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To my dear daughter,
Ariel

And moreover I saw under the sun the place of judgment, that wickedness was there; and the place of righteousness, that iniquity was there. I said in mine heart, God shall judge the righteous and the wicked: for there is a time there for every purpose and for every work. I said in mine heart concerning the estate of the sons of men, that God might manifest them, and that they might see that they themselves are beasts. For that which befalleth the sons of men befalleth beasts; even one thing befalleth them: as the one dieth, so dieth the other; yea, they have all one breath; so that a man hath no preeminence above a beast: for all is vanity.

Ecclesiastes 3:16–19

Preface

Does an offender have the *right* to be punished?

"The right to be punished" may sound like an oxymoron, but it is not necessarily so.

A 29-year-old man with no previous criminal record broke into his neighbor's car and took it without permission. He was caught 2 h later by the police in a general check. In court he was found guilty and convicted of theft. The court learned that the theft was committed because of the defendant's dire economic situation, having been fired from his job 2 weeks earlier and having a wife and son entirely dependent on him. The court must decide what is the appropriate punishment in this case: a fine, probation, or incarceration? If it is a fine, what is the appropriate sum? If incarceration, for how long?

This example raises some of the deepest questions about sentencing. For instance, when the court imposes a 3-year imprisonment, what exactly makes the offender deserve exactly 3 years and not 2 years and 11 months? What is the difference between 28 and 29 months of imprisonment? What exactly makes a particular punishment right and meet for a particular case? How should the suffering embodied in a particular punishment be measured? How can we measure deterrence? Can imprisonment be imposed on a corporation? What should be the difference between punishing a 35-year-old offender and a 95-year-old one? There are many similar questions that sentencing brings to mind.

One of the best-known maxims about the imposition of punishments in criminal law is that "*. . . the only golden rule is that there is no golden rule*."[1] This maxim reflects the common legal understandings about sentencing in most legal systems today. In modern criminal law, whereas the imposition of criminal liability follows accurate and strict rules, there are no similar rules for the imposition of punishment. The process of sentencing is vague and obscure, as are the considerations used for the imposition of punishments.

Sharp differences in approach exist between different courts, benches, and even individual judges sitting on the same panel, regarding the degree of severity to be shown when sentencing an offender. The vagueness of sentencing damages the certainty necessary in criminal law and turns sentencing into an enigma for both

the offender and the society. Uncertainty in criminal law has an extremely negative social value that prevents legal social control or at least damages its effectiveness.

The phenomenon of uncertainty in sentencing is not unique to the legal process conducted in courts of law, where punishments are imposed on individuals. It is also characteristic of legislators who turn a certain act into an offense, which then carries a certain punishment. Both legislators and courts should be directed by simple, clear, and inclusive guidelines to determine punishments. The ultimate solution for achieving such a goal is by embracing a simple, clear, and inclusive doctrine for sentencing. But what would be the outlines of such a doctrine?

Criminal law needs modern doctrinal sentencing consistent with the principle of legality, which requires certainty and clarity in the imposition of both criminal liability and punishments. General research in criminology and penology made rapid progress in the twentieth century, but the same cannot be said about punishment doctrines in criminal law; whatever progress was achieved in this field was restricted to the implementation of ideas derived from criminology and penology.

The objective of this book is to propose a comprehensive, general, and legally sophisticated theory of modern doctrinal sentencing. The challenges of such a legal theory are many and complex. In addition to clarity and certainty, modern doctrinal sentencing must deal with modern types of delinquency (e.g., organized crime, recidivism, corporate offenders, and high-tech offenses) and modern principles of criminal law. Modern doctrinal sentencing must serve the social purposes of sentencing optimally. Furthermore, such a theory must be evaluated not only by classic legal measures but also by modern interdisciplinary ones, such as economics, criminology, penology, and psychology.

With the emergence of modern criminal law, the offender gained the *right* to be punished by a rational criminal law rather than being lynched by an angry mob. The present-day offender may have the *right* to be punished by doctrinal sentencing rather than according to vague, unclear, and uncertain principles.

This present book outlines a modern general theory of sentencing in six chapters. Chapter 1 (Punishment as Part of Modern Criminal Law Theory) contains the general legal linkage between punishment (and sentencing) and criminal law. It addresses the following issues: the development of punishment and sentencing, the role of punishment in criminal law, the applicability of the principles of modern criminal law to punishments, and the balance between criminal liability and punishments. Chapter 2 (General Purposes of Punishment) outlines the four general purposes of sentencing under modern criminal law: retribution, deterrence, rehabilitation, and incapacitation. The chapter describes the legal development of these purposes, their interactions with one another, their failures, and their function in the modern criminal law.

Chapter 3 (General Considerations of Punishment) focuses on the general considerations of punishment, which may be related to the offense (*in rem*) or to the offender (*in personam*). As such, the chapter examines proportionality, fairness, recidivism, personal status (offenders who are young, very old, unhealthy, mentally ill, etc.), corporate sentencing, organized crime sentencing, cooperation with the authorities, etc. Chapter 4 (General Structure of Doctrinal Sentencing) describes the

general structure of doctrinal sentencing under modern criminal law and examines the requirement of uniformity in sentencing and in the ways used to determine the proper punishment for each particular case.

Chapter 5 (Physical Punishments) examines the applicability of physical sentencing to modern doctrinal sentencing. The examination includes the following punishments: death penalty, flogging, mutilation, deprivation of civil rights and liberties, imprisonment (of all types, including suspended, supermax, shock, non-continuous etc.), public service, chemical castration, probation, and some other forms of physical sentencing. Chapter 6 (Economic Punishments) examines the applicability of economic sentencing to modern doctrinal sentencing. This examination includes the following punishments: fine, forfeiture, damages to the victim, legal expenses, and some other forms of economic sentencing.

Thus, the book answers the legal questions of modern doctrinal sentencing by defining it, analyzing its components, types, and elements, understanding its implications, and solving the major issues it raises.

The general theory of modern doctrinal sentencing presented in this book is based on lectures delivered in the past few years in the criminal law course of the Faculty of Law at Ono Academic College. I wish to thank Ono Academic College for supporting this project, Gabriel Lanyi for his comments, and Anke Seyfried for guiding the publication of the book from its inception to its conclusion. Finally, I wish to thank my wife and daughters for their staunch support along the way.

Gabriel Hallevy

Contents

Punishment as Part of Modern Criminal Law Theory

1

Contents

1.1 The Origins of Punishment

An integral part of any criminal law theory is punishment. Criminal law theory includes not only the law for imposing criminal liability but also the law of punishment. Punishment is the infliction of suffering on the offender for committing an offense. As discussed below, this definition is based on a retributive view of punishment. Three other views look at punishment from the perspective of deterrence, rehabilitation, and incapacitation. The type of punishment may vary in different societies and at different times, but its essence, an expression of condemnation for the commission of an offense, remains constant.

Not all infliction of suffering is punishment, only when the suffering comes as a social reaction to the commission of an offense.[1] To formalize this type of social reaction, it was necessary to develop a due process of law as a condition for imposing punishment. Imposition of punishment is considered the last resort (*ultima ratio*) available to the society in response to the offender's behavior. It is also the last resort of the prevailing public order in society and among individuals. Punishment (as part of criminal law) is the extreme expression of social control, especially of legal social control, after all other social mechanisms have failed.

[1] Jerome Hall, General Principles of Criminal Law 296–324 (2nd ed., 1960, 2005).

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When other social mechanisms of socialization (family, school, etc.) fail to prevent an individual from committing an offence, and no internal limits are set in the offender's mind, it is necessary to activate the most extreme social instrument of social control: punishment within the framework of criminal law. Criminal law enters the picture when an offense is committed and criminal liability is imposed on the individual. To complete the process, punishment must be imposed.

Criminal law imposes punishment for offending, but it grants no "prize" to individuals who do not offend. Individuals who do not offend are not active objects for criminal liability. There are some other spheres of law, however, that may grant "prizes" for certain behaviors. For example, tax law may offer lower levels of taxation for certain acts, causing some individuals to prefer these acts. By contrast, criminal law offers no positive incentives, only negative ones, and these negative incentives are generally expressed as punishments, in addition to other attributes of the criminal process, such as shame, loss of time and money, etc.

The origins of punishment are rooted in the prehistory of criminal law, in the Paleolithic age, when punishment developed in three ways.[2] The first was through social organization. Initially humanoids were socially organized around a natural leader who determined what is "right" and "wrong." When a "wrong" was committed, the leader had the power and the legitimacy needed to punish the offender. Most sanctions were ostracism and expulsion from the group. Although this organization was not stable, it was the first step toward a stable regime because it enforced discipline on its members.[3]

The second means was through religion, whose main function at that time was to protect the group from harmful objects and to provide explanations of everyday occurrences. Religions set rules for "right" and "wrong" and imposed sanctions when a "wrong" was committed. The third form was the use of various instruments that caused bodily damage to other persons. In the Paleolithic age, poisons and stone weapons were already known.[4]

At the beginning of the Mesolithic age larger social organizations evolved, mostly small villages that were populated throughout the entire year.[5] As we can glean from burial arrangements (e.g., some people are buried with jewels in certain places, whereas others are not), the social status of individuals was commonly layered in these villages.[6] A higher social status was gained through the

[2] Chris Scarre, The Human Past: World Prehistory and the Development of Human Societies (2005); Chris Gosden, Prehistory: A Very Short Introduction (2003).

[3] Maureen A. Hays and Paul T. Thacker, Questioning the Answers: Re-Solving Fundamental Problems of the Early Upper Palaeolithic (2001); Olga Soffer and N. D. Praslov, From Kostenki to Clovis: Upper Paleolithic - Paleo-Indians Adaptations (2001).

[4] Bernard Wailes, Craft Specialization and Social Evolution: In Memory of V. Gordon Childe (1996).

[5] Steven Mithen, After the Ice: A Global Human History 20,000–5,000 BC (2003).

[6] Sylvie Philibert, Les Derniers "Sauvages": Territoires Economiques et Systemes Techno-fonctionnels Mesolithiques (2002); J. V. S. Megaw, Hunters, Gatherers and First Farmers Beyond Europe: An Archaeological Survey (1977).

commission of public offices in the village, including the determination of rules of behavior and the imposition of sanctions when the rules were breached.

At the same time, in the Mesolithic age a process of urbanization began, as villages formed into cities. The growth of the cities and of their populations made it necessary to determine wider rules of "right" and "wrong" and an efficient system of enforcement of these rules. The ensuing system became substantively similar to modern criminal law, with enforcement being part of the sentencing process. Religion also played an important role in determining these basic rules, in their enforcement, and in the development of moral principles.[7]

In the Neolithic age the social organization became much more complex. Social hierarchy was already common, and in some places regional or central regime have already been established. The engineering projects carried out during this age required high organizational discipline, which could be enforced only through efficient measures such as sentencing and punishment.[8] Most inhabitants considered the legal order of the cities attractive and wished to move into the cities. The main condition for acceptance into the city was conforming to the rules of behavior, and implicitly, accepting punishment.

In the Chalcolithic age the metropolis came into being. The metropolis functioned both as a commercial and as a religious center. At this time religious and criminal law were synonymous. Religion was the only legitimate source of criminal law, and therefore also the only basis for punishment. The offender was considered a sinner, and offending against the society was synonymous with offending against the gods. As the gods prohibited harming society, any harm to society was a crime against the gods. Because offending was considered to arouse the wrath of the gods, offenders were deemed impure.

Impurity was considered infectious, the same as a disease, and therefore offenders were expelled from the city. An offender who was considered impure had to undergo a process of purification and atonement through a series of punishments. Many European languages still bear testimony to this approach, as the stem "*pu*," the philological source of "purity," is also the source of "punishment." Punishment was considered to be a purifying measure.

In early Mesopotamian law there were various criminal punishments. Capital penalty was most common,[9] carried out by drowning, fire (based on the analogy of

[7] James Mellaart, Earliest Civilizations of the Near East 81–101 (1965); Louis Mumford, The City in History (1961); Colin Wilson, A Criminal History of Mankind 103–104 (2nd ed., 2005).

[8] Peter Bellwood, First Farmers: The Origins of Agricultural Societies (2004).

[9] Russ VerSteeg, Early Mesopotamian Law 126 (2000); G. R. Driver and John C. Miles, The Babylonian Laws, Vol. I: Legal Commentary 495–496 (1952): "The capital penalty is most often expressed by saying that the offender 'shall be killed'. . .; this occurs seventeen times in the thirty-four sections. A second form of expression, which occurs five times, is that 'they shall kill'. . . the offender".

the sacrifice by fire),[10] skewering,[11] etc. Mutilation was also common, and it involved various organs (hands, ears, tongue, breasts, eyes), with a symbolic connection between the organ and offense. For example, if the offender used his hands to commit the offense, he was punished by mutilation of his hands. In some cases acceptable punishments included economic sanctions,[12] exile,[13] expulsion, and flogging.[14]

Punishments were carried out differently for men and women. For example, men were thrown into the water with their hands tied,[15] whereas women were not tied up, unless the offense was adultery and the woman was caught with her lover, in which case she and her lover were tied up together and thrown into the water to expunge their sin.[16] The criminal law of early Mesopotamia did not accept imprisonment as a legitimate punishment but only as a measure to collect debts in civil affairs.[17]

The criminal law of ancient Greece accepted two types of punishment: physical (*pathein*) and economic (*aposteisai*). It was the prosecutor who asked to punish the offender, but punishment was limited by the law.[18] For Athenian citizens physical punishments included capital penalty and deprivation of civil rights (*atimia*),

[10] Law 25 of the Code of Hammurabi (L. W. King trans.) provided: "If fire breaks out in a house, and some one who comes to put it out cast his eye upon the property of the owner of the house, and takes the property of the master of the house, he shall be thrown into that self-same fire"; Law 110 of the Code of Hammurabi (L. W. King trans.) provided: "If a 'sister of a god' opens a tavern, or enters a tavern to drink, then shall this woman be burned to death"; Law 157 of the Code of Hammurabi (L. W. King trans.) provided: "If any one be guilty of incest with his mother after his father, both shall be burned".

[11] Law 153 of the Code of Hammurabi (L. W. King trans.) provided: "If the wife of one man on account of another man has their mates (her husband and the other man's wife) murdered, both of them shall be impaled".

[12] Versteeg, *supra* note 9, at p. 127; Driver and Miles, *supra* note 9, at pp. 500–501.

[13] Versteeg, *ibid*, at p. 127; Law 154 of the Code of Hammurabi (L. W. King trans.) provided: "If a man be guilty of incest with his daughter, he shall be driven from the place, exiled".

[14] Versteeg, *ibid*, at p. 127; Law 202 of the Code of Hammurabi (L. W. King trans.) provided: "If any one strikes the body of a man higher in rank than he, he shall receive 60 blows with an ox-whip in public".

[15] Samuel Greengus, *Legal and Social Institutions of Ancient Mesopotamia*, 1 Civilizations of the Ancient Near East 469, 474 (Jack M. Sasson ed., 1995).

[16] Law 108 of the Code of Hammurabi (L. W. King trans.) provided: "If a tavern-keeper (feminine) does not accept corn according to gross weight in payment of drink, but takes money, and the price of the drink is less than that of the corn, she shall be convicted and thrown into the water"; Law 133 of the Code of Hammurabi (L. W. King trans.) provided: "If a man is taken prisoner in war, and there is sustenance in his house, but his wife leaves house and court, and goes to another house: because this wife did not keep her court, and went to another house, she shall be judicially condemned and thrown into the water"; Law 143 of the Code of Hammurabi (L. W. King trans.) provided: "If she is not innocent, but leaves her husband, and ruins her house, neglecting her husband, this woman shall be cast into the water".

[17] H.W.F. Saggs, The Greatness That Was Babylon 194 (1962).

[18] Stephen C. Todd, The Shape of Athenian Law 139 (1995).

including the right to be buried in Athenian territory. For other offenders physical punishments included slavery as well. Exile and expulsion (*phuge*) were substituted for capital penalty in circumstances that called for leniency.[19]

The capital penalty was carried out by throwing the offender into a pit (*barathron*).[20] For Athenian citizens convicted of lesser crimes, this practice was replaced in the fourth century BC by poisoning a punishment, considered to minimize the suffering of the offender,[21] or by a method that resembled Roman crucifixion, in which the offender was confined to a place and denied water or food (*apotumpanismos*).[22]

Economic punishment consisted mainly of confiscation of property and fines. Confiscation was considered more severe than fines, and it was used only in rare cases.[23] The fine was much more common. The maximum rate of the fine was determined by law, but the prosecutor and the offender had the opportunity to argue for an appropriate fine in individual cases.[24] But the criminal law of ancient Greece does not clearly distinguish between criminal fine (paid to the state) and civil damages (paid to the injured plaintiff), and uses the same terminology for these remedies.[25]

Roman law did not accept any general theory of sentencing. Different rules and customs developed in relation to different offenses. For example, punishment for property offenses was generally economic, and it included fines[26] or a combination of exile and confiscation.[27] In homicide offenses the common punishment ranged from exile and confiscation[28] to capital penalty and confiscation.[29] In sexual offenses common punishments were fines,[30] annulment of marriage,[31] revoking

[19] Russell Meiggs and David M. Lewis, A Selection of Greek Historical Inscriptions to the End of the Fifth Century BC 52 (1988); Charles W. Fornara, Archaic Times to the End of the Peloponnesian War 103 (2nd ed., 1983).

[20] Todd, *supra* note 18, at p. 141.

[21] Christopher Gill, *The Death of Socrates*, 23 CQ 25 (1973).

[22] I. Barkan, Capital Punishment in Ancient Athens (1935); Louis Gernet, *Sur l'exécution Capitale: à propos d'un Ouvrage Récent*, 37 REG 261 (1924); Louis Gernet, The Anthropology of Ancient Greece (1981).

[23] Todd, *supra* note 18, at pp. 143–144.

[24] Alick Robin W. Harrison, The Laws of Athens 173–175 (1968).

[25] Douglas M. MacDowell, The Law in Classical Athens 257 (1978).

[26] Digesta, 47.21.1; Modestinus, 8 reg; Codex Justinianus, 9.2.1.

[27] Collatio Mosaicarum et Romanarum Legum, 8.5.1; Digesta, 48.10.1.13; Modestinus, 3 de poenis.

[28] Digesta, 48.8.3.5; Pauli Sententiae, 5.23.1.

[29] Digesta, 48.9.1,3.

[30] Digesta, 23.2.48.1; Ulpian, reg. 16.2; Pauli Sententiae, 2.26.14.

[31] Digesta, 34.9.13; Papinian, 32 quaest.

of legal competence,[32] and since the third century AD capital penalty if a person was kidnapped for sexual purposes.[33]

In offenses against national security, including high treason, the punishment was capital penalty and confiscation, regardless the offender's social or personal status.[34] After the codification of Roman law in the sixth century AD, the customs of punishments of the Justinian Code became the legal basis for sentencing in Europe during the Middle Ages and throughout the modern times. Roman law continued its development through the Canon law until it was assimilated in the national laws of the European states. The Canon law widened the common types of punishments to ostracism and social excommunication.[35] After the rise of the national states in Europe, these embraced the common sentencing that was widespread at the time, based on the Roman law and Canon laws.

After the World War II, the European-Continental legal systems limited the use and legality of capital penalty and emphasized more humane punishments. German law abolished the capital penalty in 1949 constitutionally.[36] The two main types of punishments since then are imprisonment (*Freiheitsstrafe*)[37] and fine (*Geldstrafe*).[38] Other less common but acceptable punishments include probation and deprivation of civil rights (e.g., prohibition from driving).[39] French law abolished the capital penalty in 1981, and the two main punishments are imprisonment (*emprisonnement*) and fine (*amende*). Other less common but acceptable punishments include public service (*travail d'intérêt général*).[40]

There is no uniformity in sentencing among the Anglo-American legal systems, especially not with regard to capital penalty. In Britain the capital penalty was abolished by statute in 1965 in relation to homicide.[41] General considerations for sentencing were determined by statute in 2003.[42] In the United States sentencing is determined mainly by the states, and it includes mostly various types of imprisonment and fines. The capital penalty is legal in some of the states, where some

[32] Digesta, 22.5.14; Papinian, de adulteriis; Ulpian, 1 ad Sab.

[33] Digesta, 47.11.1.2; Codex Theodosianus, 11.36.4; Codex Justinianus, 9.9.9, 9.9.29.

[34] Digesta, 48.4.9.

[35] Victor J. Pospishil, Eastern Catholic Church Law 745–757 (2nd ed., 1996); Richard H. Helmholz, The Spirit of Classical Canon Law 366–393 (1996).

[36] Grundgesetz, Art. 102.

[37] Article 38 of the German Penal Code provides: "(1) Die Freiheitsstrafe ist zeitig, wenn das Gesetz nicht lebenslange Freiheitsstrafe androht; (2) Das Höchstmaß der zeitigen Freiheitsstrafe ist fünfzehn Jahre, ihr Mindestmaß ein Monat"; Article 39 of the German Penal Code provides: "Freiheitsstrafe unter einem Jahr wird nach vollen Wochen und Monaten, Freiheitsstrafe von längerer Dauer nach vollen Monaten und Jahren bemessen".

[38] See articles 40–43 of the German Penal Code.

[39] See article 44 of the German Penal Code.

[40] See articles 131-1 and 131-3 of the French Penal Code.

[41] Murder (Abolition of Death Penalty) Act, 1965, c.71.

[42] Criminal Justice Act, 2003, c.44.

constitutional questions have been raised about its legality. It has been argued that capital penalty contradicts the 8th Amendment of the United States Constitution prohibiting "cruel and unusual punishment."[43]

The constitutional questions relate both to the idea of capital penalty and to the methods used in its execution, including electricity,[44] hanging,[45] firing squad,[46] and lethal gas or injection.[47] The Supreme Court of the United States ruled that the imposition of capital penalty or its execution does not contradict the 8th Amendment. The Supreme Court ruling is based also on the English common law.[48]

1.2 The Formal Part of Punishment in Modern Criminal Law Theory

Punishment is an integral part of modern criminal law theory, both formally and substantively. It is formally integrated in modern criminal law theory by being part of the structure of the offense and by serving as an indication of the severity of the offense, as discussed below.

1.2.1 Punishment as Part of the Structure of the Offense

According to the principle of legality in criminal law, the structure of the offense may be described as a valid conditional clause, the result of which is a criminal sanction.[49] For example, the offense of theft may be analyzed as follows[50]:

[43] The 8th amendment of the United States Federal Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

[44] *In re* Kemmler, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890); Provenzano v. Moore, 744 So.2d 413 (Fla. 1999).

[45] Dutton v. State, 123 Md. 373, 91 A. 417 (1914); Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994).

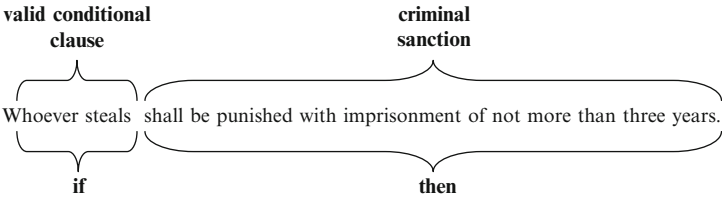
[46] Wilkerson v. Utah, 99 U.S. (9 Otto) 130, 25 L.Ed. 345 (1878).

[47] People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911 (1953); Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983); Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995).

[48] Gregg v. Georgia, 428 U.S. 153, S.Ct. 2909, 49 L.Ed.2d 859 (1979): ". . .imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and England".

[49] Gabriel Hallevy, A Modern Treatise on the Principle of Legality in Criminal Law 16–17 (2010).

[50] See examples for theft offenses, e.g., in Britain article 4(2)(b) of the Theft Act, 1978, c.31 provides: "A person convicted on indictment shall be liable- (a)... (b) for an offence under Section 3 of this Act, to imprisonment for a term not exceeding two years"; in Germany subsection 242(1) of the German Penal Code provides: "Wer eine fremde bewegliche Sache einem anderen in der Absicht wegnimmt, die Sache sich oder einem Dritten rechtswidrig zuzueignen, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft"; and in France article 311-3 of the French Penal Code provides: "Le vol est puni de trois ans d'emprisonnement et de 45,000 euros d'amende".



The offense contains two parts: a valid conditional clause (the "if" part), and the criminal sanction that embodies the punishment (the "then" part). In the above example, the offense states that *if* you steal, *then* you will be punished with imprisonment of not more than 3 years. Thus, the criminal sanction is an integral part of the offense, and both parts are required to identify the offense. (This is one of the reasons why the Biblical commandment "Thou shalt not kill"[51] is not recognized as an offense: the commandment does not contains an explicit criminal sanction.)

The centrality of the punishment within the structure of the offense is incontrovertible.[52] Most legal systems refer to this area of law by names that indicate the centrality of the sanction, as for example, "**Penal** Law" in English, "**Straf**recht" in German, and "Droit **Pénal**" in French. Some scholars identify the criminal law with the sanction,[53] but the punishment does not stand alone and must necessarily follow from a valid conditional clause, as noted above. The centrality of punishment requires that criminal law distinguish it from civil sanctions, administrative sanctions, and disciplinary sanctions, all of which are achieved by different legal processes, outside the criminal process.

Furthermore, it requires that punishment be distinguished as a negative incentive from any positive incentives. This is the basic distinction between reward and punishment. If we defined punishment as causing suffering, worsening of the individual's state, or narrowing his rights, punishment would appear to be relative. An act that some people would interpret as a punishment, others may find to be a reward.

For example, imprisonment may be interpreted as punishment by most people, but for an aging offender who had spent more than 40 years in prison and who has nothing to do outside, returning to the prison, being among his friends, within a familiar shelter that provides food and social status, imprisonment is not necessarily a punishment. In certain situations punishment can be interpreted as a positive incentive, as discussed below.[54]

The relativity of punishment, in this context, is manifest not only at the individual level but at the social level as well. A punishment in the eyes of one society may be

[51] Exodus 20:13.

[52] See, e.g., George P. Fletcher, The Grammar of Criminal Law – American, Comparative and International, Volume One: Foundations 69–73 (2007).

[53] Jerome Hall, General Principles of Criminal Law 296–321 (2nd ed., 1960, 2005).

[54] Below at paragraph 3.2.3.2.