obvious, as in Roman Law. Cf. Th. Mommsen, *Römishes Strafrecht*, Leipzig 1899, pp. 35-54.

is for a punished individual to join again his social group which is inclined to treat him as an outsider; the rehabilitation of offenders is one of the most difficult problems of practical criminology.

Having been punished is, for group opinion, equivalent with having transgressed the ethical group-conviction. In creating new types of punishable behavior political power reckons upon the substitution, and hopes that popular resentment will reinforce newly created rules.

Very often such a calculation is corroborated by events. First of all, new rules might be in conformity with the trend of evolution of the ethical group-conviction; in such cases we have to deal rather with a continued selection than with assimilation. Secondly, political power sometimes plays successfully the part of socio-ethical leaders: its acts are corroborated by influential group-members, and group-conviction is correspondingly modified. Finally, if new rules are introduced with necessary care, if obvious conflicts with existing convictions are avoided and if new rules are not too numerous, the assimilation process takes place also.

But with political power the illusion of being all-powerful is too easily associated. It seems that political power possesses the force to compel everybody to act in accordance with patterns established by force, especially if transgression is followed by the infliction of sanctions. Revolutionary governments as well as autocratic ones during periods of reformatory zeal act very often under the influence of this illusion; sometimes democratic governments also. They introduce new rules of conduct endowed with penal sanctions and hope that these rules will gradually be included in the ethical group-conviction and be reinforced by the circular reflex of Crime-Punishment. The actual result is sometimes a quite different one: acts of arbitrary punishment, based on such rules, are estimated, within the group, as inadequate, unjust ones; they may introduce the fear motive within the consciousness of group members and prevent some of them from transgressing the new rules; but they remain outside the circular reflex and sometimes result in undermining in general the ethical group-conviction. The experience with Prohibition in the United States has been a very conclusive one in this respect.¹⁶

In such cases the cause of maladjustment is that one of the elements of the circular reflex has been determined by a social group other than the basic one: the holders of political power form

¹⁶ Michael and Adler, p. 239.

a special group, of course closely related to the larger "society," but obviously endowed with a special group spirit and interests, and developing according to special laws.

Trouble and maladjustment arise also from another side: that of determining the nature and the aims of punishment. Insofar as the basic structure alone is in force, the concrete aims of punishment are determined in a rather unprecise way:¹⁷ an evil more or less proportionate to the evil of the deed should follow the Crime and nothing more

With the development and refinement of socio-ethical conviction, imprisonment has become the central element within the punitive system. Stress must be laid upon the point that this happened not because a conviction of the excellency of imprisonment had arisen, but because imprisonment alone was left when the two main penal methods which earlier prevailed, capital and corporal punishment, had been respectively greatly curtailed and almost abolished. No special aim was attributed to imprisonment by the ethical group-conviction when it was suddenly given first place.

When imprisonment became the central point of the punitive system, a new social group arose, formed by the best, most humane and most farsighted officers of prison administration. With the historical aim of reinforcing ethical group-conviction, they tried to combine other aims concerning first of all the criminals subjected to their treatment: the idea of reforming offenders by imprisonment was created in this way. Experience has shown that reformation, by existing methods, is possible in certain cases only. A movement has later arisen (in the 70's and 80's of the last century) for transforming the traditional punitive system in order to make it an adequate and general instrument of reformation; the idea of segregating persistent offenders was added to the program. In many countries the movement has been supported by the intellectual elite and has influenced Positive Law.

Consequently, in contemporary law the nature and aims of punishment are still socially determined, but this determination is often the result of the deliberations and convictions of special elites, no longer of the "society" in its totality.¹⁸

¹⁷ Cf. O. Kinberg. "Über die relative Bedeutung der Generalprevention und der Specialprevention," *Monatsschrift für Criminalpsychologie und Strafrechtsreform*, XXI (1930), 470.

¹⁸ This results sometimes in complete failure of measures which seemed to be very well motivated. A good example is the failure of special measures directed towards "persistent offenders." These measures have been introduced in positive law, but have been rejected by "public opinion" expressing the ethical group-

Intentional social determination has become a function of political power and of special elites not only within the complex of questions we are studying. But in our case the situation is a peculiar one.

The types of punishable behavior are now determined by political power more frequently than by society as a whole. The nature and aims of punishment are now determined by special elites. But the whole society is the object to be influenced by this determination: every group member is a potential criminal in the sense that an unfavorable constellation of circumstances might incite him to commit a crime; the control of the motivations of an average group member, not that of a member of the active power centre or of an elite is the aim. Furthermore, society as a whole is the bearer of the mechanism of preventing crime: the ethical group-conviction reinforced by the circular reflex of Crime-Punishment. Reinforcing this conviction, at least not undermining it should be the first principle of the rational social defense against crime.

The conclusion is not at all to return to the basic structure in its old form, but: acting with a regard for and an understanding of this structure. New types of punishable behavior should be introduced only in cases where imposing certain types of behavior has become an obvious social necessity (and not merely a transitory caprice of the legislator) and when it is completely impossible to achieve it by other means (by so-called indirect motivation). New forms of treating criminals should be introduced with caution, with due regard to the natural laws ruling the socio-cultural reflex of Crime and Punishment. Would it be of great help if in reforming 100 actual criminals we should destroy the preventive mechanism of group conviction and transform 1000 potential criminals into actual ones?

conviction and have in practice remained unapplied. Cf. for France (law of 1885) R. Heindl, *Der Berufsverbrecher*, Berlin 1927, p. 136-7; for Norway (law of 1902) K. Wilms, *Die verminderte Zurechnungsfähigkeit*, Berlin 1927, p. 322-3; for England (law of 1908), Report of the Departmental Committee on Persistent Offenders, May, 1932, Printed and published by His Majesty's Stationery Office, London, 1932.