

James Fitzjames Stephen, A History of the Criminal Law of England vol. 2 (1883)

The relation between criminal law and morality is not in all cases the same. The two may harmonize; there may be a conflict between them, or they may be independent. In all common cases they do, and, in my opinion, wherever and so far as it is possible, they ought, to harmonize with, and support one another.

In some uncommon but highly important cases there is a possibility that they may to a certain extent come into conflict in as much as a minority of the nation more or less influential and extensive may disapprove morally of the objects which the criminal law is intended to promote, and may regard as virtuous actions what it treats as crimes. There is a third class of cases in which the criminal law is supported by a moral sentiment, in so far as moral sentiment recognizes obedience to the law as a duty, but no further. ...

First I will consider the normal cases, that in which law and morals are in harmony, and ought to and usually do support each other. This is true of all the gross offences which consist of instances of turbulence, force, or fraud. Whatever may be the nature or extent of the differences which exist as to the nature of morals, no one in this country regards murder, rape, arson, robbery, theft, or the like, with any feeling but detestation. I do not think it admits of any doubt that law and morals powerfully support and greatly intensify each other in this matter. Everything which is regarded as enhancing the moral guilt of a particular offence is recognized as a reason for increasing the severity of the punishment awarded to it. On the other hand, 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. It converts into a permanent final judgment what might otherwise be a transient sentiment. The mere general suspicion or knowledge that a man has done something dishonest may never be brought to a point, and the disapprobation excited by it may in time pass away, but the fact that he has been convicted and punished as a thief stamps a mark upon him for life. In short, the infliction of punishment by law gives definition and a solemn ratification and justification to the hatred which is excited by the commission of the offence, and which constitutes the moral or popular as distinguished from the conscientious sanction of that part of morality which is also sanctioned by the criminal law. 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.

... I am also of opinion that this close alliance between criminal law and moral sentiment is in all ways healthy and advantageous to the community. I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.

... The doctrine that hatred and vengeance are wicked in themselves appears to me to contradict plain facts ... No doubt they are peculiarly liable to abuse, and in some states of society are commonly in excess of what is desirable, and so require restraint rather than excitement, but unqualified denunciations of them are as ill-judged as unqualified denunciations of sexual passion. The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to the one set of passions in the same relation in which marriage stands to the other.