

James Fitzjames Stephen, Liberty, Equality, Fraternity (1874)

The punishment of common crimes, the gross forms of force and fraud, is no doubt ambiguous. It may be justified on the principle of self-protection, and apart from any question as to their moral character. It is not, however, difficult to show that these acts have in fact been forbidden and subjected to punishment not only because they are dangerous to society, and so ought to be prevented, but also for the sake of gratifying the feeling of hatred—call it revenge, resentment, or what you will—which the contemplation of such conduct excites in healthily constituted minds. If this can be shown, it will follow that criminal law is in the nature of a persecution of the grosser forms of vice, and an emphatic assertion of the principle that the feeling of hatred and the desire of vengeance above-mentioned are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner.

The strongest of all proofs of this is to be found in the principles universally admitted and acted upon as regulating the amount of punishment. If vengeance affects, and ought to affect, the amount of punishment, every circumstance which aggravates or extenuates the wickedness of an act will operate in aggravation or diminution of punishment. If the object of legal punishment is simply the prevention of specific acts, this will not be the case. Circumstances which extenuate the wickedness of the crime will often operate in aggravation of punishment. If, as I maintain, both objects must be kept in view, such circumstances will operate in different ways according to the nature of the case.

A judge has before him two criminals, one of whom appears, from the circumstances of the case, to be ignorant and depraved, and to have given way to very strong temptation, under the influence of the other, who is a man of rank and education, and who committed the offence of which both are convicted under comparatively slight temptation. I will venture to say that if he made any difference between them at all every judge on the English bench would give the first man a lighter sentence than the second.

‡What should we think of such an address to the prisoners as this? ‘You, A, are a most dangerous man. You are ignorant, you are depraved, and you are accordingly peculiarly liable to be led into crime by the solicitations or influence of people like your accomplice B. Such influences constitute to men like you a temptation practically all but irresistible. The class to which you belong is a large one, and is accessible only to the coarsest possible motives. For these reasons I must put into the opposite scale as heavy a weight as I can, and the sentence of the court upon you is that you be taken to the place from whence you came and from thence to a place of execution, and that there you be hanged by the neck till you are dead. As to you, B, you are undoubtedly an infamous wretch. Between you and your tool A there can, morally speaking, be no comparison at all. But I have nothing to do with that. You belong to a small and dangerous class. The temptation to which you gave way was slight, and the impression made upon me by your conduct is that you really did not care very much whether you committed this crime or not. From a moral point of view, this may perhaps increase your guilt; but it shows that the motive to be overcome is less powerful in your case than in A’s. You belong, moreover, to a class, and occupy a position in society, in which exposure and loss of character are much dreaded. This you will have to undergo. Your case is a very odd one, and it is not likely

that you will wish to commit such a crime again, or that others will follow your example. Upon the whole, I think that what has passed will deter others from such conduct as much as actual punishment. It is, however, necessary to keep a hold over you. You will therefore be discharged on your own recognizance to come up and receive judgment when called upon, and unless you conduct yourself better for the future, you will assuredly be so called upon, and if you do not appear, your recognizance will be inexorably forfeited.'

Caricature apart, the logic of such a view is surely unimpeachable. If all that you want of criminal law is the prevention of crime by the direct fear of punishment, the fact that a temptation is strong is a reason why punishment should be severe. In some instances this actually is the case. It shows the reason why political crimes and offences against military discipline are punished so severely. But in most cases the strength of the temptation operates in mitigation of punishment, and the reason of this is that criminal law operates not merely by producing fear, but also indirectly, but very powerfully, by giving distinct shape to the feeling of anger, and a distinct satisfaction to the desire of vengeance which crime excites in a healthy mind.

Other illustrations of the fact that English criminal law does recognize morality are to be found in the fact that a considerable number of acts which need not be specified are treated as crimes merely because they are regarded as grossly immoral.