

Winter 1938

Responsibility and Punishment

Ledger Wood

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

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

Recommended Citation

Ledger Wood, Responsibility and Punishment, 28 *Am. Inst. Crim. L. & Criminology* 630 (1937-1938)

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

RESPONSIBILITY AND PUNISHMENT¹

LEDGER WOOD²

Punishment, as a social phenomenon, is a challenge to the moralist and the philosopher, for while it is a function exercised by every society, from the most primitive to the most highly civilized, there would scarcely seem to be a place for it in a perfect society. The problem confronting the moral philosopher is this: What are the social functions and the ethical justification of punishment in actual, imperfect societies? The ethics of punishment is, even at the present day, in a state of considerable confusion which is due in large measure to the intrusion of metaphysical and theological notions. It is generally assumed that a man is punishable for his actions only in so far as he is responsible for them, and thus the whole question of punishment is entwined with the conceptions of "sin," of guilt, of freedom of the will, and of the forensic responsibility of man before God. Important as these conceptions are for religion, they obscure the purely ethical, legal and sociological aspects of punishment. I propose to disentangle the ethics of punishment from the metaphysical and theological ideology which has enmeshed it, and to discuss punishment solely as a moral and social expedient.

The conceptions of responsibility and punishment are so closely associated that the one cannot be profitably discussed without the other. The traditional view is that responsibility, abstractly conceived, is the *sole* basis and justification of punishment. A man is punishable because he is responsible for his actions, and the amount of punishment should be proportioned to the degree of his responsibility. I shall contend that although questions of responsibility may have a bearing on the character and amount of punishment, they are subordinate to other moral and social considerations. I proceed now to examine the conceptions of responsibility and punishment in their relation to one another.

I. *Responsibility.*

The definition of responsibility is not an easy task. Tradition-

¹ An address delivered before the Staff of the New York State Vocational Institution on September 18, 1936.

² Princeton University.

ally responsibility has been defined in terms of freedom of the will: responsibility pertains to all actions which are the expression of the agent's free-will. The objection to this definition of responsibility is that it introduces the whole free-will controversy. Is the human will free and if so in what sense? By what criteria can a free-will be recognized in concrete individual cases? These difficult metaphysical issues are avoided if responsibility be defined in purely ethical terms: *responsibility accrues to all actions which express a man's moral character*; it arises from the connection between his moral self and his overt actions. If a man is responsible only for those actions which emanate from his personality, the degree of his responsibility will be determined by the extent to which they reflect the dominant trends of his personality. Actions which are forced upon him by external circumstances, physical, physiological or social, entail a minimum—perhaps sometimes zero—responsibility; actions which accord with his relatively permanent traits of character and ideals of life involve a maximum of responsibility. Between these two extremes there are numerous intermediate gradations of responsibility, acknowledged both by morality and the law. I shall attempt to classify the main types of human acts and to arrange them, so far as possible, in the order of increasing responsibility.

(1) *Acts resulting from physical causes (a) outside the body, and (b) within the body.* All purely involuntary and accidental acts, such as unintentional and unavoidable injury of another would belong in category (a). The responsibility for all such acts approximates zero. Under (b) are included all acts directly traceable to disease and other bodily infirmities. We do not hold an epileptic accountable for his attacks and we temper our censure of his conduct at other times because we take into consideration the demoralizing effects of his disease. Physical malformations and deformities mitigate guilt and responsibility: thus, we discount, to a certain extent, the misconduct of a hunch-back or a cripple. Similarly, actions done under the influence of alcohol, narcotics and other drugs involve a diminution of responsibility. To be sure, the drunken driver is dealt with more severely than a sober one guilty of the same offense, but this is because we hold him responsible for having gotten into the drunken condition. Nevertheless drunkenness, *as such*, diminishes the degree of guilt.

(2) *Acts performed under extreme economic or social pressure or under threat* are only partially voluntary and responsibility

is proportionately diminished. In this category belong acts of desperation by a victim of extreme poverty (the crime of a Jean Valjean), acts performed under the threats of an extortionist or kidnapper, acts under the sway of an overpowering passion, like fear, rage or jealousy (for example, crimes of passion in which appeal is made to the "unwritten law"), acts of mob-violence to which the individual is incited by group-hysteria and finally atrocities of war, committed in the name of patriotism. In all these cases it is possible to plead duress and extenuating circumstances. The criminal acts of a weak and highly suggestible personality, performed at the instigation of another, are only partially attributable to the actual perpetrator of the crimes. The degree of responsibility in such cases will be in proportion to the independence of the criminal's action: if he is the mere puppet of the gang leader, he is merely an instrument of the crime and does not differ from the actual weapon of destruction, except that the one is inanimate, the other animate. If he enjoys greater independence of his leader, he is a "party" to the crime and is jointly responsible for it. The extent of responsibility has to be determined by careful consideration of each individual case.

(3) *Actions attributable to hysteria, insanity, amnesia, feeble-mindedness and other disorders of personality* involve a great diminution and, in some cases, the complete absence of responsibility. Especially interesting in this connection are the phenomena of dual and multiple personality. In "split" consciousness the primary personality obviously cannot be held accountable for the conduct of the secondary personality, or vice versa. Hypnotism transfers responsibility from the subject to the hypnotic operator. One has to seriously entertain the possibility that, in certain rare cases, crime may be the result of "post-hypnotic suggestion." The hypnotic operator, the real criminal, may suggest the crime to his "tool," while the latter is in an hypnotic trance, and the criminal suggestion may later eventuate in the criminal action. Obviously the hypnotist and not his subject is the real culprit; it is he who is really responsible for the crime. The hypnotic subject doubtless has a degree of responsibility since, if the suggestion had been sufficiently repugnant to his moral nature, he would not have acted upon it. There is in addition to hypnotic criminality, another possibility, which is now only the theme of detective fiction, but which is worthy of serious exploration. I refer to somnambulant crime, criminal acts committed by sleep-walkers.

(4) I come now to a class of *actions which, although consciously and deliberately embraced, are hasty, ill-advised and uninformed*. Precipitate actions, which are prompted by a transient mood or momentary impulse and do not express the deeper nature of the agent, are attended with less responsibility than his more typical and characteristic actions. An ordinarily generous and unselfish nature yields to a mean impulse, a fair-minded man is temporarily blinded by prejudice—in such cases we discount the individual action in the light of our knowledge of his wider character. Similarly, actions resulting from carelessness or thoughtlessness are not as reprehensible as those reflectively embraced. A man is certainly to blame for his careless and ill-considered actions—actions of the “I-did-not-know-the-gun-was-loaded” type, but less so than if his intentions were malicious. Neither is a man wholly responsible for the disastrous, but unanticipated consequences of his action. Sometimes apparently innocent acts have the most far-reaching and devastating consequences. Responsibility is limited only to the actually anticipated consequences and those which the individual might reasonably be expected to have anticipated. The assassination of Arch-Duke Ferdinand was an occasional cause of the World War, but his assassin can scarcely be held responsible for that débacle in world history. (5) There is finally a class of *actions which express the whole or at least the essential part of a man’s personality*; they accord with his dominant ideals and his established patterns of action, moreover, they are intelligent and circumspect, taking cognizance of the immediate and remote consequences of the act so far as this is humanly possible. Such acts are genuinely voluntary and entail the maximum of responsibility.

The foregoing enumeration of actions is, I believe, in the spirit of Aristotle’s distinction between voluntary and involuntary actions; it proceeds from the involuntary through the “mixed” to the genuinely voluntary.³ Types (1) and (5) are pure: (1) is the purely involuntary and (5) the purely voluntary. Types (2), (3) and (4) are “mixed,” they are partially voluntary and partially involuntary. The proportions of the mixture have to be determined by an analysis of each individual case in all its antecedent and attendant circumstances. There are two rules which govern the appraisal of the degree of guilt or responsibility which accrues to any action: first, a man’s responsibility is diminished when he is under the in-

³ Cf. especially the opening paragraphs of Book III of *Ethica Nicomachea*. (Translation by W. D. Ross) 1109b30-1111b4.

fluence of forces inner or outer beyond his control; secondly, responsibility is increased when the action expresses his personality in its entirety.

The dependence of responsibility on personality is incontrovertible: it is *I* who am responsible for my acts, but I am responsible only if they are really *my* acts, that is, only so long as I preserve the integrity of my personality. Involuntary actions are produced by influences external to the core of the personality, voluntary actions flow from the personality of the agent. The distinction between voluntary and involuntary does not coincide with the free-willist's distinction between "free" and determined acts; all acts voluntary and involuntary alike are determined, the former from within, the latter from without. Thus, the admission that there are voluntary actions, in the Aristotelian sense, is quite compatible with metaphysical determinism.

There is a school of ethical thought which perversely applies the term "freedom" to psychologically determined actions.⁴ I say "perversely" because the definition of freedom as inner- or self-determination, is a complete reversal of the usual meaning of the word freedom. The only excuse for this abuse of language would seem to be a desire to retain the eulogistic word freedom while espousing a doctrine of determinism. While the conception of volitional action, advanced by these thinkers, is substantially the same as the view I have defended, their appropriation of the term freedom to describe their view is, to say the least, misleading.

To sum up, responsibility is linked not with freedom, in the traditional sense of the word, but with psychological determinism. A man is responsible for all actions consciously and deliberately embraced and therefore expressing his real intentions and motives. He is not responsible, or is responsible in a lesser degree, for such actions as result from mental derangement, or which are performed under outside pressure, either physical or social, or under the influence of an overpowering passion. Such actions do not express his "real" character, they are not *his* actions and, therefore, he is not accountable for them.

⁴ The classical statements of the conception of freedom as self-determination are: Spinoza, *Tractatus Politicus*, Chapter 2, Sections 7ff., and *Ethics*, Part IV, appendix II; Hegel, *The Phenomenology of Mind* (J. B. Baillie translation), pp. 189ff., and *Logic* (W. Wallace translation), p. 282; T. H. Green, *Prolegomena to Ethics*, Book II, Chapter I.

II. *Punishment.*

Punishment is traditionally regarded as a mere corollary of responsibility. I am punishable because I am responsible for my actions and the amount of punishment is proportionate to the degree of responsibility and guilt. The supposed dependence of punishment on responsibility is an archaic notion, the origin of which is to be found in the theological morality of the Hebrews. According to their moral mythology, God endowed man with a free-will in order that he might hold him accountable, and this accountability, in turn, conferred upon God the right of punishment. The paternalistic pattern is obvious: the God of the Hebrews is a vengeful God who punishes man for his transgressions, just as a father punishes his son for disobedience. Unfortunately, this conception of punishment, despite its un-Christian character, has been preserved in our religion, our morals and our law. It is embodied in the familiar *lex talionis* (the law of retaliation), which exacts, "an eye for an eye and a tooth for a tooth." I shall maintain that punishment is not the correlative of accountability, as the retributive theory would have us believe, that responsibility is never *in itself* a sufficient ground for the infliction of punishment although, to be sure, considerations of responsibility are sometimes relevant in the determination of punishment, but only because responsible acts are by and large more amenable to the reformative influences of punishment than irresponsible and non-responsible acts. It is stupid to punish a man for his involuntary and unintentional acts, but he may be improved by punishment of his voluntary and responsible actions.

The real issue in the ethical and philosophical theory of punishment is between the *retributive* theory, which blindly and mechanically exacts punishment in direct proportion to the injury inflicted, and the *utilitarian* theory, which metes out punishment for the sake of its beneficial moral and social consequences. The retributive theory looks *backward* to the crime, the utilitarian theory looks *forward* to the consequences of the punishment. I shall first criticize the retributive theory and then proceed to an exposition and defense of the utilitarian theory.

While it is impossible to *refute* the retributive theory—as it is impossible by logic and argumentation to set up or overthrow any ethical position whatsoever—we can, nevertheless, adduce certain considerations which militate against it. In the first place, the

theory is a sublimation of the primitive lust for revenge; it is a form of retaliation, and as such, is morally indefensible. Instead of permitting the individual, or his family to avenge an injury, which is the method of the *vendetta*, the wronged individual is permitted to enjoy vicariously the revenge taken by society. But whether vengeance is taken by the victim of the wrong, by his family, by mob-violence or by legally constituted authority, the fact remains that revenge for the sake of revenge cannot be ethically condoned. Two wrongs do not make a right, even when one of the wrongs is perpetrated by society.

Secondly, the ideal of retributive justice, even if it were desirable, would be impossible of attainment. The punishment should theoretically be the same *in kind* and equal *in amount* to the original injury; but it is never possible to exactly "even things up." Quite apart from the difficulties of measuring the amount of the original injury, the circumstances rarely permit the punishment to be the same in kind as the crime. If the crime is theft, the criminal may have no property of which he can be deprived; or if it is arson, this certainly would not justify the burning of the criminal's own house. The punishment is almost invariably different in nature from the original injury; it is in the form of such measurable units of punishment as a jail sentence, fine or what not. But who can say just how long a sentence or what amount of fine is appropriate to a given offense? Any system of equivalence between crime and punishment is in the nature of the case highly artificial and arbitrary.

The retributive theory is ethically and sociologically unsound; it encourages a vindictiveness which, if carried to its logical conclusion, would, like the infinite *vendetta*, lead to an unending series of wrongs. It is the last vestige of a cruel and barbaric code of morals for which there is no place in an enlightened and civilized society.

The only alternative to the retributive view is some form of the utilitarian theory. The utilitarian theory embraces three sub-theories: (1) the *reformative* theory, according to which the reform of the criminal is the sole end and justification of punishment, (2) the *exemplary* or *deterrence* theory, which justifies punishment as a deterrent for others having criminal tendencies, and (3) the *protective* theory, which affirms that the primary function of punishment is the protection of society against actual and

potential wrong-doers.⁵ These three theories of punishment are by no means mutually exclusive; they may be combined into a single theory which recognizes these three, and perhaps still other, utilities of punishment. Let us attempt to evaluate each of the three functions of punishment.

(1) The *reformatory* function of punishment is its supposed capacity to improve the moral character of the criminal himself and thus to prevent a recurrence of criminality on his part. Punishment, it is assumed, brings about repentance and ultimate reform. The conception of purgatory is, of course, the religious version of the reformatory theory as the doctrine of hell embodies the retributive theory. Punishment for the eternally damned is for the sake of abstract justice and possibly also to increase by contrast the satisfaction of those who are saved, but the miseries endured in purgatory purify the soul for the sake of ultimate salvation. The reformatory theory contains a modicum of truth: punishment, by its infliction of pain and privation, may in certain cases bring about the moral regeneration of the criminal, but I am convinced that such cases are the exception, rather than the rule, and that the reformatory value of punishment has been greatly exaggerated.

In this connection, it is significant that pain, as such, has a corrosive effect on the moral character of an individual. As every student of criminology recognizes, punishment often embitters the criminal and thereby fosters the very antisocial tendencies which it was designed to eradicate. It is a well-established psychological fact that the endurance of pain enfeebles rather than strengthens the moral fibre. The view that subjection to pain has, in itself, a purifying and moralizing influence—except in the rarest of cases—is sheer myth, a myth fostered by our ascetic and puritanical religious tradition.

There is another psychological factor which detracts from the reformatory value of punishment. The fear of pain and its correlative, the desire for pleasure, are by no means the main-springs of human action. Their function is auxiliary: they reinforce or inhibit our instinctive drives, but are, in themselves, relatively impotent.⁶ Thus the fear of future pain is powerless to curb an immediately compelling impulse. Moreover, the memory of pain is notoriously short-lived. Pains which seemed almost unbearable

⁵ An excellent recent discussion of punishment, which stresses its utilitarian functions, is A. C. Ewing's *The Morality of Punishment*.

⁶ Cf. William James' famous discussion of the roles of pleasure and pain in human action. *Principles of Psychology*, Vol. II, pp. 549ff.

at the time fade rapidly as they recede into the past. Try to conjure up in memory the most intense pain of your life, and you will find that it is surprisingly lacking in vividness.

The failure of punishment, especially in the form of a prison sentence, to bring about reform may be explained by a curious trick of the memory: a long interval of time, which seemed interminably long in passing, shrinks enormously in retrospect. To quote again from William James: "In general, a time filled with varied and interesting experiences seems short in passing, but long as we look back. On the other hand, a tract of time empty of experiences seems long in passing, but in retrospect short."⁷ What better explanation is there of the ineffectualness of imprisonment as an instrument of reform?

When I say that incarceration is rarely, if ever, an effective agent of moral reform, I refer only to the privations inflicted by prison existence, not to the educational, psychological, medical and other therapeutic measures employed in modern penal institutions. These are the real forces of reform to which pain and privation are merely necessary adjuncts.

(2) Punishment as an *example* to others is doubtless more effective than punishment as a device for reforming the criminal himself. The fear of punishment does operate as a curb on the criminal tendencies of certain individuals. Of course, it is impossible to estimate the extent to which the threat of punishment operates as a deterrent on potential criminals; but that it does so, can scarcely be questioned.

The effectiveness of punishment as an example and consequent deterrent depends upon several factors. In the first place, the severity of the punishment must be incomparably greater than any supposed benefits expected to accrue to the crime. Obviously, if a lucrative racket is punishable by a proportionately small fine, the fine will merely be considered one of the operating expenses of the criminal enterprise. In general, the penalty must be a large multiple of the criminal's gain, otherwise he will readily "pay the price." But, secondly, the certainty of the punishment is almost as important as its amount. To be effective, the criminal must be invariably caught and consistently punished. A single unpunished crime destroys the exemplary value of a hundred convictions, largely, I suppose, because the criminal usually has the gambler's instinct and will risk a hundred-to-one shot. The un-

⁷ *Principles of Psychology*, Vol. I, p. 624.

certainty of the punishment increases the stakes of the crime and thus makes the game more exciting. The defiant and egotistical criminal believes that he can escape where others have been caught. But, even if punishment followed upon crime as night follows day, the fear of punishment would often be submerged by the stronger criminal impulses of the moment.

In evaluating the exemplary function of punishment, it should be kept in mind that the ultimate moral and social value of actions dictated by threat of punishment is questionable. Fear is, after all, a negative force and does not genuinely moralize and socialize those whose overt acts it curbs. In an ideal society the hope of the positive rewards of good conduct would supplant the fear of punishment for transgressions.

(3) *Protection of society* against an individual who has once demonstrated his criminality is perhaps the most cogent of reasons for punishment. So uniform is the operation of human nature, that a man once guilty of a crime must thereafter be considered a potential criminal until definite, corrective and reformatory measures have been taken. It is one of the primary functions of organized society to protect itself against the criminal elements within it and this can ordinarily be accomplished only by completely isolating them.

Imprisonment for the primary purpose of protecting society against a criminal does not strictly speaking come under the head of punishment, if we define punishment as the infliction of pain or privation upon a miscreant, but the punitive and the protective functions of imprisonment are so inextricably connected that the distinction is perhaps only an academic one. The protection of society against a malefactor may, therefore, be conveniently regarded as one of the primary functions of punishment. Society has a right to isolate, not only an actual criminal, but also, anyone who can be conclusively shown to be a potential criminal. To be sure, it is not easy to prove conclusively that any given individual is a potential criminal. The law, in order to avoid serious abuses and to safeguard the rights of the individual, requires an overt act, but in terms of sociological standards, an overt act is not necessary to justify imprisonment.

In reply to the question: What are the social functions and ethical justifications of punishment? we have contended that punishment can be justified only on the grounds of utility, never retaliation, even though retaliation is euphemistically called retribu-

tion. Punishment is never called for unless it can be shown: (1) *that it may contribute to the moral regeneration of the criminal*, or (2) *that it serves as an example and hence a deterrent for others*, or (3) *that it protects society against an actual or potential wrongdoer*. If it does not accomplish one or more of these ends, it should never be resorted to.

A general appraisal of the ethical and sociological significance of punishment will have to recognize that punishment is an evil—albeit a necessary evil—of an imperfect society. It is the correlative of crime and can at best aid in the prevention and cure of criminality. Punishment, like therapeutic medicine, is required only by a diseased social organism;⁸ it is part of the technique of social pathology, but, unfortunately, like much medical practice, it cures the symptoms while it leaves the disease untouched. For this reason, punishment should be a supplement to more drastic curative measures which get at the root of the evil; I refer, of course, to social reforms, such as the alleviation of poverty and unemployment, the control of disease, the eugenic supervision of marriage, the dissemination of birth-control information, the sterilization of the unfit, etc., etc. But, in the present state of society, punishment is, and presumably will long remain, a necessary social expedient.

⁸ Cf. Aristotle's definition of punishment as "a kind of cure effected by means of pleasure and pain." *Ethica Nichomachea*, 1104b13-18.