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THE FUNCTION OF PRIVATE DEFENSE IN THE REPRESSION OF CRIME.¹

GIULIO Q. BATTAGLINI.²

Crime is a negation of social harmony, to which the law annexes specific consequences. The enforcement of these consequences appertains to the State. Thus the State by legal means is continually engaged in the struggle against crime, and its action in this regard we style *public defense*. Where, however, the efficacy of public defense falls short the prevention of a criminal act may yet be possible to the individual; here we have what is known as *private defense*. And private defense in alliance and coöperation with public defense is a powerful force for the repression of crime.

The relative positions of public and private power toward the criminal demand attention. I venture to quote what I have said in another place regarding the punitive function of the State. "Punishment is a means of defense prescribed by social necessity, and indispensable to the State. The State assumes the *Strafgewalt*, the power of punishing, and assigns it a place in the sphere of law. The very fact that the power of punishing moves within the sphere of law, or, in other words, that legal limits are set to this naturally unlimited power, gives rise to a true right to punish on the part of the State. The State becomes authorized by law to exact from its subjects who have infringed its penal commands the conduct called for by its own legally recognized interest in punishing (*interesse punitivo giuridicamente vevole*)—that is to say, submission to punishment."³ Hence the State in the exercise of public power opposes itself to the criminal as a legally delegated punitive authority.

On the other hand, the citizen, so far as his direct opposition to crime becomes necessary, exercises neither authority nor punishing power: he is merely the defender of his own person, thereunto authorized by law. And this for the obvious reason that in himself he is neither authority nor dispenser of punishment. The State alone wields the power of punishment because in the idea of this power is inherent the notion of a judicial faculty exercisable by a superior—a faculty

¹Translated from the Italian by Robert W. Millar, Esq., of the Chicago bar.

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³Battaglini, *Le Norme del diritto penale ed i loro destinatari*, pp. 40, 41.

which the citizen is without. "*Celui qui se défend est partie*," as a distinguished legal scholar has excellently put it.⁴

From the principle that the State alone exercises the punishing power it follows that the reaction of private defense does not exclude that of the public power: the wrong-doer still remains subject to the command that he submit to punishment. Thus far I have suggested nothing new.⁵ But the matter does not rest here. For at this point the question arises: If the criminal has already suffered harm from the exercise of private defense, why should he still be obliged to undergo the punishment imposed by the State?

The reason is not far to seek. Criminal law is a system of rules in which find expression the exigencies of the juridical community as a whole—exigencies of abstention from certain acts abstractly designated as crimes, exigencies of submission to punishment in the concrete case. It is the will of the entire community that the individual who violates a penal command to which he is validly subject shall undergo the punishment prescribed. The fact that in a given case private defense has been exercised, however lawfully, against the wrongdoer does not invalidate the will of the juridical community, i. e., the State, inasmuch as the self-defender exercises no right to punish and hence does not encroach upon the right of the State to punish. The law-breaker has attacked not merely the citizen who has thus defended himself, but the community as a whole, which for certain species of attacks metes out certain equivalents.

In saying that the citizen who acts in lawful self-defense is exercising neither authority nor punishing power, I have indicated in substance the contrast between public and private defense. The State's duty of punishing implies a proceeding regulated by legal rules. For public defense is a defense which proceeds with the utmost deliberation, dissociated from every movement of instinct. Public defense presupposes the established fact of a crime; the individual who acts in defense of his own person or that of another has no opportunity in the presence of the threatened wrong to sit in judgment upon the truth or falsity of his own impressions. Private defense is a defense organized on the spur of the moment.

The stamping out of crime is one of the foremost duties both of the State and the citizen. The State has not only a legal right to punish, but also a legal duty to punish, which takes precedence of the right. From the social viewpoint it is the obligation of the State to repress

⁴Pellegrino Rossi, *Traité de droit pénal*, bk. 1, ch. VIII.

⁵Cf. Rossi, *op. cit. ibid*; Alimena, *Principii di diritto penale*, Val. I, p. 550.

crime, which is the important thing. When we describe this obligation as "legal," there at once comes to mind the idea of a State subordinate to law. And modern thought, headed by the great Jellinek, is unable to conceive the existence of any other than a "juridical State."

Thus the repression of crime, as a function, is incumbent on the State: the State alone by legal means must undertake it. It is possible for the individual (and lawful private defense is but an extremely small part of the phenomenon) to strive against the inroads of crime on society in a manner yet more energetic than the State. A notable example of this is afforded by those private institutions for the prevention of juvenile delinquency which proceed on the thoroughly accepted principle that for the child education has a much greater value than punishment.⁶ But with the individual, warfare on crime remains an ethico-social duty: it never attains the peculiarly imperative nature of a legal duty.

The motives of human action are egoistic. Egoism does not, however, exclude altruism, since altruism is nothing else than egoistic aspiration to which a particular bent has been imparted. Man is in general altruistic when it is possible for him to be ego-altruistic. Now the legislator knows how to deal with egoism. He recognizes that it cannot be successfully overcome by human force—that the most that can be done is to deflect it in a particular direction.⁷ And just here lies the basis of private defense. When his legal interests are in danger of attack and the power of the State is not present to defend them, no menace of punishment could hinder the citizen from his own immediate reaction, simply because as a motive any such menace could never counteract the motive which determines self-defense. Self-defense is determined by the natural instinct of preserving one's own life and property;⁸ and it is for the legislator to impose motives only where he finds a normal state of determinability. The self-defender is unpunishable, because citizens are not disposed to submit to threatened injury even at the legislator's command. The legislator yields so far as is reasonable. And reason cannot condemn the innate and invincible impulses of man.

Apart from the considerations just advanced, the impunity of private defense is required by the interest of the State. The fact that the State recognizes the right of its subjects to self-help in the defense of

⁶The facts recently adduced by Stoppato in his admirable paper read before the Society for the protection of minors under conditional sentence (*Patronato dei minorenni condannata condizionalmente*), of Bologna, strikingly emphasize the usefulness of this principle.

⁷Analogously, Hold von Ferneck, *Die Rechtswidrigkeit*, Vol. I, p. 36.

⁸Cf. Ferri, *Sociologia criminale*, N. 47.

their imperiled legal interests operates as a considerable reinforcement of the motives of abstention, furnished by the legal command. The possibility of private defense and its effective exercise thus tend to prevent crime. The wrong-doer is an individual in whom the criminal motives have taken the upper hand of the motives of social harmony. Now there is an instant when his mind is swayed by conflicting motives and the motives of social harmony are ready to succumb to the criminal motives. An inhibitory force opposes itself to the latter and renders them powerless—the prospect of the consequences of the crime. And in this prospect he sees the danger of punishment from the State combined with that of private reaction. Punishment administered by the State and private reaction are thus the two great counter-motives of crime.

The interests of the whole juridical community demand that private defense, so far as it coöperates with public defense, be allowed free play within its legal limits. In this consists the whole function of private defense. In exercising the right of self-defense the citizen is asserting the high value of legal personality. His legal personality is the concern not merely of the man himself, but of all the members of society: it is something whose value all the associated men desire to see preserved. The citizen in the exercise of the right of self-defense is therefore really engaged in the defense of law and society.

But if private defense is adequately to fulfill this important social function, the public power should put no obstacles in its way. The recognition is forced upon us that in its actual working the right of private defense does not exert upon the criminal motives that inhibitory force of which it is capable. We ought not to let the citizen be deterred from the exercise of this right by the fear of running afoul of the law. The intending criminal must be made to understand that the citizen whose legal interests are attacked can repel the assailant without incurring legal danger. In short, resoluteness must be lent to private defense and the display of private energy against the law-breaker encouraged if we mean to impress on the criminal mind the existence of private defense as a real inhibitory force side by side with that of punishment on the part of the State. Tolstoi's remark that criminals are the most energetic of men is after all far from paradoxical. Honest men must be educated to energy and activity if we intend to combat crime effectively. To that end the law should be so modified that where there is every reason to believe that a man has acted in lawful self-defense he should, pending judicial inquiry, be allowed his liberty without the necessity of giving bail. Moreover, a summary method of procedure should be devised so that he may be relieved from annoyance at the

earliest possible moment.⁹ These changes will result in giving full sway to the vital force of private reaction.

In such a state of the law the self-defender, conscious of the legality of his own act and unrestrained by fear of legal harm, would have no hesitation in informing the police authorities of the *repulsio violentiæ* which he has effected. It is the interest of the State to know who takes life criminally and who by virtue of its permission; hence the obligation of laying the facts before the proper authorities. But the omission of this duty ought merely to constitute a misdemeanor (*transgressione di Polizia*), entailing only the payment of a fine.

Furthermore, the judge ought to put himself in the place of the man who has been compelled to exercise the right to self-defense and determine the case according to its particular circumstances and the particular psychic condition of the self-defender. For otherwise the fear of being punished because of an excessive exercise of the right would check the salutary activity of self-defense, would render it ineffective and thus operate in favor of crime and to the detriment of legal security. Sometimes the initial intent to steal a thing of insignificant value may become transformed into an intent to kill. The judge then ought to bear in mind that the intensity of the danger cannot be determined with mathematical exactitude, that it may increase or diminish during the conflict and that its degree at the outset cannot always be regarded as a safe criterion. As a preliminary to the application of the law there here devolves upon the judge a difficult psychological function.

I have said that the citizen has an ethico-social duty of self-defense. Does morality then approve the taking of life? Not at all. But morality does impose the duty of combating crime with every available means, and in this end even the taking of life is justifiable. The citizen is under the ethical duty of preventing the commission of crime; this duty he may even fulfill by killing his assailant. The taking of life is not per se enjoined by morality, but morality enjoins the end which sometimes cannot be attained without the taking of life. In social ethics the maxim of Machiavelli that the end justifies the means does not meet with rejection. For social well-being is to be attained at any cost and morality in looking to a higher appreciation of the value of human life necessarily demands the repression of crime.

⁹To the same effect: Manzini, La politica criminale ed il problema della lotta contro la delinquenza e la malavita,—*Revista penale*, Vol. LXXIII, p. 8.