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Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen

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This paper reflects critically on what is the near-universal contemporary method of conceptualizing the tasks of the scholar of criminal punishment. It does so by the unusual route of considering the thought of Sir James Fitzjames Stephen, a towering figure in English law and political theory, one of its foremost historians of criminal law, and a prominent public intellectual of the late Victorian period. Notwithstanding Stephen's stature, there has as yet been no sustained effort to understand his views of criminal punishment. This article attempts to remedy this deficit. But its aims are not exclusively historical. Indeed, understanding Stephen's ideas about the nature of punishment serves two purposes, one historical and the other theoretical.

The historical aim is to elucidate Stephen's own thought, a subject which has been thoroughly contested and, unfortunately, deeply misunderstood. The primary culprit has been exactly the effort to pin down Stephen's ideas about punishment as retributivist, or consequentialist, or a specific hybrid. The drive to systematize Stephen's thought has had the regrettable effect of flattening it, in some cases unrecognizably. Though he followed Kant, Hegel, Beccaria, and Bentham, Stephen wrote at a time that preceded the full flowering of the philosophy of punishment by roughly a century, and his assumptions and arguments about the nature and purposes of punishment are an uncomfortable fit within the modern hard-edged methodology of punishment theory.

The theoretical aim concerns whether punishment theory might learn from its serious misunderstanding and misrepresentation of Stephen, whether and to what extent its own methodological assumptions ought to be adjusted in light of the paper's historical reconstruction. The article claims that that they might be, and arguably should be. Perhaps more than any other writer on the subject, Stephen poses a

* Assistant Professor, St. John's University School of Law. I am grateful to Dan Markel and Mitchell Berman for extensive and incisive comments. Thanks also to Adam Benforado, Joshua Dressler, Philip Hamburger, Kyron Huigens, Gerald Leonard, Max Minzner, Mark Movsesian, Judge Richard Posner, Alice Ristroph, Robert Vischer, and Ekow Yankah, as well as to Carey Alexander for superb research assistance, and to the staff of the *Ohio State Journal of Criminal Law* for their careful editing.

powerful challenge to the methodology of systematization in punishment theory; his ideas are an extended argument that an allegiance to system renders thought about the reasons for punishment less rich and more monolithic than they otherwise might be. The article suggests, first, that punishment theorists ought to open themselves to historical scholarship as a source of illumination in fashioning, and perhaps modifying, their sophisticated normative accounts; and second, the theoretical perspective that is most capable of internalizing historical studies and ideas would adopt a pluralistic view of the justification of punishment. The reason for examining neglected historical views is that one may actually improve one's theory by beclouding and complicating it with perspectives that do not match one's existing prescriptive views. And the reason for inclining toward pluralistic theoretical accounts is that it is precisely their untidy and unsystematic methodological commitments which make it possible for theory to learn from history.

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INTRODUCTION

Scholarly thought about the purposes of criminal punishment has long been dominated by the concepts and categories of consequentialism and retributivism—the two great justifications or theories of punishment.[1] The student of criminal law is conditioned almost reflexively to expect that each theory offers a complete and self-standing approach to the justification of punishment. Consequentialism, whose paradigmatic example is utilitarianism, splinters off into its constituent penological functions: deterrence, rehabilitation or reform, and incapacitation. While the functions and varieties of retribution are many, in today's scholarship they often assume a liberal and/or deontological cast—they speak in terms of what the state owes an offender as an independent moral agent,[2] what the offender deserves in recognition of or respect for his autonomous choices, or what the liberal political community is obligated to communicate to the offender.[3]

In the last fifty years, punishment theorists have developed "hybrid" theories of punishment, which blend strands of retributivist and consequentialist theories in philosophically precise portions.[4] But the emergence of hybrid accounts has in many ways served exactly to highlight and reinforce the orthodox categories within which scholars think about punishment. For in reflecting on new directions for understanding punishment, the methodology of systematization—of carefully distinguishing the reasons that should count from those that should not in constructing an integrated whole—inescapably imprints and reproduces itself. So powerful is the attachment to system in punishment theory that it is difficult even to imagine what thinking about punishment might be like without it.

This paper reflects critically on what is the near-universal contemporary method of conceptualizing the tasks of the scholar of criminal punishment. It does so by the unusual route of considering the thought of Sir James Fitzjames Stephen, a towering figure in English law and political theory, one of its foremost historians of criminal law, and a prominent public intellectual of the late Victorian period. Notwithstanding Stephen's stature, there has as yet been no sustained effort to understand his views of criminal punishment. This article attempts to remedy this deficit. But its aims are not exclusively historical. Indeed, understanding Stephen's ideas about the nature of punishment serves two purposes, one historical and the other theoretical.

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[1] Justifications of punishment may be something less than theories of punishment, but tracking the perhaps imprecise contemporary usage, these terms will be used interchangeably in this article.

[2] *See, e.g.*, Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

[3] *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2002); Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, *in* RETRIBUTIVISM, ESSAYS ON THEORY AND POLICY (Mark D. White ed., 2011).

[4] *See infra* Part I(A)-(B).

The historical aim is to elucidate Stephen's own thought, a subject which has been thoroughly contested and, unfortunately, deeply misunderstood. The primary culprit has been exactly the effort to pin down Stephen's ideas about punishment as retributivist, or consequentialist, or a specific hybrid. The drive to systematize Stephen's thought has had the regrettable effect of flattening it, in some cases unrecognizably. Though he followed Kant, Hegel, Beccaria, and Bentham, Stephen wrote at a time that preceded the full flowering of the philosophy of punishment by roughly a century, and his assumptions and arguments about the nature and purposes of punishment are an uncomfortable fit within the modern hard-edged methodology of punishment theory.

The theoretical aim concerns whether punishment theory might learn from its serious misunderstanding and misrepresentation of Stephen—whether and to what extent its own methodological assumptions ought to be adjusted in light of the paper's historical reconstruction. The article claims that that they might be, and arguably should be. Perhaps more than any other writer on the subject, Stephen poses a powerful challenge to the methodology of systematization in punishment theory; his ideas are an extended argument that an allegiance to system renders thought about the reasons for punishment less rich and more monolithic than it otherwise might be. Yet this conclusion is controversial inasmuch as it appears to conflate an "is" with an "ought": while it may be useful to attain a more accurate view of Stephen's thought, that type of historical exercise offers no independent reason to embrace Stephen's ideas today. If we are to adopt Stephen's ideas, they must be politically and morally attractive—they must be justified.

One approach to negotiating the is/ought gap might simply be to acknowledge that punishment theory and the intellectual history of punishment are separate academic tasks that should proceed independent, if not isolated, from one another—academic ships passing in the night. But a second possibility might seek to combine the intellectual history of punishment with the normative or conceptual project of punishment theory. Supporters of this second path would argue that if history has anything of value to tell us about the justification of punishment today, then the fundamental methodological assumption that theoretical accounts improve as they become increasingly systematic and exclusive should be questioned. The difficulty for the second path is that there is no getting around the core aim of a theory of punishment: to theorize about punishment is ultimately to produce a justification of punishment practice, and it is less than obvious why one should want intellectual history to inform that justification.

This paper suggests nevertheless that (1) punishment theorists ought to open themselves to historical scholarship as a source of illumination in fashioning—and perhaps modifying—their sophisticated normative accounts; and (2) the theoretical perspective that is most capable of internalizing historical studies and ideas would adopt a pluralistic view of the justification of punishment. The reason for examining neglected historical views is that one may actually improve one's theory by beclouding and complicating it with perspectives that do not match one's existing prescriptive views. And the reason for inclining toward pluralistic

theoretical accounts is that it is precisely their untidy and unsystematic methodological commitments which make it possible for theory to learn from history.

The paper begins by rapidly surveying the landscape of contemporary punishment theory; the most influential theories are briefly explained and some of their more prominent descendants are discussed. It is argued that what binds many contemporary theories of punishment is a methodological commitment to systematization. In Part II, the paper examines the treatment that Stephen has received from criminal law scholars and others who have studied his ideas about punishment. It will be seen that classifying and systematizing Stephen's views of punishment has been something of a conundrum for legal scholars: opinion about whether Stephen was a retributivist or a consequentialist is almost exactly evenly divided. Uncertainty and confusion about how to label Stephen have contributed to a small number of more sophisticated views of Stephen as a hybrid theorist but also to the caricatured description of Stephen as an "assaultive retributivist." Part III explores Stephen's ideas about the nature of punishment, distilling and reconstructing from his vast corpus four general ideas about punishment's purposes that do not correspond neatly to any contemporary approach, in large part because of their self-consciously unsystematic quality. The relationship of intellectual criminal history and punishment theory is addressed in Part IV, and two models—that of ships passing in the night and collaboration—are considered. It is suggested that as punishment theory becomes more pluralistic, so, too, does collaboration between normative theory and intellectual history become more possible.

I. THE THEORIES OF PUNISHMENT

A. *The Schools*

This sub-section presents an intentionally rough sketch of the dominant schools of punishment theory. The following offers greater detail about a selection of refinements and complications representing several branches of the respective punishment theory trees. It also expresses some reservations about what it claims is punishment theory's overarching methodology of systematization.

1. Retributivism

The idea of retributivism has ancient roots, but its contemporary revival began with a series of writings in the 1960s and '70s,[5] particularly Herbert Morris's classic, *Persons and Punishment*,[6] and his subsequent efforts to devise liberally

[5] *E.g.*, H.G. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 INQUIRY 249 (1965); JOHN KLEINIG, PUNISHMENT & DESERT (1973).

[6] *See* Morris, *supra* note 2.

beneficent accounts of desert.[7] In the broadest sense, retributivism holds that an offender's desert is in some focal way relevant to his punishment. But retributivist theories today are rarely content to say only this.

The most demanding approaches on the retributivist spectrum hold that states have both the right and the moral obligation to punish offenders, and that such punishment is not only intrinsically good or right, but also sufficient to justify punishment.[8] Such approaches rely on a universal moral intuition that crime and punishment fit together hand-in-glove.[9] A less demanding but more influential counterpart—"limiting" or "negative" retributivism—holds instead merely that desert limits the maximum of a sentence.[10] Another version of "limiting" retributivism extends the same principle to mean that no punishment should be too lenient or too severe: "When we say a punishment is deserved," writes Norval Morris, "we rarely mean that it is precisely appropriate . . . . Rather we mean that it is not undeserved; that it is neither too lenient nor too severe."[11] There is even a fourth, intermediate, position between negative and positive retributivism, which its advocates call "moderate" retributivism, and which posits that "negative desert is necessary and sufficient for punishment but that desert does not mandate punishment."[12] Yet for all of these approaches, as the role of desert diminishes, the theory begins to look more and more mixed, or "hybrid" (assuming that desert continues to play some role).

2. Consequentialism

Consequentialism is an umbrella category for theories of value in which the consequences of actions or rules count exclusively for assessing the correctness of those actions or rules.[13] An enormous swath of punishment theories may be classified as at least in some measure consequentialist. And as is well known,

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[7] Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981).

[8] MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 91 (1997) [hereinafter MOORE, PLACING BLAME].

[9] *Id.* at 145–50.

[10] This version is so undemanding that it might be described as "side-constrained consequentialism." *See* R.A. DUFF, *supra* note 3, at 11.

[11] Norval Morris, *Punishment, Desert and Rehabilitation*, *in* EQUAL JUSTICE UNDER THE LAW, 137, 158 (U.S. DEP'T OF JUSTICE, Bicentennial Lecture Series, 1976).

[12] LARRY ALEXANDER, KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 7 (2009)

[13] There is an issue about whether consequentialism in punishment theory is identical with consequentialism in moral theory. It may not be; in punishment theory, it is simply the claim that punishment is justified exclusively by the good consequences that it produces. Thanks to Mitch Berman for this clarification.

Jeremy Bentham's utilitarian approach to punishment is one of the most important in the history of punishment theory.[14]

Consequentialist theories of punishment generally take the view that punishment is justified insofar as it is an effective instrument to promote some future-looking social benefit. These benefits, the functions of consequentialist punishment, are usually thought to include deterrence, rehabilitation, and incapacitation. The chief of these functions historically and even today is deterrence, and the cost of punishment is itself deemed a check on the degree of punishment that the state ought to administer.[15]

While it is true that consequentialist theories of punishment came to special prominence in the post-war period,[16] there are very few, if any, punishment theorists writing today who espouse consequentialist theories without some qualification—often a limiting retributivist component.

3. "Hybrid" Theories

Hybrid theories of punishment blend retributivist and consequentialist features: "A typical hybrid approach holds that moral desert specifies a range of permissible penalties, and utilitarian considerations should drive the selection of the appropriate penalty within that range."[17] One might think of limiting retributivism as itself a hybrid—one in which retributivism is a necessary but insufficient condition for punishment.[18]

Hybrid theories accept a certain degree of conflict among the values of punishment: desert and deterrence may conflict, as may incapacitation and deterrence, and there may be internal competition within individual functions as well. Likewise, reliance on retributivism or desert does little to resolve what ought to be the appropriate constituents of desert—harm or intent—and whether, for example, the crime of attempt truly deserves less punishment than a completed offense because it caused no concrete harm.

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[14] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* 1 THE WORKS OF JEREMY BENTHAM 83–96 (John Bowring ed., 1843). Cesare Beccaria, writing earlier than Bentham and specifically about punishment's utility, is too often overlooked. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., Hackett Pub. Co., Inc. 1986) (1764).

[15] John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1055–57 (2009) [hereinafter *Happiness and Punishment*].

[16] Michael T. Cahill, *Punishment Pluralism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25 (Mark D. White ed., 2011); *see, e.g.*, GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961).

[17] Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 621 (2009).

[18] Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443, 450 (2004).

Many hybrid approaches nevertheless insist that a fully systematic scheme of punishment can be achieved by careful blending of theoretical explanations.[19] In an early and influential exposition of a hybrid approach, Paul Robinson urged a "hybrid distributive principle" of punishment:

> Desert is to be given priority over the combined utilitarian formulation, except where it causes an intolerable level of crime that the utilitarian formulation could avoid. At this point utilitarian adjustments can be made, but no utilitarian adjustment can be made if it generates a formulation that imposes an intolerably unjust punishment.[20]

It is difficult to predict future academic trends, but some have argued that hybrid approaches are increasing in number and influence, as both retributivists and consequentialists accept limited features of the other camp's approaches.[21]

B. *The Objective of System*

The children of these major theories are diverse—enormously more diverse than I can convey in this short space—and ever-changing, as theorists continue to develop and refine their ideas about the justification of punishment. It is therefore difficult to arrive at any universal conclusion about the methodology of punishment theory, as there is always a risk of failing to account for an outlier or iconoclast.

Nevertheless, and admitting the near certainty of exceptions, it may be possible to say at least this: theories of punishment today—very much including hybrid theories—generally display a methodological commitment to systematization. Punishment theorists are commonly interested in distillation and exclusion, in declaring what punishment justification is in—politically legitimate, morally just, or otherwise institutionally necessary—and what is out. Arguments about which punishment aims are "necessary" and which others are "sufficient" exemplify the objective of system—the desire to keep a careful and hard-edged division between the core and the periphery, the legitimate and illegitimate, the

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[19] *See* Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 NW. U. L. REV. 19, 20–22 (1987).

[20] *Id.* at 38. Before Robinson, one of "the most famous" hybrid approaches was H.L.A. Hart's. Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 258–59.

[21] *See generally* Mitchell N. Berman, *Two Kinds of Retributivism*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433 (R.A. Duff & Stuart Green eds., 2011) (arguing that hybrid theories are ascendant); Mitchell N. Berman, *The Justification of Punishment*, *in* THE ROUTLEDGE COMPANION TO THE PHILOSOPHY OF LAW (Andrei Marmor ed., forthcoming 2012) (on file with author) [hereinafter Berman, *Justification*].

included and the excluded, in constructing fully rational justifications.[22] To be clear, by systematization I do not mean that punishment theory is becoming more purely retributivist or consequentialist. In fact, these may be the halcyon years of hybrid theories. Rather, punishment theories are becoming more exclusive as well as more philosophically ordered, in the sense that they purport to offer fully worked out resolutions to the problems and dilemmas of punishment.

Running parallel to its increasing systematization, punishment theory is becoming dizzyingly complex. A host of sophisticated distinctions now dominate the discussion of punishment's purposes. On the "desert" side of the ledger, there are moral retributivists,[23] legal (or political) retributivists,[24] confrontational conception retributivists,[25] empirical retributivists,[26] communicative/penitential retributivists[27] (to be distinguished from expressivists), victim vindication theorists,[28] virtue ethicists,[29] vengeance retributivists,[30] restorativists,[31] and restitutionists.[32] On the consequentialist side, there are hedonic adaptationists,[33]

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[22] *See, e.g.*, MOORE, PLACING BLAME, *supra* note 8, at 153–54 (1997); Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 150 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) [hereinafter, Moore, *Moral Worth*].

[23] *See* Moore, *supra* note 22 (all of them).

[24] *See* Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 333 (2002).

[25] Markel, *supra* note 3; Daniel Markel & Chad Flanders, *Bentham on Stilts?: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907 (2010). Confrontational conception retributivists are one variety of legal retributivists but not necessarily the only kind.

[26] PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1996). *See also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997). Empirical retributivism is a variety of retributivism because it gives a crucial place to common notions of retributivism in assigning liability, though some believe that it is actually a consequentialist theory. *Id.* at 491.

[27] *See* DUFF, *supra* note 3.

[28] Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992); *see also* Adam J. MacLeod, *All For One: A Review of Victim-Centric Justifications for Criminal Punishment*, 13 BERKELEY J. CRIM. L. 31 (2008); Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L. J. ___ (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1808125.

[29] *See, e.g.*, Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423 (1995).

[30] JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS (2003).

[31] *See* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002). *See also* Philip Pettit with John Braithwaite, *Not Just Deserts, Even in Sentencing*, 4 CURRENT ISSUES IN CRIM. JUST. 225 (1993).

[32] Restitution is rapidly becoming one of the most prominent theories of punishment in certain cases involving the victims of violent sexual offenses. *See* Mandatory Victims Restitution Act, Pub. L. No. 104-132, § 205, 110 Stat. 1227, 1229 (2006) (codified as amended at 18 U.S.C. § 2259 (2006)); *see also* STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME, at x (2d ed. 1970). For other reflections on restitution, see Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1400–06 (2011).

law and economics adherents,[34] social influence deterrence theorists,[35] "new" rehabilitationists,[36] and subjective experientialists.[37] Hybrid theories are too various to typologize without tedium setting in, but they break down roughly along the lines of those who, with Hart, argue that different functions of punishment ought to inform different punishment issues[38] and those who claim that several functions of punishment ought to play a carefully calibrated (though rarely co-equal) role for all issues.[39] And these are only a selection of the major varieties in play today, as theories of punishment of all kinds continue to become more numerous and systematic.

It is certainly true that the activity of parsing, distinguishing, refining, excluding, and purifying—of continuing to systematize and with increasing precision to identify which punishment objectives ought to count and which ought not, and in which circumstances, and for what reasons—is an important one. Analytical clarity may come by increasing systematization, and it might be thought obscurantist (or worse!) to claim otherwise.

Nevertheless, I want to suggest three possible costs that may attend the ever-increasing systematization of punishment theory. Whether the first two of these dangers are problematic issues today is debatable, though if punishment theory continues on its present trajectory, they will be. The third danger, however, is the subject of Parts II and III of this article; I am more confident that it has already negatively affected the activity of punishment theory.

The first cost is that as punishment theory becomes more and more systematic, it may become less and less useful to at least some of those who may be its intended audience—lawyers, judges, and, especially, legislators. The scholasticization of the justification of punishment may well be a positive

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[33] *See Happiness and Punishment, supra* note 15; John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1464 (2010).

[34] *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181 (1994); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

[35] *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

[36] *See, e.g.*, FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION (1982); Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951 (2006); Sue Rex, *A New Form of Rehabilitation?*, *in* PRINCIPLED SENTENCING, *supra* note 22, at 34–41.

[37] *See* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). Kolber does not explicitly subscribe to a consequentialist theory of punishment, but he criticizes traditionally retributivist justifications for punishment and does not believe that those criticisms apply with equal force to consequentialist theories. *Id.* at 186.

[38] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 3–13 (1968) (distinguishing between principles for the "general justifying aim" and the "distribution" of punishment).

[39] *See* Garvey, *supra* note 18, at 444; Robinson, *supra* note 19, at 20–21.

phenomenon for legal theory and philosophy, but it brings with it risks that judges, sentencing commissioners, legislators, and others charged with the task of actually devising just and effective sentences, laws, or guidelines will not pay it much heed.[40] A judge or legislator compelled to explain her sentencing decisions as within this or that systematic framework simply will not deem it worth her while to familiarize herself with the perplexing and ever-expanding panoply of theories. And even if a legislator and/or judge is able to settle on, say, the confrontational conception of retributivism coupled with the new rehabilitationism (having first decided, after long study and reflection, that she prefers a species of hybrid theory), it will not be at all plain what these conclusions will mean when she sets to the business of deciding on sentencing laws.[41]

Some may not believe this to be a significant danger or loss; it might even be claimed that the systematization of punishment theory portends the natural extension of the already wide chasm between theory and practice.[42] Still, if at least part of the purpose to develop punishment theories is to guide judges and legislators in thinking about punishment, and perhaps even in crafting appropriate punishments, the narrowing of punishment theory's audience to a fairly small number of specialists is a regrettable development. Moreover, the unsystematic, unrefined, inclusive approach to punishment had in its favor a certain commonsensical quality; to speak of punishment's needing to be deserved, or about crime prevention being desirable, is to speak a relatively accessible, ordinary language. The more systematic and technical positions today are more abstruse and less easy to master, let alone implement. It is not clear to me whether this is already a danger of punishment theory's increasing system, or instead a possible loss which has not yet eventuated.

While the first danger is practical, the second is conceptual. If it is indeed the meta-purpose of punishment theory to work itself into a pure system then one might wonder whether the increasingly formidable architecture is actually helpful. The problem is that the process of systematizing may damage the way in which it

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[40] As Judge Richard Posner put it to me in correspondence, "I wasn't aware until I read your piece how voluminous and complex punishment theory has become! Lawyers and judges pay absolutely no attention to it, I am afraid." E-mail from Judge Richard Posner to Marc DeGirolami (Aug. 9, 2011) (on file with author).

[41] Some have suggested that this indeterminacy is unproblematic, provided that the sentencing decision is not "inconsistent with the values underlying [the theorist's] answer to the justification question." Markel & Flanders, *supra* note 25, at 949. At the very least, however, the legislator will have to settle on the underlying justification and ensure that any actual sentence is consistent with it.

[42] Indeed, some theorists may believe that this is a welcome development, as faux, popular, and philosophically crude ideas can more easily be eliminated as frauds. *Cf.* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1665 & n.230 (2010) (observing that "not all retributivists are pure Kantians," and that the non-Kantians "include[] many politicians, pundits, practitioners, and others who claim the mantle of retributivism. The sad fact is that many of these folks are not really retributivists at all . . . . This author shares in the unapologetic belief that we ought not endorse or accept individual sentences or a system of criminal punishments that cannot be justified by a coherent and persuasive theory of criminal law and punishment.").

is optimal to conceive of punishment. Steven Smith, in another, perhaps analogous, context, writes:

> The risk is that philosophical analysis will fail to appreciate, and may even undermine, the puzzling capacity of humans *in practice* to embrace and live with both sides of an antimony, or at least with what seem on an intellectual level to be divergent or incompatible positions or perspectives . . . . When considered on a theoretical level, such questions may present what appear to our finite and language-limited minds to be radically dissimilar or even incompatible alternatives. And yet it seems that in practice, and particularly in law, humans manage to embrace such incompatible alternatives in ways that arguably are more productive and beneficial than the single-minded commitment to either alternative would be.[43]

The capacity to support multiple otherwise logically conflicting notions of, say, retributivist justice, or varieties of retributivism and deterrence simultaneously—in some reasonable though philosophically unsystematic combination—may well be a cost of the current methodological orthodoxy.

Consider the distinction between expressivism and communicative retributivism: the value in the former is that a society ratifies and reinforces its deep moral commitments by expressing legal condemnation of grave criminal offenses (perhaps in part, though not only, for reasons of deterrence); the value in the latter is that the state communicates to the offender the message that he has done wrong, with the intention that he internalize the message and change his behavior.[44] In a significant number of criminal cases, if given a choice between these conceptually distinct—and even conflicting—options, why should one not say, "both"? It seems plausible that legislators who fashion sentencing schemes would want punishments both to express social stigma or condemnation and to communicate moral and political values to the offender. That it is possible logically to distinguish expressivism from communicative retribution does not mean that someone contemplating the justifications of punishment might not sensibly be thinking simultaneously about both sorts of reasons. Indeed, the reasons may be called up in the legislator's mind together, as a justification with two moving parts, and it is not clear that breaking them apart serves a purpose other than to suggest falsely to the legislator that she must choose for the sake of theoretical order.

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[43] Steven D. Smith, *That Old-Time Originalism* at 23–24 (U. of San Diego Sch. of Law Legal Stud. Res. Paper Series, Research Paper No. 08-028, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447.

[44] For discussion of the difference, with preference for the latter, *see* Markel & Flanders, *supra* note 25, at 942–43.

To this, one might reasonably reply that breaking apart justifications merely helps us to think more clearly about them; it does not tell us what we ought to do. That might be true, but it might not. Breaking apart justifications might not make it possible for us think more clearly about them at all; it might only make it easier for us to think in an individuated way about them, without noticing how they complement one another. At all events, clear thought for its own sake does not seem to be the spirit in which the breaking apart sometimes is proposed. Again, whether this danger of systematization—of exclusion of punishment aims, a completely worked-out ordering of punishment values, and an artificially imposed choice among philosophically conflicting options—is a real one today for punishment theory is not clear.

The final danger is that systematization may make it more difficult to understand ideas about the aims of punishment that flourished in the past. This is the possibility that, given an increasingly powerful drive to systematize and exclude, punishment theorists may misread and misinterpret the thought of older writers who did not share those commitments. The danger is, in sum, that of reading the past through the methodological lens of the present, and in consequence misunderstanding it as well as rendering oneself unable to learn from it. I turn to this cost in what follows.

II. STEPHEN THEORIZED

Having achieved a rough sense of the scope of contemporary punishment theory and its internal drive to systematization, it is useful to explore how punishment theorists have been influenced by their methodological and other commitments in understanding the ideas of historical figures in criminal law. A comprehensive inquiry of this nature would be immense, so to limit its scope, this Article focuses on the thought of one of the preeminent figures in English criminal law, Sir James Fitzjames Stephen. Stephen lived and wrote in the middle to late Victorian period, and achieved lasting importance as a jurist, a scholar of the history of English criminal law, a committed champion of codification of the substantive criminal law, a colonial administrator in India, a bracing and elegant critic of John Stuart Mill, a prolific essayist, and a prominent public intellectual (whose friends included Oliver Wendell Holmes, Henry Maine, and George Eliot).[45] While his political contributions—especially *Liberty, Equality, Fraternity*—are at least somewhat known by legal writers,[46] his chief works in

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[45] James C. Livingston, *The Religious Creed and Criticism of Sir James Fitzjames Stephen*, 17 VICTORIAN STUD. 279, 281–82 (1974); K.J.M. SMITH, JAMES FITZJAMES STEPHEN: PORTRAIT OF A VICTORIAN RATIONALIST (1988).

[46] Richard Posner has helpfully introduced American audiences to Stephen's writing. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 259–70 (1995); JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS (Foreword by Richard A. Posner, U. Chicago Press 1991) (1874) [hereinafter STEPHEN, LIBERTY].

criminal law and his numerous essays on all manner of subject have received little sustained scholarly attention.[47]

This part investigates how Stephen's writing has been perceived, interpreted, and analyzed while the following part reconstructs Stephen's ideas about punishment in greater detail. The reader may wonder, why Stephen? What makes an examination of his thought particularly worthwhile? The immediate answer is that consideration of Stephen's ideas keenly illustrates the perils of approaching intellectual history through the prism of conventional punishment theory. The broader answer is that more than any other writer, Stephen suggests and informs a wholesome modification in the methodological predilections and prejudices of contemporary punishment theory.

A review of the scholarship discussing Stephen's views makes two conclusions plain. First, that resolving once and for all whether Stephen was a retributivist, a consequentialist, or some specific hybrid seems to be the paramount issue for those who investigate and discuss his ideas. Second, that opinion about whether Stephen *actually was* a retributivist or a consequentialist is almost exactly evenly divided. Of the legal scholars and other commentators who have discussed Stephen's thought about punishment, approximately half characterize him as squarely a retributivist, half as a classic utilitarian.

Also interesting is that both sides in the debate tend to rely on a handful of quotes,[48] and one in particular—the tract in the second volume of the *History* where Stephen writes that the "sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax," converting "into a permanent final judgment what might otherwise be a transient sentiment," and that criminal punishment "proceeds upon the principle that it is morally right to hate criminals . . . ."[49] Memorable though the passage may be,[50] its repeated and a-

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[47] This notwithstanding the judgment of the distinguished legal historian, John Langbein, that Stephen was "[t]he first great historian of the early modern criminal trial." JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 62 (2003).

[48] For ease of reference, the following abbreviations to Stephen's work will be used. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND, VOLUMES I, II, & III (London, MacMillan and Co. 1883) [hereinafter STEPHEN, HORAE SABBATICAE, FIRST, SECOND, or THIRD]; JAMES FITZJAMES STEPHEN, HORAE SABBATICAE, FIRST, SECOND, AND THIRD SERIES (London, MacMillan and Co. 1892) [hereinafter STEPHEN, HORAE SABBATICAE, FIRST, SECOND, or THIRD]; JAMES FITZJAMES STEPHEN, ESSAYS BY A BARRISTER (London, Smith, Elder and Co. 1862) [hereinafter STEPHEN, ESSAYS]; JAMES FITZJAMES STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND (London, New York, MacMillan and Co., 2d ed. 1890) [hereinafter STEPHEN, GENERAL VIEW].

[49] STEPHEN, HISTORY II, *supra* note 48, at 81.

[50] Stephen's muscular style sometimes can seem brusque, even brutal. This was no less the case in his own era than in ours. *See* JAMES A. COLAIACO, JAMES FITZJAMES STEPHEN AND THE CRISIS OF VICTORIAN THOUGHT 125 (1983) ("Some readers are liable to be repelled by Stephen's blunt manner of expression, his penchant for stating his views in the most forthright and critical fashion. During his youth he had been known as 'the Gruffian' and 'the Giant Grim'; and as a member of the Cambridge Apostles his powerful oratory and relish for polemics earned him the sobriquet 'the

contextual use as evidence that Stephen belonged to a sub-species of retributivist or consequentialist theory suggests that scholars may be missing the subtlety of Stephen's mind—misled precisely by their drive to systematize his thought within inapposite modern frameworks.

A. *Stephen the Retributivist*

Retributivism today is a highly varied theory of punishment. The retributivism of Michael Moore is not that of Herbert Morris, is not that of Jean Hampton, is not that of Dan Markel, and so on. Nevertheless, all of these forms of retributivism are comparatively modern developments, and most rely on liberal accounts of autonomous moral agents and the importance of conveying adequate respect to the offender and his choices.[51]

Stephen's understanding of desert as a justifying aim of punishment is markedly different, but that difference has gone largely unnoticed by punishment theorists and scholars who have considered his writing. One of his primary biographers, for example, writes that while Stephen was a "child of English Utilitarianism" and "inherited from Bentham the deterrent view of punishment," nevertheless, and in light of the "good-to-hate-criminals" passage of the *History*, "Stephen thus takes his place with the retributionist theorists, including Kant and Hegel, who believed that justice requires that a criminal be punished whether or not the punishment benefits either himself or those whom he injured."[52]

Yet to describe Stephen as concerned about what "justice requires" lends to his ideas an abstractness and a disconnection from the affairs of the ordinary, working world of criminal law that, as will be seen, fails to capture Stephen's distinctive contribution. In fact, Stephen almost never adverts directly to the philosophical demands of justice. Certainly he discusses at length concepts which in some way relate to the justness of a punishment—for example, proportionality, desert, and moral condemnation. Moreover, Stephen believes that these features of desert are highly relevant components of an appropriate system of punishment. But claims of abstract justice are not issues that he explores anywhere in detail.

Furthermore, linking Stephen to Kant and Hegel—philosophers who were very interested in the transcendent justice of punishment, and who labored to systematize their views—just exactly inasmuch as he is a retributive thinker suggests a unity of perspective that does not exist. Indeed, Stephen was skeptical

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British Lion.'"). It is not implausible to suppose that the substance of his thought may sometimes have been masked by his powerful style.

[51] *See* Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 694 (2003) ("If criminal theory now widely emphasizes moral justice to the accused, was this more or less retributivist orientation also dominant in other periods? . . . . Did [retributivism and consequentialism] even define the range of choices for criminal theorists before the modern age or do they constitute a peculiarly twentieth-century construct?").

[52] COLAIACO, *supra* note 50, at 80–81.

about metaphysical speculations regarding the purposes and justification of punishment, and preferred to remain attuned to the common morality of his day.[53] Stephen's mind developed from a tradition of thought at a great distance from eighteenth century German philosophy,[54] one initially much closer to classic utilitarianism, but which eventually departed decisively from it.

Similarly, legal scholars who have discussed Stephen's views and who have categorized him as a retributivist generally miss the mark. For example, in a thoughtful article that is critical of the prevailing theories of punishment and proposes a harm-dependent framework, Kenworthey Bilz and John Darley write:

> If Kant and Bentham were the first punishment-philosophy purists, they definitely were not the last. Their writings spawned one of the classic debates in law: Should criminal punishments be retributive or consequentialist? Advocates in this argument have sometimes been blunt, like Sir James Fitzjames Stephen, an early retributivist who argued, "The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it."[55]

In fairness to Bilz and Darley, theirs is not a piece on Stephen and they cannot be faulted for offering a less than complete picture of his views. Yet in ostensibly criticizing the impermeability of the traditional theories of punishment they misconstrue Stephen's ideas and, in the process, end up exacerbating the rigidity of the very methodology they mean to attack. Their description of Stephen as a philosophical "purist" about punishment gets things exactly backwards. As will be seen, Stephen was in fact committedly impure in his ideas about punishment, and he consistently criticized pristine and exclusive theories of punishment as disconnected from the concerns of ordinary experience. In fact, the self-consciously anti-systematic bent of his thought represents his signature contribution to the field.

Second, relying on the "good-to-hate-criminals" passage of the *History* in isolation and as conclusive evidence that Stephen was a retributivist does not do justice to Stephen's views. Stephen did not believe that it was right to hate all criminals; even that specific passage is concerned with a very small class of

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[53] *E.g.*, STEPHEN, HISTORY III, *supra* note 48, at 96; *Conventional Morality, in* STEPHEN, ESSAYS, *supra* note 48, at 31, 35 ("[T]he enforcement of the sanctions on which [common morality] depends will always be warranted by the common sense of the great bulk of mankind, whilst it will be a never-failing object of the contempt of those who think themselves philosophers because they have discovered that gilt cornices are not made of solid gold.").

[54] *See* SMITH, *supra* note 45, at 63 (describing Stephen as "implacably opposed to the natural law theories offered by Kant and Hegel").

[55] Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1218 (2004).

particularly grave and morally reprehensible criminal activity,[56] and when read in the context of his larger views of the aims of punishment, it does not amount to the not-very-interesting proposition that punishment is only ever appropriate inasmuch as criminals ought to be loathed.

Unfortunately, other legal scholars who have classified Stephen as unequivocally a type of retributivist have also been misled. Stephen has been called a "backward-looking . . . traditional retributivist[]," [57] dismissed as the progenitor of "disturbingly" "conservative" ideas loosely related to expressive retribution,[58] and deemed a kind of proto-retributivist whose "simple" ideas of hatred of criminals are somehow connected across the centuries to Justice Scalia's views about substantive due process.[59]

In one of the most common mischaracterizations of Stephen's ideas, it is even claimed that Stephen believed that "immorality as such" ought always to be criminalized,[60] which sounds as if Stephen held to some abstractly metaphysical view of morality which demanded the vindication and sanction of punishment for its violation.[61] Thus, Leo Zaibert argues that Stephen believed that "if something is immoral (or, what for [Stephen] amounts to almost the same thing: if it is a religious sin), then it should also be illegal."[62] This description of Stephen's views is not correct on two counts. First, Stephen did not believe that the domains of morality and legality were co-extensive. In fact, he wrote in several places that there were spheres of ordinary morality where it would be unwise in the extreme for law to intervene. Moreover, he states plainly that there are significant features of morality which ought to be unregulated by criminal law, lest "all mankind would be criminals, and most of their lives would be passed in trying and punishing each other for offenses which could never be proved."[63] Second, Stephen did not believe that religious sins ought uniformly to be criminalized, though he obviously did believe that some behaviors which are considered sinful by some were properly the object of criminal law. The relationship of religion to morality and law was admittedly a complicated one for Stephen, and one about

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[56] *See* STEPHEN, HISTORY II, *supra* note 48, at 82.

[57] John Mikhail, *"Plucking the Mask of Mystery from Its Face": Jurisprudence and H.L.A. Hart*, 95 GEO. L. J. 733, 745 (2007).

[58] Chad Flanders, *Shame and the Meanings of Punishment*, 55 CLEV. ST. L. REV. 609, 623 n.54 (2007).

[59] S.I. Strong, *Justice Scalia as a Modern Lord Devlin: Animus and Civil Burdens in* Romer v. Evans, 71 S. CAL. L. REV. 1, 40 (1997).

[60] Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 927 (1999). Dworkin frames the terms of debate in this fashion, but it is less certain whether he himself endorses this view of Stephen.

[61] *See, e.g.*, STEPHEN, LIBERTY, *supra* note 46, at 93–94.

[62] Leo Zaibert, *The Moralist Strikes Back*, 14 NEW CRIM. L. REV. 139, 143 (2011).

[63] STEPHEN, HISTORY II, *supra* note 48, at 78.

which he wrote at length,[64] but at no point did he write that sinfulness as such (whatever that might mean, and whoever might be charged to determine it) ought to be subject to criminal sanction.

Any account of Stephen's thought must grapple with the "good-to-hate-criminals" passage from the *History*, and Stephen held firm views both about the moral desert that several types of crimes evince and the important role of criminal law in expressing and reinforcing society's proper sense of that desert. There are indeed vital strains of his thought about punishment that reflect strong support for moral desert. Unfortunately, almost all of the descriptions of Stephen as retributivist rely either exclusively on the "good-to-hate-criminals" passage of the *History* or on H.L.A. Hart's too-rapid dismissal of Stephen's views,[65] or both. Stephen's views of punishment were far richer and more varied than most of the contemporary accounts have been able to convey.

B. *Stephen the Consequentialist*

The identification of Stephen with consequentialism—and classical utilitarianism specifically—appears at first to rest on firmer ground. Early in his life, Stephen had great regard for Bentham's utilitarianism (though this changed later in his life)[66] and was attracted temperamentally to certain features of the legal

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[64] *See, e.g.*, STEPHEN, HISTORY II, *supra* note 48, at 396–497. In these pages, Stephen explores topics ranging from the structure of ecclesiastical courts, to statutes against witchcraft, to punishment of adultery, to Canon law.

Lest there be any doubt that Stephen did not believe the domains of criminality and immorality (let alone sinfulness) co-extensive, this critical discussion of the jurisdiction of ecclesiastical courts ought conclusively to dispel such suspicions:

> Such were the old ecclesiastical courts . . . . It is difficult even to imagine a state of society which on the bare suggestion of some miserable domestic spy any man or woman whatever might be convened before an archdeacon or his surrogate and put on his or her oath as to all the most private affairs of life . . . as to relations between either and any woman or man with whom the name of either might be associated by scandal, as to contracts to marry, as to idle words, as to personal habits, and in fact as to anything whatever which happened to strike the ecclesiastical lawyer as immoral or irreligious.

Id. at 412–13.

[65] *See* H.L.A. HART, LAW, LIBERTY, AND MORALITY 34–38, 60–64 (1963). Hart's immediate target was Lord Patrick Devlin. He defended the Wolfenden Committee's views with respect to the decriminalization of homosexuality and prostitution. But since Hart wrote, Devlin's and Stephen's views on the issue of punishment have been commonly conflated. Both are said to be "legal moralists," who saw something of an identity between immorality and criminality. *See id.* at 62. In the case of Stephen, this is not true. Furthermore, with the exception of the "good-to-hate-criminals" passage from the *History*, Hart relied exclusively on *Liberty, Equality, Fraternity* to understand Stephen's views, ignoring his substantial writing on criminal punishment.

[66] *See* STEPHEN, ESSAYS, *supra* note 48, at 27 ("Mr. Hallam") ("Bentham was not only unjust to his antagonists in refusing them credit to which they were justly entitled, but was himself a dogmatist of the most unsatisfying kind."). *See also* Leon Radzinowicz, Director, Dep't of Crim. Science of Trinity College, Lecture at Senate House of University of London Annual Meeting of the ABA, SIR JAMES FITZJAMES STEPHEN: 1829-1894: AND HIS CONTRIBUTION TO THE DEVELOPMENT OF CRIMINAL LAW 16 (1957) ("Even Jeremy Bentham, for whom [Stephen] had unbounded admiration,

positivism of Bentham's pupil, John Austin.[67] As has been noted, Stephen was also deeply skeptical about natural law theories of punishment and in *Liberty, Equality, Fraternity,* he proudly calls himself a "common" utilitarian.[68] "In a certain sense," he writes coyly, "I am myself a utilitarian."[69] And as will be explored in greater detail, Stephen emphasized the importance of the law's "expediency,"[70] a term which has a rough resemblance to its "utility," but actually is far closer in meaning to something like its "appropriateness." Frequently he alluded to and lauded the extent to which criminal law has the power—the "force"[71]—to deter members of society from committing crimes, though he was always careful to qualify that function of punishment by raising other aims alongside general deterrence. Stephen was also a committed supporter of the effort to codify the substantive criminal law, and his drafting of and ultimately unsuccessful effort to push through the Homicide Bill of 1872 expressed his belief that the judiciary's legitimacy depended on a movement away from the common law.[72]

Nevertheless, if Stephen is a utilitarian, it is a very peculiar variety and one which is likely to mislead contemporary theorists. As the political historian Joseph Hamburger sagely noted, the "mixed character" of Stephen's views "raises questions . . . about the usefulness of the utilitarian label in the absence of careful definition."[73] Modern consequentialist theories of punishment which emphasize deterrence, incapacitation, or rehabilitation as primary are an inadequate characterization of Stephen's position.

Unfortunately, legal scholars and other writers who favor the consequentialist/utilitarian label have not noted its problematic quality. Just the opposite, they have been intent on designating Stephen as squarely and unequivocally a utilitarian, and they often have identified his utilitarianism with a selection of consequentialist theories of criminal law currently on offer. One noteworthy example is Neal Katyal's claim that Stephen subscribed to a theory of pure deterrence—both general and specific—because he emphasized the criminal law's "educational effect[s]" on society at large and the individual offender in

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was criticized by him for his lack of historical sense, for his disregard of the fact that the past contains a permanent legacy which the present cannot repudiate but must honour and, while modifying it to a certain extent, should not fail to transmit to posterity.").

[67] SMITH, *supra* note 45, at 46–50. For extensive discussion by Stephen of Austin's views, see James Fitzjames Stephen, *The Province of Jurisprudence Determined* (1861) (book review).

[68] STEPHEN, LIBERTY , *supra* note 46, at 227.

[69] *Id.*

[70] *See infra* Part III(C).

[71] *See infra* Part III(D).

[72] *See* James Fitzjames Stephen, *Suggestions as to the Reform of the Criminal Law*, 6 NINETEENTH CENTURY 737 (1877).

[73] Joseph Hamburger, *James A. Colaiaco's James Fitzjames Stephen and the Crisis of Victorian Thought*, 16 ALBION 328, 328–30 (1984) (book review).

particular.[74] That Stephen really did not put much stock in rehabilitative ideas of punishment, that he rarely if ever discusses the "educational" benefits of punishment to the individual offender,[75] and that he sometimes even states that the function of the criminal law was not moral improvement for the offender,[76] is missed in this assessment.

Other characterizations have been equally problematic. Stephen has been called a "Hobbesian positivist, [and] a utilitarian"[77] without sufficient explanation about what these terms actually mean; a utilitarian because he raised certain objections to the arguments about freedom of speech in Mill's *On Liberty*[78]; a utilitarian because his support for capital punishment was based on its potential for general deterrence[79]; a "core instrumentalist" because of the self-evident import of the "good-to-hate-criminals" passage[80]; and, perhaps strangest of all, a utilitarian who was the intellectual antecedent of Jerry Falwell.[81]

Setting aside these views, which, again, to be fair, are largely contained in scholarly papers whose subject is not Stephen's thought specifically, the extent to which there is confusion about Stephen's utilitarian bona fides is even reflected in K.J.M. Smith's thoughtful and deeply informed discussion of Stephen's life and ideas.[82] After noting various contrasting features of Stephen's thought, Smith falls into the same trap of attempting to "pin[] down [Stephen's] position" by attempting to answer the question that has drawn the lion's share of contemporary comment:

> Although Stephen quite explicitly believed in the importance of the 'direct' prevention of crime by 'fear, or by deterring' the offender, less clear was whether he saw the denunciatory element in punishment as preventive or retributive in complexion . . . . Pinning down his position requires a careful exercise in separating the substance of an argument

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[74] Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2449 (1997).

[75] Stephen's ideas are, for example, at a great distance from the "moral education" theory that Jean Hampton has defended.

[76] "[P]unishment is not intended to benefit the sufferer. It is distinctly intended, to a certain extent, to injure him for the good of others." James Fitzjames Stephen, *Variations in the Punishment of Crime*, 17 NINETEENTH CENTURY 755, 757 (1885).

[77] Ian Duncanson, *The Sovereign, the Law and the Two British Empires*, 25 WINSOR Y.B. ACCESS TO JUST, 313, 356 (2007).

[78] David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 115 (1982).

[79] Robert Blecker, *But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply*, 5 RUTGERS J. L. & PUB. POL'Y 9, 20 (2007).

[80] Arthur Ripstein, *Closing the Gap*, 9 THEORETICAL INQUIRIES L. 61, 81 (2008).

[81] Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 353 (2008).

[82] *See* SMITH, *supra* note 45.

> from its often highly robust packaging . . . . Shorn of this rhetoric many elements of his discussions suggest an essentially utilitarian stance.[83]

Even Smith, who is neither a traditional legal academic nor a punishment theorist, and so who might have been expected to steer clear of the attractive nuisance of neat theoretical categories, cannot resist doing so. But in dismissing those features of Stephen's thought which are not obviously consequentialist, Smith is forced to explain them away as empty rhetorical flourishes—or as George Eliot described Stephen's style, beguilingly polemical "rimbombo."[84] Likewise, Smith's view that whatever non-consequentialist arguments appear in Stephen's writing are simply examples of "want of clarity or even completeness"[85] exhibits the familiar compulsion to systematize Stephen's thought as cleanly within one of the two primary camps.

Yet Smith is well aware of the substantiality of Stephen's unequivocally non-consequentialist statements and writings. As a result, in order to make the consequentialist case stronger, Smith is compelled to minimize the inconsistent statements as ill-considered or at least insufficiently thought through. But in this process of downplaying the material that does not fit the selected category, Smith misses or too quickly side-steps the extent to which Stephen's thought resists classification as purely consequentialist—indeed, Stephen himself resists it.

C. *Stephen the "Assaultive Retributivist"*

Most recently, some scholars have recognized the mixed quality of Stephen's ideas. The best effort in this respect is a short and sympathetic essay in which Stephen Morse traces Stephen's view of why people blame and punish at all to what Stephen believed was an attribute of human nature—an ineradicable emotional response to certain kinds of acts which, though it differs among cultures and through time, is nevertheless consistently in evidence.[86] This basic building block of Stephen's views about punishment, Morse claims, might be described as an early naturalistic conception of retributivism. With respect to Stephen's theory of punishment itself, Morse writes:

> It is commonplace knowledge that Fitzjames was a consequentialist . . . . The *History* and *General View* are replete with arguments in favor of rules that would maximize deterrence by giving potential miscreants good reason to refrain from violating the law. But, I claim, Fitzjames

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[83] *Id.* at 57–58.

[84] *Id.* at 57 (quoting Letter of George Eliot to Frederic Harrison, June 20, 1873).

[85] *Id.* at 70–71.

[86] Stephen J. Morse, *Thoroughly Modern: Sir James Fitzjames Stephen on Criminal Responsibility*, 5 OHIO ST. J. CRIM. L. 505, 513 (2008).

> was a mixed theorist, who refined his consequentialism with retributive concerns. [87]

This is a much-improved description, as it notes that Stephen's writing contains both of what are commonly conceived in rough terms as retributivist and consequentialist functions. But it is not accurate in assigning priority to consequentialism; in this it mimics contemporary hybrid theories, which, as was seen earlier, generally weight the functions of punishment differently and aim to describe precisely how much, and which, consequentialist and retributivist considerations matter, and for what purposes. Indeed, to say that Stephen was fundamentally a consequentialist who "refined" his theory with retributivism makes it sound as though retributivist concerns were some type of secondary side-constraint for Stephen, in the way that they are for some limiting retributivists. For Stephen, they were not. Morse does say that Stephen's mixed approach "awkwardly and uncomfortably amalgamates consequentialism and retributivism," but says little more than this, and he misses that Stephen was foundationally committed to an anti-systematic approach.[88]

A more critical and also sophisticated treatment of Stephen's views may be found in Alice Ristroph's discussion of the work of Paul Robinson and John Darley.[89] Like Morse, Ristroph argues that Stephen is best characterized as a hybrid theorist whose ideas about punishment made space for both deterrence and retribution.[90] But, relying again on the "good-to-hate-criminals" passage, Ristroph makes the mistake of assigning priority to consequentialism, arguing that "Stephen's retributivism was openly instrumentalist" and that because Stephen was skeptical of "deontological philosophy" he cannot have held to any authentic commitment to desert as an intrinsic, normative feature of punishment.[91]

Part of the difficulty is that Ristroph and others who categorize Stephen as some type of hybrid theorist rely on the influential descriptions of Stephen by Joshua Dressler as an "assaultive retributivist"[92] or "revenge utilitarian."[93] In his

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[87] *Id.* at 514.

[88] Gerald Leonard also has a perceptive, though brief, discussion of the mixed character of Stephen's thought, emphasizing especially the extent to which Holmes and Stephen disagreed about the connection between law and morality. *See* Gerald Leonard, *Civilizing Darwin: Holmes on Criminal Law*, *in* MODERN HISTORIES OF CRIME AND PUNISHMENT 205–06 (Markus D. Dubber & Lindsay Farmer eds., 2007).

[89] Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151 (2010–11). It might be argued that since Stephen at times described himself as a utilitarian, that ought to be good enough for the rest of us. But there are many varieties of commitment to utilitarianism, both in degree and in kind, and one ought to be clear about the nature of the commitment before using such a capacious label. Thanks to Alice Ristroph for pressing this point.

[90] *Id.* at 1156.

[91] *Id.* at 1157.

[92] *See, e.g.*, JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 41–42 (5th ed. 2009). *See also id.* at 44 (contrasting Herbert Morris's "protective retribution" with Stephen's

commonly used textbook,[94] after citing that portion of the *History* containing the "good-to-hate-criminals passage," Dressler writes:

> *Assaultive retribution.* Stephen might be characterized as a defender of "assaultive retribution," the view that, as Professor Jeffrie Murphy has put it, we should treat "criminals as rather like noxious insects to be ground under the heel of society." . . . . What do you think of Stephen's assaultive views?[95]

If "assaultive retributivists" are indeed people who believe that all criminals ought to be crushed like bugs, then Stephen is not one of them. Even the "good-to-hate-criminals" passage does not indicate anything about the justifiability of torturing or degrading offenders as if they were sub-human. It is true that for certain very serious offenses, Stephen argued that there was a large overlap between criminal law and common morality, and that the general popular sense of strong condemnation elicited by particularly heinous or atrocious crimes was both merited and socially sanitary.[96] But this is quite different than saying either that Stephen held to such views exclusively for their consequentialist payoff or that he thought that punishment ought to be as excruciatingly painful and inhumane as possible.

In the ongoing effort to systematize Stephen's thought, recourse to hybrid theories of punishment might have been expected. There are, in fact, important strains of desert, deterrence, and expressivism which run through his writings. But hybrid theories ultimately are little more satisfying than the pure theories from which they are derived. Indeed, the use of hybrid theories to describe Stephen's thought creates the independent danger of caricature. Because Stephen is an uneasy fit, the move to hybrid theory carries with it the risk that his thought will be reduced to a smattering of (unattractive) features of the major theories—one dash of retributivism and one dash of consequentialism. Moreover, with the possible exception of Morse, scholars who have described Stephen using the language of hybrid or mixed theory inevitably decide that he was really—when one gets right down to it—either a consequentialist or a retributivist.

III. STEPHEN'S THOUGHT

It is well beyond the scope of this Article to attempt anything like a comprehensive exposition and assessment of Stephen's ideas; even an effort to do

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"assaultive variety," in which "criminals have no rights" because they are "nothing more than noxious insects").

[93] Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451–52 (1990).

[94] An outstanding book, used gladly and gratefully by this author.

[95] *Id.* at 42.

[96] *Infra* at notes 102-128 and accompanying text.

so for criminal law generally would be overly ambitious.[97] Instead, this Part undertakes the more manageable exploration of a number of Stephen's writings about criminal punishment. That study evinces several overall themes, which, when considered synthetically, do not correspond either to a retributivist or consequentialist view (though there are certainly substantial connections to each). Neither do they match up neatly to the conventional view of a hybrid theory of punishment, though if pressed, an unsystematically "mixed" approach might best characterize them.

The four themes are: (1) the core meta-theoretical insight of opposition to systematic theories of punishment; (2) the moral freight of punishment; (3) the "expediency" of punishment; and (4) the interdictory force of punishment. Each of these themes combines to form a unique and complex approach to the justification of punishment, but for methodological purposes, the first theme is by far the most important. Indeed, the first theme helps to explain exactly why it is that contemporary criminal theorists have been stymied by Stephen's thought.

A. *Against Theories of Punishment*

Unlike many theorists of punishment writing today, Stephen's crucial insight with respect to the justification and practice of punishment was not substantive, but methodological. His view might best be described as a skepticism about theory's internal drive to systematize and exclude, or at least a recognition of the limits of theory in adequately conceiving, let alone managing, criminal law's actual complexity. His reservations are expressed pithily in the following capsule statement: "Human life and philosophical explanations of it move in different planes till the explanation has become so complete as not to interfere with the thing to be explained."[98]

Stephen did not think that theoretical activity was without value; to the contrary, he studied closely and with interest the views of his contemporaries and past writers with respect to punishment's justifications, and he developed his own views on these matters. But he held consistently to the position that the separation of theory and practice could lead to the desiccation, preciousness, and insignificance of each:

> To speak of theoretical and practical men as two powers opposed to, or at all events independent of, each other, is to revive all of the old fallacies which are written in Bentham's book of fallacies about the opposition between theory and practice. The construction of theories and their application to practice ought to go hand in hand; they ought to check and

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[97] Stephen wrote extensively about criminal liability for the insane, for example, a subject that will be treated only fleetingly here. *See, e.g.*, STEPHEN, GENERAL VIEW, *supra* note 48, at 78–82; STEPHEN, HISTORY II, *supra* note 48, at 124–86.

[98] STEPHEN, HISTORY II, *supra* note 48, at 84.

> correct each other, and ought never on any account to be permitted to be long or widely separated. The result of doing so is that practical men construct for themselves crude, shallow, and false theories which react on their practice, and that theoretical men construct theories which are very slightly connected with facts.[99]

From this and similar passages,[100] it is plain that the overarching commitment that binds together Stephen's thought about punishment is an abiding resistance to systematic and abstract theoretical formulations—those which are intent on excluding altogether particular functions of punishment from the relevant compass of reasons. Just as Stephen accepted the inevitability of theorizing and of speculation, as well as its usefulness, so, too, was he acutely aware of theory's presumptions and its limits.[101] It is exactly this feature of Stephen's ideas that has confused today's punishment theorists. Stephen's ideas espouse, at different points, incompatible functions of punishment. Even more than this, Stephen himself understood his own views in just this way: he thought that the exercise of developing ever more orderly theories of punishment was misguided.

To understand this core insight more fully, it may be helpful to examine his relatively late essay, *Variations in the Punishment of Crime.* Stephen begins by noting that there had been some agitation on the part of the Home Secretary about making sentences for particular offenses more uniform, and for developing "general rules"—sentencing guidelines of a sort.[102] In contrast to his staunchly pro-codification position for substantive criminal law, Stephen, though admitting that the issue was important, felt that whatever changes were made to the law of punishment should be "slow, gradual, and partial."[103] Any attempt to enact rigid sentencing rules, and to "solve" the problem of sentencing disparity in a "trenchant, conclusive manner would be a great mistake, and, indeed, a great public misfortune."[104]

Stephen's hesitations about punishment codes go to the heart of his ideas about punishment. He engages in an extensive discussion of the inadvisability of fixed sentences and the necessity of retaining a system in which judicial discretion plays an important, even if not exclusive, role. In itself, support for indeterminate sentencing systems does not necessarily indicate skepticism about systematic theories of punishment: it is certainly possible that a group of judges would sentence offenders with a unanimously approved, fully worked out theory of punishment in mind.

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[99] STEPHEN, LIBERTY, *supra* note 46, at 131.

[100] *See infra* at notes 102-128 and accompanying text.

[101] *See, e.g.*, STEPHEN, LIBERTY, *supra* note 46, at 262–63.

[102] Stephen, *Variations*, *supra* note 76, at 755.

[103] *Id.* at 756.

[104] *Id.* at 755.

But Stephen's reasons for valuing judicial discretion put the issue more clearly. Stephen did not believe that any offense bore any "absolute relation" to any punishment.[105] In a rebuff to the idea that punishment is "required" as an abstract demand of justice, Stephen denied the "fanciful notion" that "some imaginary balance" would be brought to equipoise if A were put to death simply because he, A, had killed B.[106] Indeed, he believed that a codified system of punishments was dangerous because of its inflexibility, its incapacity to account for changed circumstances, and its erroneous supposition that there was any quantum of desert which could be permanently fixed for any given crime.[107] It is worth emphasizing again that these doubts about a fully codified system of punishment did not imply more generalized skepticism or opposition to all criminal reform or codification.[108] Stephen mentions repeatedly that specific areas of the criminal law were in need of simplification, clarification, and rationalization. In this very essay, for example, he notes that the maximum penalties for theft and other offenses ought to be reduced and made uniform.[109] But at least as to punishment, he prefers smaller reformative steps to wholesale revisions, and he is doubtful that codes which are overly rigid, proceed from top-down principles, and cannot be frequently revised are advisable.

If judicial discretion in sentencing is not to be controlled by principle, then is it not unrestrained and arbitrary in all of the ways that make indeterminate sentencing unattractive? No, says Stephen: "It does not, however, follow that discretion either is or ought to be wholly personal and subject to no regulation at all. By what then is it to be regulated? The answer is by custom and the pervading tone of public feeling."[110] Opponents of indeterminate sentencing may be squirming at this response, and Stephen concedes but is not much troubled by the criticism:

> This leaves, as I have already admitted, a wide range within which nothing more can be said than that the judge ought to exercise his discretion in good faith and with the closest possible attention to the circumstances of the case. Some will be more lenient, some more severe; but this, I think, is incidental to the infliction of punishment.[111]

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[105] *Id.* at 761.

[106] *Id.*

[107] *Id.* at 761–62.

[108] *See, e.g.*, James Fitzjames Stephen, *Suggestions as to the Reform of Criminal Law*, *supra* note 72, at 740. For the profound influence of Stephen's Draft Code of 1878, see M.L. Friedland, *R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law*, 1 O.J.L.S. 307 (1981).

[109] Stephen, *Variations*, *supra* note 76, at 765.

[110] *Id.* at 766–67.

[111] *Id.* at 767.

Stephen notes that the charge of arbitrariness in such a system is unwarranted because a reticulated and determinate system is itself arbitrary in punishing dissimilar crimes similarly, but his essential point is that sentencing schemes which vest too much authority in the abstractions of punishment principles are undesirable because they are liable to exclude too many relevant details and reasons for punishment. Even if greater judicial discretion results in instances of unequal punishment, the inequality of particularistic assessment—its necessary partiality—is in some measure in the very nature of appropriate punishment.[112] At the very least, it is a necessary cost of a properly functioning institution.[113]

Stephen sounds these themes repeatedly. At one point in the *History*, for example, he wonders aloud what a judge ought to do when confronted with conflicting punishment interests:

> The only practical result in the actual administration of justice of admitting each as a separate ground for punishment is that when a discretion as to the punishment of an offence is placed in the judge's hands, as it is in almost all cases by our law, the judge in the exercise of that discretion ought to have regard to the moral guilt of the offence which he is to punish as well as to its specific public danger.[114]

Both kinds of consideration, in sum, ought to impact the judge's discretion, and it is "pointless" to suppose that any prior categorical determination of the importance of each consideration, based on claims of justice, equality, liberty, or any other abstract principle, ought to control.

Likewise, in his shorter work, *The Classification and Definition of Crime*, Stephen observes, first, that "[i]t is the inevitable result of the process by which English Law has grown up, that it should be unsystematic in its arrangements and definitions."[115] Whatever classifications ought to be made should be in some sense organic and particular, rather than proceeding from broadly applicable and hard-edged principles: "To attempt to extract from our existing authorities a scientific system of criminal law is much like trying to systematize a set of irregular verbs."[116]

The core view, therefore, that grounds Stephen's beliefs about punishment and its justification depends largely on an anti-systematic methodological

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[112] Stephen's criticisms of an egalitarian ideal in the punishment context run parallel to his criticisms of equality as an abstract, foundational political value. *See generally* STEPHEN, LIBERTY, *supra* note 48, 191–92.

[113] Stephen sometimes stakes out the more moderate position that the unsystematic nature of sentencing carries with it the significant cost of seeming disorder and mismanagement. James Fitzjames Stephen, *The Classification and Definition of Crime* (May 5, 1856), *in* PAPERS READ BEFORE JURIDICAL SOCIETY: 1855–1858, 208–09 (1858) [hereinafter *Classification and Definition*].

[114] STEPHEN, HISTORY II, *supra* note 48, at 83.

[115] Stephen, *Classification*, *supra* note 113, at 192.

[116] *Id.*

commitment—a suspicion that the theorist's drive to express an exclusive principle of punishment is apt to derail judges from the wise practical exercise of their discretion to consider multiple, clashing values. Of the theorist's delusions that such a principle or set of rules has, seemingly always for the first time, been found, he writes:

> Instances are to be found in abundance in the history of speculation . . . in which people have tried to show that all previous writers and thinkers were merely their precursors, and that these precursors were groping blindly after great truths, certain aspects of which they dimly recognized, though the full knowledge of them was reserved for the reformers themselves. 'See how my theory reconciles and gives symmetry to all the great doctrines which you, my predecessors, who were all very well in your way, did not succeed in grasping,' is the remark more or less emphatically made by many a reformer when he looks on his work and, behold, it is very good.[117]

Exactly this critique anchors Stephen's opposition to the exclusivity of punishment theory. "[I]nflexible rule[s]" relating to the imposition of punishment, which ostensibly make it possible for the same punishment to be administered in every like case, are to be avoided "because the degrees of moral guilt and public danger involved in offences which bear the same name and fall under the same definition must of necessity vary."[118]

Stephen's anti-systematic methodological commitments extend even to capital punishment. He believed that it is unprofitable to codify those murders which deserve the death penalty:

> [N]o definition which can ever be framed will include all murders for which the offender ought to be put to death, and exclude all those for which secondary punishment would be sufficient. The most careful definition will cover crimes involving many different degrees both of moral guilt and of public danger; moreover, those murders which involve the greatest public danger may involve far less moral guilt than others which involve little public danger.[119]

In fact, at one point in the second volume of the *History*, Stephen illustrates his antipathy for reductive answers to the question of the merit of capital punishment by describing his own capital sentencing practices over a three-year span. Those practices shed light both on his desire to reform the definition of murder in order to keep more distinct the moral condemnation of the label, and his abiding sense that

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[117] STEPHEN, LIBERTY, *supra* note 46, at 132.

[118] STEPHEN, HISTORY II, *supra* note 48, at 87.

[119] STEPHEN, HISTORY III, *supra* note 48, at 84.

judicial discretion even as to capital punishment was necessary. "I am convinced that in regard to capital cases the judge should have a discretion analogous to that which he has in cases not capital," he writes, and to this he adds an extended footnote explaining in light of his own sentencing experiences why greater discretion and an absence of rigid principles or rules was the preferable approach.[120]

Finally, even facets of the substantive criminal law were subjected to similar assessment. Stephen believed that the categories of mens rea could not be distilled definitively by the theorist. The issue of the identification of culpable mental states "relates not to some abstract or imaginary system of law, but to the positive law of the country in reference . . . ."[121] It was not quite "useless," Stephen believed, to formulate "[g]eneral theories as to what ought to be the conditions of criminal responsibility," but it was an exercise which inevitably depended "on the tastes of those who form them, and they cannot, so far as I can see, be said in any distinct sense to be either true or false."[122] Similarly, in the context of a discussion of the choice of evils justification, Stephen eschews reliance on any fixed rule at all to determine "cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it. . . ."[123] These cases cannot be "defined beforehand, and must be adjudicated upon by a jury afterwards . . . . I see no good in trying to make the law more definite than this, and there would I think be danger in attempting to do so."[124]

In sum, Stephen's substantive views of punishment must be considered in light of his central meta-theoretical position. In uncannily modern—even value pluralist—sounding terms, Stephen writes that the "*erreur mère* . . . lies in the fact that nearly every writer is an advocate of one out of many forces, which, as they act in different directions, must and do come into collision and produce a resultant according to the direction of which life is prosperous or otherwise."[125] Societies do not progress from "bad to good" as intellectuals develop more and more orderly political or legal visions, and certainly not as they reduce the functions of institutions to reflect fewer and fewer values.[126]

In the context of criminal punishment, systematic and exclusive theories may partake of a type of logical elegance, but in the end, writes Stephen, the fundamental limitation of theory is that it is never capable of expressing in fully satisfying fashion the complexity of the world that it means to describe, order, and judge. Stephen's concern echoes what was described earlier as the second danger of systematization—the possibility that rigidity in one's ideas about punishment

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[120] STEPHEN, HISTORY II, *supra* note 48, at 89.

[121] *Id.* at 96.

[122] *Id.*

[123] *Id.* at 109–110.

[124] *Id.*

[125] STEPHEN, LIBERTY , *supra* note 48, at 173.

[126] *See id.* at 212.

will choke off the ability to recognize and exist in a position of tension between conflicting values and purposes[127]:

> It is this necessity for working with tools which break in your hand when any really powerful strain is put upon them which so often gives an advantage in argument to the inferior over the superior, to the man who can answer to the purpose easy things to understand over the man whose thoughts split the seams of the dress in which he has to clothe them . . . . The things which cannot be adequately represented by words are more important than those which can . . . . This also is the reason why our language on the deepest of all deep things is so poor and unsatisfactory, and why poetry sometimes seems to say more than logic . . . . Logic drives its thoughts into your head with a hammer. Poetry is like light.[128]

A poetry of criminal punishment sounds rather impractical, but what Stephen really means is to espouse a resolutely unsystematic and inclusive approach to the justification of punishment. It is precisely this methodological stance which has both eluded contemporary writers and which has resulted in such confusion about how best to characterize Stephen's thought. To ask whether Stephen was a retributivist, or a consequentialist, or a hybrid theorist, is at once to ask a question with no definite answer and to ask the wrong question.

B. *The Moral Freight of Punishment*

The relationship between morality and criminality plays an important role in Stephen's ideas about punishment which connects directly to both traditionally retributivist and consequentialist functions of punishment. Punishment was, Stephen believed, a social activity often freighted with an intrinsic moral significance. And the morality of punishment depended on the extent to which offenses could be said to merit it, as well as the socially sanitary effects of reaffirming that certain classes of criminal acts were, in fact, wrongful.

Stephen has sometimes been described as a "legal moralist" (a term possibly coined by Hart)[129] but there seems to be some confusion about what the term actually means. Leo Zaibert, for example, claims that legal moralism "is the view that it is legitimate (at least prima facie) for the state to criminalize whatever is morally wrong, regardless of whether or not it harms anyone,"[130] and he includes Stephen within this definition. Without discussing Stephen specifically, Robert

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[127] *See supra* at notes 43–44, and accompanying text.

[128] STEPHEN, LIBERTY, *supra* note 46, at 247.

[129] HART, *supra* note 65, at 6.

[130] Zaibert, *supra* note 62, at 141. *See also* David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1439 n.16 (2008) ("Legal moralism typically refers to the claim that the law should be used to enforce morality . . . .").

Goodin makes a similar argument that legal moralism "is the doctrine that law should track morality,"[131] and Jody Kraus likewise says that legal moralism "holds that the state is justified in enforcing morality generally."[132]

Whatever the accuracy of these descriptions of legal moralism, they do not match up well with Stephen's views about the relationship of morality and punishment.[133] Stephen did not believe that the criminal law ought to be used to punish all, or even most, episodes of immorality. He did claim that understanding criminality was both a legal and moral enterprise, and that "the merits and defects of legal definitions cannot be understood unless the moral view of the subject is understood."[134] But he was clear that "[l]aw and morals are not and cannot be made co-extensive, or even completely harmonious."[135] Criminal law, he said, "must, from the nature of the case, be far narrower than morality. In no age or nation . . . has the attempt been made to treat every moral defect as a crime."[136]

What Stephen believed was that as to a comparatively narrow and circumscribed, but vitally important, category of criminal law—the hottest core of criminal law,[137] encompassing the worst crimes, especially including "gross offenses . . . murder, rape, arson, robbery, theft, or the like"[138]—the overlap between morality and criminality was nearly complete. Moreover, society ought in such cases to use the criminal law both to signal social condemnation for the commission of such offenses and to reaffirm its commitment to those interdictions. No implausible claims about social disintegration are advanced by Stephen; no

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[131] Robert E. Goodin, *An Epistemic Case for Legal Moralism*, 30 O.J.L.S. 615, 615 (2010).

[132] Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1611 n.20 (2009).

[133] Michael Moore's definition—that "in some sense there are right answers to moral questions . . . and that such right answers do not depend on what most people . . . happen to think about these matters"—is entirely disconnected from Stephen's views. *See* MOORE, *supra* note 8, at 645. Even Jeffrie Murphy's careful characterization of the legal moralist as someone who refuses to "grant that it was ever wrong *in principle*" to use criminal law to enforce moral prohibitions, while it may be perfectly correct, is not certain to include Stephen. Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 74–75 (1995). At all events, the issue of whether "in principle" it was possible to divorce criminality and morality would probably have seemed a rather abstract question to Stephen's more practical mind.

[134] STEPHEN, HISTORY II, *supra* note 48, at 75.

[135] *Id.*

[136] *Id.* at 78–79. Perhaps the definition of legal moralism that most closely fits Stephen's view was formulated by Joel Feinberg: that "it is always a *relevant reason* of at least minimal cogency in support of penal legislation that it will prevent genuine evils other than harm and offense." *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 5 (1988).

[137] Stephen is vulnerable to Doug Husak's objection that a "time-honored device to retain some degree of fit between theory and data is to confine the application of the theory to the so-called *core* of the criminal law . . . . The adequacy of this device, of course, cannot be assessed in the absence of a criterion to identify the core of the criminal law." Douglas Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 969 (2000).

[138] STEPHEN, HISTORY II, *supra* note 48, at 80–81.

argument is made that without an unerring and unchanging commitment to morality, things will fall apart. Rather, the claim is that in any given period, and as to a comparatively small but crucial class of crime, the overlap between morality and criminality ought to be reflected in the law's treatment of those specific offenses.

This is what Stephen is getting at in the oft-cited "good-to-hate-criminals" passage: that for the restricted part of criminal law which coincides with the most fundamental moral proscriptions, a society that wishes to maintain its hold on the sense in which those transgressions are deeply wrongful ought to use the criminal law to give expression to and reaffirm those commitments.[139] Stephen remarks that criminal law is an "extremely rough engine"[140] and must be used sparingly and with great circumspection. Nevertheless, he views it as an appropriate purpose of criminal law to vindicate basic and essential moral principles.[141] "In short," he writes, "[criminal law] affirms in a singularly emphatic manner [the] principle . . . that there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity."[142]

The quality of Stephen's understanding of the relationship of morality and criminality is best summed up in the following statement of what represents (even, I daresay, today)[143] a rough understanding of criminality:

> By a criminal, people in general understand not only a person who is liable to be punished, but a person who ought to be punished because he has done something at once wicked and obviously injurious in a high degree to the commonest interests of society.[144]

Acute and learned writers sometimes have been wont to interpret statements like this as proof that Stephen was utterly unconcerned with moral truths themselves—or, in the punishment realm, with the actual desert of punishment for any given offense—and only interested in what common people believed about these matters. So, for example, Jeffrie Murphy writes that for Stephen, "society is bound together, not by moral truth, but simply by *shared moral beliefs*—however irrational and unenlightened those beliefs may be."[145]

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[139] *Id.* at 81. *See also* STEPHEN, LIBERTY, *supra* note 46, at 162.

[140] STEPHEN, LIBERTY, *supra* note 46, at 143.

[141] *Id.*

[142] *Id.* at 162. The argument against self-protection as the exclusive grounds of punishment is of course a reference to the theory of harm that Stephen read in Mill.

[143] Stephen did not believe that there was anything conceptually necessary about criminality, so he would have been perfectly happy to agree that not all criminality manifests this quality.

[144] STEPHEN, HISTORY II, *supra* note 48, at 76.

[145] Murphy, *supra* note 133, at 93. *See also* Ristroph, *supra* note 89, at 1157.

Yet a better interpretation may be that commonly held moral beliefs with respect to criminality actually do represent a kind of truth with its own independent normative force.[146] Stephen believes not only the empirical proposition that many people actually do feel certain ways about certain classes of particularly heinous offenses, and that it is socially sanitary for the criminal law to reaffirm those views, but the normative proposition that they are right to feel that way—that offenders who commit grave crimes deserve punishment not merely because most people may think so, but because such people have acted wrongfully. "[A]n institution works well," Stephen writes in another context, when "it is founded on true principles, and answers its purpose."[147] In the case of the most serious offenses at least, there is an overlap between "true principles" and commonly-held views.

Consider also the following passage from the *History*:

> My other observation is that, in my opinion, the importance of the moral side of punishment, the importance that is of the expression which it gives to a proper hostility to criminals, has of late years been much underestimated . . . . My own experience is that there are in the world a considerable number of extremely wicked people, disposed, when opportunity offers, to get what they want by force or fraud, with complete indifference to the interests of others, and in ways which are inconsistent with the existence of civilised society.[148]

Stephen is not saying only (or even primarily) that cohesion in any society requires the official expression of condemnation of criminality—what has been termed the "denunciatory" theory of punishment—whether the reasons for such treatment are deserved or not. He is saying that "extremely wicked people" ought to be denounced—that they have merited society's rightful condemnation, and that there is no alternative measure of wrongfulness (immorality) which is any more "true" or "real" by which to judge them. Furthermore, and contrary to those who have described Stephen as a "vengeance theorist" or an "assaultive retributivist," Stephen believed that exposure to the infliction of pain on offenders would sensitize the public to the moral power of punishment. This contact with the real world of pain in punishment would temper the public's desire for vengeance:

> It is not to be wished that whatever is wrong and bad should be penned off from the rest of the community in a moral cesspool . . . . A somewhat more precise acquaintance than is commonly possessed with some of the

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[146] This gloss on Stephen's views follows very much from the discussion of his normative commitment to judicial custom as a check on gross disparities in sentencing.

[147] STEPHEN, LIBERTY, *supra* note 46, at 204.

[148] STEPHEN, HISTORY II, *supra* note 48, at 91.

> secrets of prisons and hospitals would make many of us sadder, and most of us wiser.[149]

The interplay and mutual reinforcement of expressivist reasons which sound in consequentialism and straightforwardly desert-oriented considerations also color Stephen's discussion of the reasons for differential punishment of various kinds of homicide. For example, in considering the distinction between killings done with minor provocation and sudden killings with antecedent malice, Stephen's reasons for punishing them similarly blends both types of "moral" considerations. Stephen did not understand why "wanton" killings upon "slight provocation" were any less culpable than killings with tacit or unknown motivations.[150] Similarly, Stephen argued that the distinction between murder and manslaughter should not rest on traditional and, he believed, artificial distinctions in the manner of the killing, but on the killing's differential "moral character": killings which evinced "on the one hand, brutal ferocity, whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by a serious cause."[151] At some points, Stephen even includes what today might be described as a victim vindication theory of punishment, which he blends together seamlessly with other justifications implicating punishment's moral freight:

> The criminal is triumphant and victorious over his enemy and over the law which protects him until he himself has suffered a full equivalent for what he has inflicted, in other words, in the case of homicide, till he has been put to a shameful death, and from this he ought to be excused only on grounds capable of being understood by the commonest and most vulgar minds.[152]

There are here identifiably distinct, but blended, components of victim vindication theory, expressivism, and simple moral desert.

The same view emerges in his discussion of the distinction for purposes of punishment between different types of homicide. First, with respect to killings done with premeditation and deliberation as compared with those done in hot blood, he says that distinctions in punishment ought not to depend on procrustean categories but on an assessment of the comparative "natural sense" in which each kind of killing manifests dangerousness coupled with, in Stephen's colorful language, "diabolical cruelty and ferocity"—that is, wrongfulness.[153]

Second, he makes similar points in discussing the comparative moral culpability of what is commonly called depraved heart or reckless murder and

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[149] STEPHEN, ESSAYS, *supra* note 48, at 148 (*Pain*).

[150] STEPHEN, HISTORY III, *supra* note 48, at 51.

[151] *Id.* at 71.

[152] *Id.* at 91.

[153] *Id.* at 94.

intentional murder. Stephen's emphasis always in the end implicates a fundamentally desert-oriented moral quality:

> Is there anything to choose morally between the man who violently stabs another in the chest with the definite intention of killing him, and the man who stabs another in the chest with no definite intention at all as to the victim's life or death, but with a feeling of indifference whether he lives or dies? It seems to me that there is nothing to choose between the two men, and that cases may be put in which reckless indifference to the fate of a person intentionally subjected to deadly injury is, if possible, morally worse than an actual intent to kill.[154]

Stephen uses the language of comparative "cruelty" to criticize what was then the division between depraved heart murder and intentional homicide: the more cruel the offense, the greater the moral freight implicated in the punishment that ought to be expressed and that was deserved.[155]

Third, Stephen was a staunch opponent of the doctrine of felony murder or implied malice, but the reasons for his dislike of the doctrine go not to skepticism about its deterrent power, but to the dilution of the moral opprobrium that attaches to the core case of murder.[156] Felony murder, Stephen believed, cheapens the moral atrocity of murder, both for expressivist and desert-oriented reasons: "A thief trips up a policeman who is in pursuit of him, and kills him, can this be compared in atrocity to the offence of stabbing a man to the heart in return for a blow?"[157] Using terms that sound in moral desert, Stephen skillfully argues that implied malice ought to be eliminated as a category of murder, and perhaps even as an offense altogether:

> [S]hooting at a fowl with intent to steal it and killing a man is murder, because of the felonious intent, whereas if the thing shot at were a wild bird the accidental killing of a man would be but barely manslaughter . . . . [T]his doctrine is as much mistaken in law as it is repugnant to common sense-and humanity.[158]

Finally, and in keeping with his preference for practical concerns over abstract ideas, Stephen frequently considers famous cases for what they show about the moral quality of punishment. For example, in his account of "Palmer's

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[154] *Id.* at 92–93.

[155] *Id.*

[156] *See* James Fitzjames Stephen, *Capital Punishments*, *in* 69 FRASER'S MAG. FOR TOWN & COUNTRY 753, 762–68 (1864) [hereinafter Stephen, *Punishments*].

[157] *Classification and Definition*, *supra* note 113 at 202.

[158] STEPHEN, GENERAL VIEW, *supra* note 48, at 131–32. *See also* STEPHEN, HISTORY III, *supra* note 48, at 57–58, 74–76.

Case," Stephen describes how the defendant, a doctor, was convicted of murdering his friend by poisoning him in order to steal the dead man's money to pay down large debts.[159] Stephen concludes his treatment of this particularly heinous case with the observation:

> [S]uch a thing as atrocious wickedness is consistent with good education, perfect sanity, and everything, in a word, which deprives men of all excuse for crime. Palmer was respectably brought up. . . . He was a model of physical health and strength, and was courageous, determined, and energetic. No one ever suggested that there was even a disposition toward madness in him; yet he was as cruel, as treacherous, as greedy of money and pleasure, as brutally hard-hearted and sensual a wretch as it is possible even to imagine.[160]

As in all of these examples, it is the moral freight of criminal law—its implication of several functions which might without much precision be described as desert-oriented—which runs like a thread through his views of punishment.

Since some writers have commented on Stephen's views of the relationship among religion, morality, and criminality, and because that relationship may shed some light on the nature of what I am calling the moral freight of punishment, a brief word on the subject is in order. Stephen was deeply interested in the relationship among the Christian religion, morality, and criminality,[161] but not because he believed that un-Christian behavior of any kind ought to be categorically criminalized. For Stephen, social institutions, including the institution of criminal law and punishment, express "not merely the present opinions of the ruling part of the community, but the accumulated results of centuries of experience, and these constitute a standard by which the conduct of individuals may be tried, and to which they are in a variety of ways, direct and indirect, compelled to conform."[162] Stephen believed in the loose but vital association of "virtuous" and "vicious" conduct with religious (for Stephen, Christian) belief, or its absence, and he further praised the government which acted "upon such principles, religious, political, and moral, as they may from time to time regard as most likely to be true."[163]

Naturally, this is a position in tension with at least some of the commitments of liberal states, but for present purposes, it is more interesting to probe the degree to which Stephen saw a relationship between criminal sanction and religiosity. As in the case of morality generally, Stephen believed that only very partial agreement

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[159] STEPHEN, HISTORY III, *supra* note 48, at 400–04.

[160] *Id.* at 424–25.

[161] *See generally* STEPHEN, ESSAYS, *supra* note 48. *See also* STEPHEN, HISTORY III, *supra* note 48, at 396–98.

[162] STEPHEN, LIBERTY, *supra* note 46, at 157.

[163] *Id.* at 87.

as to religious opinion was necessary for sustaining and mutually reinforcing the sanction against the worst criminal offenses.[164] To deny that there was any relationship at all between Christianity and morality, and in turn between morality and criminality, was tantamount to "denying the agency of the sun in the physical world."[165]

Moreover, Stephen saw ties between criminal law and religiosity, not only because that relationship was, he believed, likely to enhance social stability, but also because those connections formed the core of social attitudes that Stephen deemed actual, real, and, in that modest sense, true.[166] Stephen is never quite clear that he takes this view, however. He poses the issue conditionally, but with the suggestion that he approves the formulation: "If, then, virtue is good, it seems to me clear that to promote the belief of the fundamental doctrines of religion is good also, for I am convinced that in Europe at least the two must stand or fall together."[167] Nevertheless, this statement and others like it suggest at least a latent moral realism about religious belief as well as the institution of criminal law—that a civilization's religion and its morality are at a deep level intimately bound up, and that one risks greatly altering (not destroying, as he takes pains to emphasize) the civilization and its particular institutions—with their distinct histories and heritage—if one removes the systems of support represented by the religious convictions held by the majority of the populace.[168]

To recapitulate, a core feature of Stephen's thought about the nature and aims of criminal punishment depends upon the relationship of criminality to morality, and it finds expression in the morally freighted quality of punishment. That relationship is not all-encompassing; it does not represent anything conceptually necessary about all criminality. It does not imply the implausible belief that the domains of morality and criminal law are co-extensive. Its reach is more limited, but no less powerful—implicating the most serious types of criminality—and it trades on expressivist ideas as well as more ordinary notions of simple desert. It involves conventionally consequentialist-sounding claims about the stability-enhancing potential of crime and punishment as well as conventionally retributivist-sounding claims about moral evil and the rightfulness and deservedness of its punishment. This unrepentant blending together of the functions of punishment matches Stephen's broad commitment to methodological anti-system and inclusivity.

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[164] *Id.* at 93.

[165] James Fitzjames Stephen, *The Unknowable and the Unknown*, *in* 15 THE NINETEENTH CENTURY: A MONTHLY REVIEW 905, 914 (James Knowles ed., 1884).

[166] *See* James Fitzjames Stephen, *Sceptical Humility*, *in* 17 SATURDAY REV. OF POL., LITERATURE, SCI., & ART 434, 435 (John Cook ed., 1864).

[167] STEPHEN, LIBERTY, *supra* note 48, at 98.

[168] *See id.* at 232–33.

C. *The "Expediency" of Punishment*

There is little doubt that deterrence figures prominently as a function of punishment in Stephen's thought. Much of the earlier discussion evidences his commitment to deterrence alongside other values. While the expression of moral condemnation may be one aim of punishment:

> [a]nother object is the direct prevention of crime, either by fear, or by disabling or even destroying the offender, and this which is I think commonly put forward as the only proper object of legal punishments is beyond all question distinct from the one just mentioned [the aim of moral condemnation] and of coordinate importance with it.[169]

As has been noted, Stephen describes himself as a "common" utilitarian.[170] Though the label is not transparent, Stephen is at least committed to the view that crime prevention is a central function of punishment and that the state's expression of condemnation in response to criminal offense serves to strengthen its moral commitments.[171]

Less clear is the nature of the currency in which Stephen's consequentialism trades. Stephen does not generally speak of the utility of punishment but of its "expediency." The notion of expediency is tied, for Stephen, to its appropriateness—its meetness. The idea of expediency, as Stephen uses it, helps to illuminate his thought about punishment in two ways. First, it distinguishes Stephen's brand of consequentialism from almost all contemporary exemplars of consequentialism which play any major role in punishment theory (e.g., hedonic consequentialism, preference satisfaction consequentialism, and so on). Second, it connects directly to his distinct sense both of the moral freight of punishment and his opposition to system.

To understand the idea of expediency, it may help to begin with the following passage:

> A rule of positive morality may be called unjust as well as law. For instance, there are in most societies rules which impose social penalties on persons who have been guilty of unchastity, and these penalties are generally more severe upon women than upon men. Those who think it on the whole expedient to make the difference in question will regard these rules as just. Those who think it inexpedient will regard them as

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[169] STEPHEN, HISTORY II, *supra* note 48, at 83.

[170] STEPHEN, LIBERTY, *supra* note 46, at 227.

[171] STEPHEN, HISTORY III, *supra* note 48, at 91.

> unjust, but it is impossible to discuss the question of their justice or injustice apart from their expediency or inexpediency.[172]

In this and in later passages where Stephen makes similar statements about the nature of expediency, he connects the justice—or, for lack of a better term, the propriety—of a law to its effectiveness in "get[ting] what we want."[173] Does this mean, as some have claimed,[174] that Stephen holds no substantive views about what is actually expedient? Stephen is rarely crystal clear about this, but I argue that the answer is no.

As was seen in the discussion of his skepticism about systematic theory and his commitment to the moral freight of criminal law, the grounding for Stephen's ideas generally takes the form of the normative force of common custom. So, too, for the idea of expediency. In this, and as he emphasizes himself, he resembles Edmund Burke:

> Like almost all the principal writers, on what may broadly be called the orthodox side, in the eighteenth century, Burke was from first to last a utilitarian of the strongest kind . . . . Expediency is thus the basis of all his speculation, and the first rule of expediency is to set out from existing facts, and to take all measures whatever with respect to them.[175]

Stephen wrote this passage immediately after approvingly citing Burke at length for the views (1) that the problems of politics and law relate not to "truth and falsehood. They relate to good or evil. What in the result is likely to produce evil is politically false; that which is productive of good is politically true";[176] and (2) that liberty and natural rights are not founded on an "abstruse science. [They are] a blessing and a benefit, and all the just reasoning that can be upon it, is of so coarse a texture as perfectly to suit the ordinary capacities of those who are to enjoy, and of those who are to defend it."[177] Stephen's is not the rationalistic utilitarianism of Mill.[178] It is instead founded on the normative power of custom to shape and give content to what is expedient.

From this, and turning to the realm of punishment, the relationship of expediency to the other components of Stephen's views of punishment becomes

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[172] STEPHEN, LIBERTY, *supra* note 46, at 182.

[173] *Id.* at 184.

[174] *See, e.g.*, Murphy, *supra* note 133, at 76; Ristroph, *supra* note 89, at 1156–57.

[175] STEPHEN, HORAE SABBATICAE, THIRD, *supra* note 48, at 114–16.

[176] *Id.* at 115 (quoting Edmund Burke, *Appeal From the Old to the New Whigs*).

[177] *Id.* at 116. Less important for present purposes is the accuracy of Stephen's description of Burke as a utilitarian than his association of expediency with custom. For more on the connections between Stephen and Burke, see Radzinowicz, *supra* note 66, at 15–16; SMITH, *supra* note 45, at 114–16.

[178] *See, e.g.*, STEPHEN, LIBERTY, *supra* note 46, at 78–79. *See also* James Fitzjames Stephen, *Mr. Lecky on Rationalism*, *in* 72 FRASER'S MAGAZINE 537, 540 (James Froude ed., 1865).

clearer. Criminal punishment's moral freight is connected to its expediency not through a theoretical principle, but through the common customs and traditions associated with the practice of punishment:

> The general doctrine as to both murder and theft may be said to be that, in the normal state of society, people ought—that is, it is highly expedient for them—to guarantee to each other the enjoyment of life and property against the attacks to which private passions usually expose them. This is the common settled course of human societies[.][179]

In the context of capital punishment, Stephen brings to bear a battery of consequentialist reasons for supporting the practice as punishment for murder. The first two, its effective deterrent value and its expressively cohesive value, are familiar consequentialist functions; but the third specifically references both its "cheap[ness]" (a purely economic consideration) and its "appropriate[ness]."[180] The expediency of retaining capital punishment, Stephen believed, implicates both conventionally consequentialist aims and the appropriateness of condemning grave offenses—the idea that the "temper in which it is desirable that people should regard great crimes" be one of "warmest indignation": "The toleration of what ought not to be tolerated is nearly as great an evil as the persecution of what ought to be tolerated."[181]

It is sometimes supposed, particularly by those who have described Stephen as an "assaultive retributivist," that hard-sounding statements such as these establish that Stephen was a callous sadist or that he approved the ventilation of bloodthirsty feelings for its own sake.[182] But this was not the case. Stephen believed that capital punishment was the most serious and sober event in criminal law; it was not in the least an occasion for the crude gratification of social blood-lust:

> Shamefully to expel a man from the world, to turn him out and have done with him, when he is clearly fit to live there no longer, may be a stern proceeding; but it is not the proceeding of people to whom the infliction of physical pain is a pleasure.[183]

A similar idea of expediency as appropriateness can explain why Stephen was opposed to capital punishment for felony murder.[184] It is also the reason that Stephen believed that the homicide laws needed reforming to trim from the definition of "murder" categories of homicide that did not belong there: "[E]very

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[179] STEPHEN, ESSAYS, *supra* note 48, at 211.

[180] Stephen, *Punishments*, *supra* note 156, at 753.

[181] *Id.* at 762.

[182] *See supra* at notes 92-96 and accompanying text.

[183] Stephen, *Punishments*, *supra* note 156, at 763.

[184] *Id.* at 765.

part of the legal conception of murder, as it stands at present, is open to considerable objections, and is wider than the common popular notion."[185] And it also explains why he believed that attempted murder ought to be a capital offense.[186]

Stephen's commitment to the expediency of punishment, itself deriving in no small measure from his "common" utilitarianism, mixes together traditionally consequentialist functions of punishment with a less conventional idea of punishment's propriety or meetness. As in the case of punishment's moral freight, theorists who have relied on contemporary varieties of consequentialism to describe his thought have been susceptible of missing the complex interplay of explanations that lace Stephen's view that criminal law and punishment ought to protect society from crime by relying on customary ideas of propriety.

D. *The Interdictory Force of Punishment*

Stephen writes about the final theme in his thought about punishment less frequently than the others, but it is nevertheless an important component. And in this last idea, Stephen reveals his Austinian sympathies.[187] The practice of punishment, says Stephen, ultimately does not depend on developing more and more organized justifications for punishment, but on the imposition of interdictory force by the state on its subjects—"[f]orce is an absolutely essential element of all law whatever. Indeed law is nothing but regulated force."[188]

Moreover, laws which are both morally freighted and expedient carry with them a stronger quality of interdictory force, and therefore a greater chance of gaining legitimacy, than those which do not.[189] For example, for Stephen, international law and criminal law lay on opposite poles because the sense in which people felt compelled to obey them was so different—that is, their "enforceability" was, respectively, weak (international law) and powerful (criminal law).[190] But even truly binding law—paradigmatically criminal law—while it may maintain a limited overlapping domain with common morality, has nothing like the

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[185] *Id.* at 766.

[186] *Id.* at 767.

[187] *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE (Isaiah Berlin et al. eds., Curwen Press 1954) (1832). *See also* Leonard, *supra* note 88, at 204 (calling Stephen and Holmes fellow Austinians).

[188] STEPHEN, LIBERTY, *supra* note 46, at 200. *See also id.* at 118 ("[T]he essence of life is force, the exertion of force implies a conflict of forces."); SMITH, *supra* note 45, at 146 (noting that Stephen "had said at some length . . . [that force] was the presupposed basis of all governments").

[189] *See* SMITH, *supra* note 45, at 88 ("[I]n the case of substantive law and punishment, Stephen saw as of prime importance the promotion of public confidence in the system.").

[190] STEPHEN, HISTORY II, *supra* note 48, at 35.

power of morality itself to bind and bend individuals to the will of the person exerting force[191]:

> Criminal legislation proper may be regarded as an engine of prohibition unimportant by comparison with morals and the forms of morality sanctioned by theology. For one act from which one is restrained by the fear of the law of the land, many persons are restrained from innumerable acts by the fear of the disapprobation of their neighbors, which is the moral sanction; or by the fear of punishment in a future state of existence, which is the religious sanction[.][192]

The deterrence of self-protection aside, for Stephen, a fundamental quality of the criminal sanction is the fear—a manifestation of psychological force—of transgression that it inspires.

Punishment schemes based on different types of distinct theories of punishment might vary in times and places depending on changeable tastes, but the imposition of force always, says Stephen, will remain an indispensable feature of punishment whatever its theoretical rationale. This position does not necessarily distinguish Stephen from many other punishment theorists who recognize that punishment requires a procedural mechanism of enforcement. Yet Stephen elevates interdictory force to a different plane of importance. As a staunch defender of the British Empire and its global power, Stephen celebrated the dominance of English law over any who would resist it; the force of law produces not an equal society, but a society of dominion. The interdictory force of punishment is not merely a legitimating procedural device but an instrument of physical and psychological coercion to bend the recalcitrant to the will of the governing class.

The interdictory force of punishment also supplies context to his own "common" utilitarianism, which does not depend on the hedonic idea of aiming at the greatest happiness for the greatest number of people but instead "the widest possible extension of the ideal of life formed by the person who sets up the standard."[193] The interdictory injunction "[t]hou shalt not commit crimes," the overwhelming threat of force that supports the commandment, and the consequent fear of violation that it inspires, is an unchanging element of any "expedient" system of criminal justice and punishment.[194] Force—like liberty and equality, in

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[191] Stephen makes different claims than do at least some (revisionist?) legal positivists, who speak of law as in some sense the uniquely binding normative system. Stephen is not claiming that force or coercion "individuates the law as a normative system," but instead that force is an integral part of all normative systems, including law. *Cf.* Ekow Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1198 (2008). *See also* Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 RATIO JURIS 1, 11 (2010).

[192] STEPHEN, LIBERTY , *supra* note 46, at 57.

[193] *Id.* at 228.

[194] *Id.* at 206–07.

Stephen's view—was to be thought good when the objective was good.[195] "When the object aimed at is bad," including in the case of punishment, then compulsion, too, is bad; expediency is determinative.[196] The interdictory force of punishment, in its association with the moral freight of punishment and its expediency, explains for Stephen the perceived legitimacy of punishment and the fear of transgression it excites.

IV. PUNISHMENT THEORY AND INTELLECTUAL HISTORY

The attempt to clarify Stephen's thought about punishment may serve its own historical purposes, but it also suggests two further questions. First, why have contemporary commentators who have described Stephen's ideas about punishment failed to capture them accurately? Second, in light of that failure, what, if any, adjustments might punishment theorists make, either when they train their descriptive sights on historical figures or when they fashion their own theoretical accounts, or both?

The response to the first question is comparatively straightforward. Stephen's ideas not only defy categorization within any of the currently dominant theoretical schools but it is also a central theme of Stephen's writing on punishment that theoretical anti-system and inclusivity is itself a chief desideratum. The methodological orthodoxies of contemporary punishment theory, when directed at Stephen's writing, were all but sure to render a firm grasp of Stephen's ideas unlikely. Theorists have struggled mightily to identify Stephen's thought cleanly with retributivism or consequentialism, explaining away or ignoring whatever writing did not match the preselected category. Those who have described Stephen as a hybrid theorist at times have done better, but at others have resorted to labels that seem to pick out a few unappealing qualities of the orthodox theories of punishment, relying on only a few fragments of Stephen's writing as evidence. This is not a criticism of them or their efforts—many are distinguished and deeply thoughtful writers. It is instead a claim that orthodox methodological commitments have prevented them from understanding the thought of a writer who did not share them.

As for the second question—whether punishment theorists might make adjustments to their methodological commitments in light of their misreading of Stephen, and the possible misreadings of other historical figures that a commitment to theoretical system and exclusivity might portend—the answer is less clear. First, one might argue that the case of Stephen is unique, or at least not necessarily representative. The orthodox methodology has not been an auspicious choice for understanding Stephen's thought, but perhaps it might be more successful as an analytical approach with respect to other historical figures who wrote about punishment—those, for example, with less multifarious and conflicting substantive

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[195] *See* STEPHEN, HORAE SABBATICAE, SECOND, *supra* note 48, at 12.

[196] STEPHEN, LIBERTY, *supra* note 46, at 85.

commitments. That may well be, but there is at least some reason to suspect that punishment theorists who consider historical figures sometimes (not always) conscript those figures in the service of what they consider to be the larger normative aim of their work. There is a danger lurking that the intellectual history of punishment might become the handmaid of normative punishment theory.

But this provokes questions of its own. Why should that matter? What is the task of the punishment scholar? These are very large questions, but a few speculative possibilities are offered here.

One might conceive several discrete tasks: to devise and justify approaches to the practice of punishment; to consider latent puzzles in existing punishment laws and practices; to challenge the settled and perhaps insufficiently examined conclusions of other writers; and to trace or uncover the history of punishment, with an eye to its future or otherwise. There are obviously many more. But it is clear enough that scholars who study punishment take up both descriptive and normative tasks. The issue is then whether it is desirable that those projects should be undertaken together and blended—and what role, if any, the intellectual history of punishment might play in the theory of punishment. There are, I think, two general possibilities.

A. *Ships Passing in the Night*

The principal obstacle for any attempt to blend the intellectual history of punishment and punishment theory might be described as a variation on the hoary is/ought gap. The mere historical fact that some person once thought and wrote about punishment supplies no independent reason for espousing her views as a justification of punishment practices today. Indeed, in Stephen's own case, at least some (and perhaps many) of the reasons for punishment that he defends have seemed profoundly unappealing to a variety of contemporary punishment theorists. Views deemed to be morally, politically, or legally objectionable, whatever their provenance, ought to be rejected. The intellectual history of punishment is one sort of activity; the justification of the state's coercive power to punish is another.

One might call this view of the relationship between intellectual history and normative theory the model of "ships passing in the night": each type of scholar—historical and philosophical—has his own projects to pursue. Those tasks ought to be undertaken without the ambition that one category of scholarship might have any substantial influence on the other. It may well turn out that intellectual history can uncover some explanation or justification of punishment, or some interesting and useful argument, or even some particularly objectionable claim, that might be incorporated into or used as a foil for one's preferred punishment theory. But such incorporation would depend on the degree to which the historical nugget was useful either to defend and explain one's theory or to show that it was superior—an improvement—to that which preceded it. In the absence of this type of instrumental relationship, the two scholarly endeavors would proceed largely independent of and isolated from one another.

The difficulty with the ships-passing-in-the-night model is that it is in practice impossible to achieve and that the risks are not insignificant that history will become the puppet of theory. The ideal of mutual independence and isolation is actually nothing of the kind. Part II of this article is only one of many examples of the union, even if largely an unsuccessful one, of these efforts. Indeed, it is unrealistic—perhaps even obtuse—to suggest that punishment theorists would do their work somehow self-consciously hermetically sealed off from historical contributions to the subject. To the contrary, because the model is in practice fantastically infeasible, it tacitly encourages theorists to deploy historical investigations strategically, working backwards from their own favored normative account so as to arrive, having detoured through the past, exactly where they intended when they journeyed forth.[197]

That is largely how Stephen's thought has been employed by many punishment theorists—as an instrument serving the interests of whatever view the theorist seeks to defend or criticize. There is nothing necessarily objectionable about this provided that one believes intellectual history really is the tool of normative theory: if it is, then there is little reason why it ought not to be used in this fashion. What matters most is that the strongest case is made for the normative account being proposed and defended, and tactical historical exposition might serve those ends effectively. Indeed, one might even revel in historical distortion for its rhetorical power to re-cement one's existing prescriptive views. Misrepresenting the past is worth it so long as our certitude about the present increases.

But the accuracy and perhaps even the viability of the ships-passing-in-the-night model is then less obvious. In fact, it is highly implausible to suppose that punishment theorists somehow could isolate themselves from considering the relationship between their own ideas and what preceded them. They will necessarily look to the past, whatever use may be made of it, in constructing their accounts.

If the interpenetration of intellectual history and normative theory is therefore inevitable, then the two types of scholarly inquiry are not ships passing in the night. Their paths cross—frequently. Since they do cross, and since theorists frequently make use of historical ideas, we require a richer account of the ways in which theory might be affected by intellectual history.

B. *Pluralistic Punishment and the Place of Intellectual History*

Another approach to the relationship of intellectual history and normative theory in punishment scholarship might begin from the premise that the boundaries

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[197] Much the same phenomenon may have occurred both in jurisprudence and constitutional theory. For the former, see generally BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010). For the latter, see generally Marc O. DeGirolami, *The Vanity of Dogmatizing*, 27 CONST. COMMENT. 201 (2010) (book review).

of the two enterprises are permeable. But the issue still would remain: even if some degree of interaction is admitted, the is/ought gap has not been bridged. The aim of a theory of punishment still is and must be to produce a normatively attractive justification of the exercise of the state-sanctioned infliction of pain. It is possible to be both a careful intellectual historian and nevertheless to reject the proposition that intellectual history ought in principle to influence one's normative justifications of punishment.

That is certainly true in principle, but, at least in the case of legal scholarship about Stephen, where descriptive and normative projects have fused, it has not generally been the case. Theorists who have approached Stephen have tended to do so using the methodological assumptions about punishment theory that prevail today. Moreover, oftentimes they may have misunderstood his thought because they were focused primarily on bolstering their own normative accounts. That is, they were not open to the possibility that exploring Stephen's ideas about punishment might introduce considerations which would complicate, or perhaps even conflict with, their preexisting normative commitments. This is in some measure to be expected when intellectual history collides with a methodology of systematization and exclusivity. The result is, in some cases, a good-faith but still very real distortion of the past coupled with its conscription in the cause of defending one's own prescriptive claims.

Still, while the union of intellectual history and normative theory may always present these dangers, they might be mitigated, by electing a normative approach whose own premises were themselves unsystematic and inclusive with respect to the reasons for punishment. Theorists who hold open the possibility that intellectual history might change or complicate their normative prescriptions would benefit from such an approach, simply because there would be conceptual space within their overarching view of the reasons for punishment to learn from history. I believe that one can find such a view in a pluralistic theory of punishment.

Following in the footsteps of value pluralist theories, the organizing idea framing a pluralistic theory of punishment is that the values both supporting and counting against the practice of punishment are likely to be incompatible (at least partially mutually exclusive) and incommensurable (lacking any universal scale of measurement through which the goods and evils of punishment could be conclusively rank ordered).[198] The incompatibility and incommensurability of the

[198] George Crowder, *Two Concepts of Liberal Pluralism*, 35 POL. THEORY 121, 125 (2007) (a value pluralist theory "contemplates the likelihood of many cases where moral decision making will be highly problematic, since there will be no absolute or universal ordering . . . to which we can appeal for a solution"). There is a vast literature on value pluralism with which I will not burden the reader. For a very few writings that have been influential for me, see generally WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002); JOHN GRAY, ISAIAH BERLIN (1997); JOHN GRAY, TWO FACES OF LIBERALISM (2000); STUART HAMPSHIRE, JUSTICE IS CONFLICT (2000); STUART HAMPSHIRE, MORALITY AND CONFLICT (1983); JOHN KEKES, THE MORALITY OF PLURALISM (1993); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); MICHAEL STOCKER, PLURAL AND CONFLICTING VALUES (1992); BERNARD WILLIAMS, ETHICS

values of punishment would entail the belief that no single value—and also no single value set—ought categorically to be preferred over another. It would also mean that any rigid systematization—a fixed rank ordering of the functions of punishment, for example—would be avoided.

In a recent paper, Michael Cahill usefully describes punishment pluralism in this way:

> An overtly pluralistic account eschews any favoritism toward or against particular purposes of punishment and also explicitly acknowledges the existence of multiple, possibly incommensurable principles or goals and the difficulty of adjudicating among them. It does not simplify the decision-making process—indeed, it might make it harder—but it clarifies that process. Given that punishment can serve multiple ends and generate multiple harms, which may conflict in ways that demand second-best solutions, reasonable minds can disagree about the proper resolution. But at least a pluralistic perspective openly and honestly reminds us that multiple answers *are* reasonable—rather than one being right and the others all ludicrous—and can increase the odds of realizing a better accommodation of our conflicting, often incompatible objectives instead of distorting the result by placing a thumb on the scale.[199]

In other writing, I have espoused or defended a value pluralistic view of various issues in law and legal theory.[200] For many difficult legal questions, I believe it to be a profitable methodological approach to the ever-present conflicts of values and the complexity of real disputes. Jeffrie Murphy once wrote that "[n]eat formal theories in ethics generally produce not illumination but (in Herbert Hart's fine phrase) uniformity at the price of distortion."[201] Much the same may be true for theories of punishment.

Some theorists of punishment have argued that most scholars today are already pluralists, or at least rapidly becoming so. Mitchell Berman, himself a punishment pluralist, claims that there is even an emerging "consensus regarding the pluralistic justifiability of punishment"[202] inasmuch as partisans of retributivism or consequentialism accept that features of the other camp ought to have influence in any reasonable approach to punishment. What Berman seems to

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AND THE LIMITS OF PHILOSOPHY (Frank Kermode ed., 1985); BERNARD WILLIAMS, MORAL LUCK (1982); GEORGE CROWDER, LIBERALISM AND VALUE PLURALISM (2002); and the essays in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997).

[199] Cahill, *supra* note 16, at 41.

[200] *See* Marc O. DeGirolami, *The Choice of Evils and the Collisions of Theory*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 25, 192–212 (2011); MARC O. DEGIROLAMI, TRAGEDY AND HISTORY: THE QUALITY OF RELIGIOUS LIBERTY (forthcoming Harvard University Press) (manuscript on file with author); DeGirolami, *supra* note 197.

[201] MURPHY, *supra* note 30, at 6.

[202] Berman, *Justification*, *supra* note 21, at 2.

mean, however, is that *hybrid* theories of punishment are increasingly popular—that more and more theorists are no longer pure consequentialists or pure retributivists. That seems plausible enough. But it does not speak directly to the objective of system that punishment theory also displays: many hybrid theorists are no less intent on excluding specific values of punishment—or in thoroughly organized punishment schemes which adhere strictly to their exclusive theories—than are, say, positive retributivists or pure deterrence theorists.

Be that as it may, and for the more limited purposes of this article, I want to make a different claim that does not depend either on defending the merits of pluralism in punishment theory or on a perfect description of the general state of the methodology of punishment theory. It is this: a pluralistic theory of punishment, exactly because of its refusal to elevate any one reason for punishment to master value status, its resistance to a fully systematic methodology, and its commitment to include a broad range of values within the compass of reasons to punish, is best suited to deal evenly with intellectual history and to learn from it. That is because a pluralistic theory of punishment would not be as burdened by the need to enlist historical writings about punishment (either as a sword or shield) to support its own commitments. The untidiness of a pluralistic punishment theory's view of the reasons to punish—its embrace of many sorts of reasons, and its belief that those reasons will invariably clash and cannot be permanently systematized—permits it greater freedom to listen carefully to what history can tell, and to pick and choose those features of historical studies of punishment which it finds relevant, interesting, and persuasive as it considers the multiple values that ought to count in its theory of punishment.

Three qualifications are necessary. First, it should be clear that I do not believe that Stephen himself was a model of punishment pluralism. While the first theme of his thought about punishment displays an admirable skepticism about systematic theories of punishment, and while he does blend a wide variety of punishment aims, explicitly without granting any one of them overriding status, he is too dismissive of rehabilitation and the state's responsibility for the general well-being of the offender as legitimate functions of punishment,[203] granting too much preeminence to the moral freight of punishment and its deterrent value.[204]

Second, the punishment pluralist who considers Stephen's (or anyone else's) thought certainly is not compelled to accept Stephen's arguments about punishment's aims if she finds them morally repugnant, ineffectual, passé, or otherwise unpersuasive. That is, punishment pluralists need not be uncritically accepting of the insights of intellectual history; indeed, it would be an untenable view that any theorist, pluralist or otherwise, ought to be uncompromisingly open to the normative power of intellectual history just in virtue of its being history.

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[203] *See* Radzinowicz, *supra* note 66, at 33 ("Reformation of the delinquent as a distinct function of punishment had no place in [Stephen's] view of criminology.").

[204] *See supra* at notes 129-168 and accompanying text.

Third, there is also the possibility that the punishment pluralist might himself misread, misunderstand, or misinterpret the insights of punishment history because of the premises of his own methodological approach. It is certainly conceivable that he might make the very same mistakes of illegitimate conscription that systematic theorists do.

Notwithstanding these caveats, however, the position of the punishment pluralist is superior to that of his rivals on the issue of the relationship of history and normative theory. Since it is inevitable that normative theory will engage with and draw on the resources of intellectual history—because the projects of normative punishment theory and descriptive punishment history are not ships passing in the night, but cooperative enterprises—pluralistic punishment theorists stand the greatest chance both of appreciating the subtleties of historical treatments of punishment and of improving their own ideas thereby. Punishment pluralists, unlike their monistic brethren, take a genial, open, and welcoming view of the possibility that an unforeseen and unnoticed argument for or against punishment might complicate and further becloud the swirl of values that attends the practice of punishment. That cheerful confusion is a state of affairs that punishment pluralists welcome, or at least do not dread.

Punishment pluralists believe that it is an error to seek a single, unifying theory of crime at any particular historical moment, including the present moment. They hold to the view that the actual reasons for punishment—as evidenced in the reality of the practice of punishment by courts[205]—are not best explained by the "closed world" of punishment theory but instead by the broader universe of "cultural values peculiar to different periods."[206] Those multivalent values clash and accepting that clash as an indelible feature of the social and historical practice of punishment is a perspicuous, useful, and, most importantly, true view to thinking well about the justification of punishment today. It is for this reason that punishment pluralists are in the best comparative position to learn and benefit from the past.

CONCLUSION

Contemporary punishment theory is a complex, variegated, technical, and increasingly fragmented enterprise. The dominant theoretical schools, retributivism and consequentialism, are the progenitors of a vast and ever-expanding array of highly sophisticated approaches, some of which carefully combine functions and are concerned to enunciate what punishment aims ought,

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[205] We have reached a rough stability in federal sentencing, with the Federal Sentencing Guidelines having been held merely advisory for sentencing judges, and with deferential appellate review of sentencing decisions. The current regime represents a kind of discretionary and particularistic common law of sentencing. The reasons for this state of affairs have constitutional causes, but it is nevertheless the case that the practice of federal sentencing today evinces a powerful methodological preference for punishment pluralism.

[206] Leonard, *supra* note 51, at 694–95.

and ought not, to count. A commitment to system—to exclusivity and a fully worked out justification of punishment by recourse to only a small number of values—characterizes punishment theory today. While there is no doubt that punishment theory has benefited greatly from this approach, there may be costs as well.

One cost, this paper has claimed, involves the relationship of punishment theory and the intellectual history of punishment. Punishment scholars who engage with past authors are apt to superimpose the conventional methodological commitments—the concepts and categories of normative punishment theory that currently prevail—on the ideas of bygone eras, with the result that those ideas are likely to be misread and misconstrued. The pervasive misunderstanding of the thought of James Fitzjames Stephen reflects exactly the kinds of distortions that can occur when intellectual history is conscripted to be the handmaid of normative theory. This article has attempted to clarify Stephen's ideas about the nature and aims of punishment by taking his writing on its own terms, without reading it through the flattening lens of punishment theory.

The history of ideas is not an innately normative project. Our reasons for punishment do not admit the justifications of the antiquarian. Nevertheless, normative theory and intellectual history frequently cross paths. They are not academic ships passing in the night; they are fellow travelers on a common venture. Those theories which are pluralistic in their methodological commitments—those which hold that a welter of multivalent and clashing values rightly informs our punishment practices—are more likely than their rivals to be open to the possibility that the past can illuminate the present exactly by complicating—beneficially—our theories of punishment.