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A PRELIMINARY ANALYSIS FOR THE FORMULATION OF A PHILOSOPHY OF CRIMINAL LAW

TWO general views of the nature of crime have been advanced. One is the morally absolutistic, *i.e.*, that crime is a violation of the moral law.[1] The other is a social-utilitarian view, that crime is a violation of the social order.[2] As to both these points of view, a criticism may be made similar to that made to the idea that the law protects prior-acquired property rights. Just as there cannot be property without a legal order, so there cannot be crime without a legal order. Crime is a legal conception; it is a legal label placed on certain acts. An individual wholly apart from society cannot commit a crime any more than he can own. Hence to call a crime a violation of a moral law or of a social obligation or interest, is misleading unless such moral law or social interest is recognized and protected not only by the law of the community, but by the criminal law. Now, since law is a product of, or perhaps coeval with, society, and crime is a product of law, crime is indirectly a product of society, and in that sense such statements as those of Saleilles,[3] that "crime is a social phenomenon. . . . It is an outgrowth of social institutions," are correct. But an action neither immoral or unsocial, nor in any other way objectionable, may be a crime. For example, if the law provided ten years' imprisonment for eating, eating would thereby become a crime. Whatever the law says is a crime, and nothing else, is a crime. A crime may then be defined as a criminal act, and a criminal act is an act which is declared by the law to be criminal. A criminal is, therefore, one who has committed a criminal act. It becomes irrelevant, now, to seek the nature of crime either in morals or in theories as to the nature of social obligations. It does not, however, become irrelevant to consider either morals or social utilitarian theories in

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[1] Kant, Philosophy of Law.

[2] Saleilles, "Individualization of Punishment," page 4; "Crime is a social phenomenon in the nature of a violation of a generally recognized social obligation."

[3] Saleilles, op. cit.

forming or discussing the criminal law, nor in the formulation of criteria and ideals. It is in this search for criteria that a critical philosophy of the law plays its important role, for it is only in the light of such considerations that the law is enabled properly to determine what shall and what shall not be called a crime.[4]

Before passing to the philosophic considerations involved in attempting to find a basis for the criminal law, we are met with certain empirical considerations. These will be accepted, not as inherently necessary in the nature of things, but as hypothetical premises on which to base what follows.

The first of these is that there is a society which, as a society, desires to continue to exist, which contains members who individually desire to exist, and whose object is, in part at least, to bring about such continued existence.

The second of these is, that there are certain [5] elements in both the society as such, and in its individual members, which tend to destroy it and them.

The third is, that both society and the individuals who compose it, will, and do, take steps to protect themselves against the abovementioned elements.

On these assumptions, we may pass to a rough classification of acts. There will be acts[6] which the individual will resent, as directed against him or something which he values; there will be acts which the state will resent as directed against it or something which it values, and there will be acts which neither will resent. Obviously, the first two classes may overlap. As to some of those acts, the state will be content to let the individual take the steps necessary, within limits. There then arise "rights" which can be "vindicated" by "civil actions." As to others, the state will require its own vindication. The persons committing those acts are subject to criminal prosecutions. Still other acts subject the actor to both civil action and criminal prosecution. Lastly, some acts do not subject the actor to either civil or criminal action, *i.e.*, they are justified.

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[4] Holmes, Path of the Law, 10 Harv. L. Rev. 470, "What have we better than a blind guess to show that the criminal law in its present form does more good than harm?"

[5] It is interesting to note that "certain", used in this way, almost always means "uncertain".

[6] "Act" here is used broadly enough to include "non-act".

The philosophic problem is to find a guide by which it may be determined within which of the above classes a given act should[7] fall. Two persons come into contact with one another, and one, claims the other, has "injured" that other. There will arise in that "injured" person a number of feelings. He will, for example, have some desire for revenge, "to get even." He will feel that he must not let that same person do the same thing again, either to him or, perhaps, to others. He may go so far as to feel that other persons should not do the same act. He may even condemn a whole class of similar or related acts.[8] The personal satisfaction of any of these feelings or desires (particularly the first) is, or may well be, incompatible with the "instinct for self-preservation" which the group has, but nevertheless the desire for some action does exist, and will tend to find some expression; and so must be considered.[9] The group, being the stronger, may either allow personal action (which in most cases it cannot now do), give some form of substituted revenge or balm, *i.e.*, action, or else make any personal revenge, in turn, the basis of an action, *i.e.*, justify the act. The individual will feel injured for a number of reasons; among these will be harm to his body or his property, an infringement of his personal or the general code of morals, interference in his relations with things or persons, or injury to other persons. If the feeling of injury is strong enough, or the injury itself great enough, he will himself take steps to obtain some sort of satisfaction, or else will feel dissatisfied with the existing legal order. Since either or both of these (irrespective of any logical justification) is opposed to social and individual self-preservation, one of the considerations which must be taken into account in calling an

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[7] The word "should" is here used advisedly, since by hypothesis the law may put an act in any class. The existence, if any, of constitutional limitations on this power cannot, of course, be considered here. For example, it may be that a breach of contract cannot constitutionally be made a crime. See, *e.g.*, *Exparte* Drayton, 153 Fed. 986 (1907); Bailey *v.* Alabama, 219 U. S. 219 (1911). Yet it is in Macauley's draft of the Indian Penal Code. An interesting use of the word "should" is found in 41 Harv. L. Rev. 669 (March, 1928) in the comment on Keller *v.* State, 299 S. W. 803 (Tenn. 1927).

[8] It is not claimed that this is an exhaustive enumeration, or that these various reactions are of the same strength, or even that one individual will experience them all, either simultaneously or successively.

[9] Holmes, Common Law, page 61. "The law is made to govern men through their motives, and it must, therefore, take their mental constitution into account."

act criminal is the existence[10] of these feelings and their strength, and of the general moral code. That is to say, the law must either provide an outlet for the expression of the feelings caused by an alleged injury, or else put such penalties on that expression as may be necessary to discourage or prevent it. On the strength of such feelings, therefore, must rest the decision whether the outlet is to be a civil or criminal action, or both, and if criminal, the nature and severity of the punishment.[11] This, then, may be our first canon: the natural reaction of a "reasonable man" to a given act will be considered in determining whether or not that act is to be called criminal. The stronger that reaction, and the greater the desire for individual action, the better it will be to call that act a crime.[12]

It will be observed that this will include only one of the above classes of acts, *i.e.*, those by which the individual feels personally wronged, and some sort of legal redress is allowed. There remain two other classes, one a subdivision of that class of acts which the individual feels are injurious. There are those acts which the state permits or justifies for reasons of its own, even though they are injurious to the individual so far as his personal reactions are concerned, *e.g.*, certain kinds of competition, injuries committed without fault, etc. The second is that class of acts which are, as between the immediate persons involved, beneficial, but, as between state and individual, injurious, *e.g.*, rebates in interstate commerce, or non-payment of taxes, and which the state therefore resents.

The former class may be dealt with in the same manner as the first class, but rather from the point of view of protecting the actor from possible action of the "injured" person. The object here is to repress all expressions of a feeling of wrong. The law is departing

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[10] *i.e.*, either probable or normal existence.

[11] As to this, see *infra*.

[12] Holmes, Common Law, p. 41. "The first requirement of a sound body of law is. that it should correspond to the actual feelings and demands of the community, whether right or wrong." If persons generally resent an act and will defend themselves against it, that act should, in framing a criminal code, be called a crime. It may well be that such an act should not be resented. The proper course is so to direct and mould the moral and ethical code, that the commission of that act will no longer be resented. When that has been done, the act may be permitted and no harm will ensue. If the state, however, desires to permit that act at once, then the expression of any resentment thereto must be made a crime.

from the community or individual standard and taking a broader point of view, which it is seeking to impose upon the individuals. The considerations of social policy and "social engineering" which will dictate this attitude are beyond the scope of this paper. For our purposes, however, we may find here, in the attempt to make the individual bear his injury without attempt to right the wrong, if any, our second canon: In determining that a certain act shall not be called criminal, the chances of individual unsocial reaction thereto must be counteravailed by chances of social good, safety and expedience.[13] Once having determined that an act is justified, whether or not the reaction thereto will be called a crime, will obviously be governed by the same principles as any other act.

The latter class of acts which may be called crimes are those which are beneficial or non-injurious to the parties, but which the state, for reasons of its own, forbids. Here the considerations are slightly different. It is not a case of revenge, for there is no wrong done. It is merely the prevention of some possibly gainful action. Since the temptation to engage in a prohibited action will increase in proportion as the chances and desires for gain resulting therefrom increase, whether civil action is sufficient or whether a criminal action is necessary, will depend upon the intensity of the desire and the amount of possible gain. This, then, may be a third canon, *i.e.*, to consider these elements in determining whether the commission of such an act is to be a crime or not.[14]

It is fairly apparent that the answer to any particular question would, on these tests, vary with each individual. It is submitted that these variations do not permit of sufficiently precise measurement to

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[13] See a similar notion of balancing expected good against expected evil, from a more individualistic point of view, in Beccaria, Essay on Crimes and Punishment, Chap. XXVII, page 94: "That a punishment may produce the effect required, it is sufficient that the evil it occasions should exceed the good expected from the crime, including in the calculation the certainty of the punishment and the privation of the expected advantage."

[14] Pushing this analysis one step further, these same elements should be factors in arriving at a conclusion that the act should, as a matter of social policy, be prohibited or required. For example, it should have been a strong factor in considering the passage of the prohibition amendment. With this, however, we are not concerned here. The problem is more specific, *i.e.*, given that certain acts are undesirable and penalties should be attached to the commission thereof, should that penalty be (a) a civil action, (b) a criminal prosecution, or (c) both.

be considered, nor could any reasonably swift system of the administration of justice take them into account.[15] The answer will vary, however, not only with the individual, but with the place. In certain localities some acts will be so generally looked upon with disfavor, that the mere labeling of the act as a crime may be sufficient, whereas in another place even heavier penalties might be insufficient.[16]

The above discussion necessitates taking into account this kind of variation. Where the political divisions are small, and the population is homogeneous, the variation will be slight enough to be disregarded, but there is a substantial variation within areas the size of some of the states of the United States. For purposes of the administration of the criminal law on this basis, there would be required a division into homogeneous groups, based on general morality and standards of conduct (similar, perhaps, to the federal districts). In each of these, unjustified acts would be crimes or not, according as they are viewed with favor or disfavor, within that group. Of course, the ultimate question, whether or not the act is unjustifiable at all, must be the same within all the subdivisions of one political sovereignty, but the form of the remedy, it is submitted, may well change from civil to criminal, and the criminal remedy vary from

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[15] This is merely another illustration of the impersonality and lack of individuality of all law

[16] For example, in rural communities, the more or less indiscriminate "borowing" of farm implements without permission, or the practice of taking a "short-cut" over a neighbor's land, is not frowned upon. Yet in an urban community, such acts would be resented as trespasses and intrusions upon privacy. Tarde, laying down in his Penal Philosophy (section 54, page 265) the general proposition that "the classification of criminals should be psychological above everything else." says, "Let us classify murderers and thieves separately according to the nature of their occupation and of their habitual life before they are condemned, according to the social category to which they belong." Then he draws a distinction between urban and rural populations. Perhaps this paper contains something of that classification. Perhaps Tarde's suggestion is more applicable to the grouping and treatment of prisoners in the prison. The necessity for a requirement of *mens rea* will likewise vary with the location. The general feeling of repulsion to an act may in one place be so great as to require some outlet irrespective of any mental condition of the actor, *e.g.*, the running over of pedestrians by motorists in a crowded city. In a rural community, this occurrence may be so rare that there would be no feeling against the motorist unless he did have a certain mental state.

reprimand to death.[17] Beccaria, writing in the latter part of the eighteenth century, said, "Every member of society should know when he is criminal and when innocent," [18] and he stresses the need of certainty.

It must be remembered that he was writing at a time when the abuse of magisterial discretion, or, indeed, any other discretion, was a commonplace, when punishments were brutal and harsh, when there was a sharp distinction between the civil and the criminal law. It is believed that conditions now have so changed that abuse of discretion is or can be made so rare that the need for absolute certainty is thereby lessened, that no such sharp line need be drawn between criminal and civil law, that it is sufficient if a person knows he has committed an offense for which he is responsible to some one, be it civilly or criminally. The commission of *any* wrong, breach of contract or murder, for which the law gives a remedy, is injurious to society. The injuries differ only in degree. Whatever penalty is adequate, for the purposes of the individual and society, comprised

[17] The classic distinction between compensation and punishment is one sometimes difficult to trace. Both can well be merged in a system whose object is both. This would greatly simplify procedure, if it has no other merits. Moreover, as has been often pointed out, some civil wrongs are more injurious than some crimes, and some civil penalties are more severe than some punishments. The variation from reprimand to death is extreme. It is hardly possible that the same offence can be adequately dealt with by reprimand, if, in some not distant place, the requisite penalty is death. Yet in Louisiana, for example, the punishment for arson in the first degree is hanging, or from one to ten years' imprisonment. For variations in the amount of punishment for the same crime, see the summary compilation in the World Almanac for 1927, page 211 ff. See also the N. Y. Baumes Laws. Severer punishment for second offenders has been held to be constitutional: Moore v. Missouri, 159 U. S. 673; Graham v. West Virginia, 224 U. S. 616.

[18] Crimes and Punishment, Chap. XI, page 45. See also Chap. V, page 26: "Crimes will be less frequent in proportion as the code of laws is more universally read and understood; for there is no doubt but that the eloquence of the passions is greatly assisted by the ignorance and uncertainty of punishment." It is submitted that the certainty required is rather of liability than of the precise amount of punishment. Moreover, there will be certainty within each division at any given time. There will, of course, have to be reached some solution of the problems raised by acts in one division having effects in other divisions. The principles of causation might here be made inadequate alone. See 33 Harv. L. Rev., 843.

in a general law of obligations, civil and criminal, restitutional and punitive, should be imposed.[19]

The variations in a general moral or other standard due to the time element must be considered.[20] This may well be done by some administrative body with broad and flexible powers, which would actually perform Ehrlich's method of study, and become, like Carter's judges, experts in custom.

Acts could be shifted from civil to criminal, or *vice versa*, and the amount of punishment varied, as they or their investigations suggested.[21] Here again, the same answer may be made to the argument of uncertainty as was made before.

Without going into the question whether there is a criminal type, it may be admitted that certain people do do acts because of biologic or psychic causes, *e.g.*, kleptomaniacs. Such persons, if they exist, require special treatment, for the purposes of cure, or protection to others, rather than punishment[22] or restitution or outlet for feelings of vengeance.

The foregoing may suggest, beyond a theory of the classification of wrongs, a theory of punishment. "In dealing with a disturber, society has two objects: to avoid further harm from this man, and to guard itself against would-be offenders."[23] "The legitimate purpose of punishment is to make of the criminal an honest man, if that be possible, or if not, to deprive him of the chance of doing further harm."[24]

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[19] On this principle a subordinate authority such as a municipality should consider whether or not a state statute imposing a penalty on an act is not sufficient without municipal action, thus avoiding duplication. See, *e.g.*, City of N. Y. *v.* Marco, 58 Misc. 225 (1908).

[20] Indubitably, the street attire of a modern young lady of fashion would have had a different effect upon Peter Stuyvesant than that which it has on James Walker.

[21] This might be an answer to what Dr. Pound has listed as one cause of popular dissatisfaction with the law, *i.e.*, the lag between changes in popular conceptions and their expression in the law. Pound, Proceedings of the American Political Science Association for 1907, Vol. 4.

[22] Holmes, Path of the Law, 10 Harv. L. Rev. at p. 470: "If the typical criminal is a degenerate, bound to swindle or murder . . . it is idle to talk of deterring him. . . . He must be got rid of."

[23] Ross, Social Control, p. 107.

[24] Saleilles, Individualization of Punishment.

Greater specificness is required. A more complete (though no doubt not exhaustive) enumeration of the objects of a criminal law, based on the views advanced herein, would include the following:

1. Compensation, if possible to those injured, by fine if that punishment is deemed sufficient,[25] or by productive labor; [26]
2. Close association between the punishment and the act, so that thought of the act at once brings up the picture of the penalty;
3. Prevention of this same act by this same man;
4. Prevention of other crimes by this man;
5. Prevention of this same act by other persons;
6. Prevention of other crimes by other persons;
7. Expression of individual and social disapproval;
8. Stimulation of imitation of legal conduct.[27]

The amount and nature of punishment will likewise be governed by the general feeling concerning the act which is being punished. The stronger the general feeling, the less necessity for punishment. Fine, reprimand or even the mere fact that the act is called a crime, may be sufficient.[28] Where there is no particular moral feeling either way, or where there is no injury, the amount of gain which its prohibition does away with, or the annoyance which its commanding may entail, must likewise be considered in fixing the punishment. Similar machinery will take care of variations in the nature and amount of punishment, due to time and place. There may be even greater flexibility here than in determining whether an act is to be a crime or not.

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[25] See, as an attempt to prevent the punishment from falling on the offender's family, the system of paying fines in instalments, said to be a reason for the lack of overcrowding in English prisons. L. N. Robinson, European Methods and Ideas of Penal Treatment.

[26] In this connection may be considered projects for converting prisons into factories and paying the convicts regular salaries which are to be turned over to their dependents.

[27] See generally, Tarde, "Les lois de L'imitation," for what Pound calls a "demonstration of the extent to which imitation is a factor in the development of legal institutions and his working out of the psychological or sociological laws of imitation." 25 Harv. L. Rev. 504, "Sociological Jurisprudence."

[28] It is undoubtedly true that many people will refrain from doing acts merely because they are illegal. For example, even a taxicab driver will stop at traffic signal lights when no policeman is about. On the other hand, some people delight in doing things merely because they are illegal or prohibited. For example, it has become "smart" to purchase alcoholic beverages, or censored books or periodicals.

In accomplishing these results, what means can the law use? Fear of the punishment is basic, but even it has its limitations, for there are always venturesome or fearless, or careless people.[29]

Another is to create in the popular consciousness a feeling of disapproval for one who commits a crime. It has been said that the true purpose of punishment is active disapproval of the criminal.[30] This, too, is limited, for first, it is not always possible to create this disapproval, and secondly, it is dangerous, for the disapproval may be so great as to ostracize an ex-convict, prevent him from thereafter "earning an honest living" and so "drive him to crime" again.

Imitation of virtuous conduct, or perhaps some form of reward for virtuous conduct, is of value.

Undoubtedly, an educated and intelligent public opinion will do much to prevent crime. It is this thesis which is so remarkable in as early a work as Beccaria's.[31] The methods of doing this are beyond the scope of this paper. Education in the school, the home and the church, to breed a Socratic respect for the law is fundamentally the only escape from so-called crime waves.

The individualization of punishment would lead too far afield, and no attempt will be made to treat of it, other than to agree with Dean Pound's statement in the introduction to Saleilles' book, that what is needed is a *system* of individualization, a sort of criminal equity. Perhaps the suggestions herein are similar to Saleilles' first type of individualization, *i.e.*, legal. It may be a sort of "objective individualization" adopting the punishment rather to a group than to an individual. Perhaps a refinement would lead us to say that feel-

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[29] Pound, Proceedings of American Political Science Association for 1907, Vol. 4, page 229. And, of course, if crime is a result of biological conditions in the individual, it is entirely possible that fear will have no effect whatsoever.

[30] Von Bar, Moral Reprobation Theory of Penal Law, in the Rational Basis of Legal Institutions, page 588 ff.

[31] Crimes and Punishment, Ch. XLII, page 151: "Would you prevent crime? Let liberty be attended with knowledge," and Chap. XLIV, page 156, "Finally the most certain method of preventing crime, is to perfect the system of education."

ings of disapproval, condemnation, revenge, whatever they are—are stronger against, *e.g.*, professional, than casual offenders, so that the punishment of the latter should differ. Or the objection may be made that the whole system is impractical.[32]

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[32] Perhaps it is. But the objection that the logical outcome of this basis of punishment would be to punish more severely a breach of a parking ordinance than an offense such as robbery because there is more public feeling about the latter, is not sound, for the consideration of other factors (which is not hereby excluded), such as protection, may well change the result arrived at by considering one factor alone.