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In Defense of (Punishment) Theory, and *Contra* Stephen, A Reply to DeGirolami

Chad Flanders*

Marc DeGirolami's searching recent essay in this Journal¹ is—appropriately enough—hard to categorize, or even to summarize. It aims to criticize the rise of “theory” in the academic study of criminal punishment, but it does not stop at merely being critical. Rather, it attempts to revive the thought of James Fitzjames Stephen, and also to urge a better way of looking at the study of punishment: one that is more historically oriented as well as more pluralist. Stephen's thought, DeGirolami complains, has been misunderstood and flattened, and it is our loss. We have lost not only the views of a surprising, and surprisingly relevant, historical figure, but more importantly we have lost a kind of sensitivity that is missing in much of contemporary philosophy of punishment.

I want to resist DeGirolami's praise of Stephen, but more than this, I want to register an objection to his near-universal panning of theory. Theory in any case is poorly defined by DeGirolami, which ironically prevents him from seeing how Stephen himself was a theoretician, and how DeGirolami's own pluralism is a theory, albeit an incomplete one (at best). Moreover, it is theory itself that shows us how Stephen is mistaken on several key substantive issues and why we are right to leave Stephen largely behind.

My paper divides into three parts. The first part is heavily critical of DeGirolami's case against theory: the brickbats he throws at theory are poorly developed and for the most part misfire. What we need is not to get rid of theory (supposing this is even possible), but to have a better understanding of what theory is. The second part, more positive, aims to develop in a little more detail Stephen's positions on various issues. Stephen had theories about criminal law and how to think about it, theories worth taking seriously. But at the same time, they were theories we should ultimately reject.² I briefly conclude on the relevance of

* Assistant Professor of Law, St. Louis University. I am indebted to Christopher Jones and Sam Dickhut for excellent research assistance. Thanks also to the participants in the N.Y.U. Criminal Theory workshop: Dan Markel, Michael Cahill, Kim Ferzan, Anthony O'Rourke, and especially Marc DeGirolami. Finally, thanks to Monica Eppinger, Efthimi Parasides, and Jeff Redding of the SLU Law monthly writing group. All mistakes are my own. My long-standing debt to the work of Martha Nussbaum is obvious throughout.

¹ Marc DeGirolami, *Against Theories of Punishment: The Thought of Sir Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. (forthcoming Mar. 2012), [hereinafter, *Against Theories*].

² JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (Univ. of Chi. Press 1991) (1873) [hereinafter, LEF]; 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF*

history to contemporary punishment theory and expand a little more on what I've said earlier about what punishment theory should become. *Pace* DeGirolami, we need punishment theory more than ever but punishment theory of the right kind.

I. THE ALLEGED TROUBLES WITH THEORY

The debate about the value of theory is as old as theory itself: at least as old as the dispute between Aristotle and Plato on the nature of philosophy. How closely should philosophy be tied to conventional norms and the appearances of things? Or should it abstract from these, distrusting them?³ Is philosophy primarily a matter of rules to follow, or must we be sensitive, and aim to make precise, particular judgments about matters? Interestingly, the debate about the role of theory itself risks becoming extremely theoretical, suggesting, perhaps, that at a certain level theory is unavoidable, as DeGirolami himself seems to concede. The only real dispute then is what exact shape our theories should take, what things they should be attentive to, and why.

DeGirolami argues at length that the Anglo-American study of punishment has become too theoretical, but he is frustratingly unclear about what he means by this. DeGirolami certainly thinks that some theory is bad, but the nature of that badness is hard to pin down; it is likewise hard to pin down what DeGirolami proposes to replace theory with.⁴ The claims made in the early parts of his essay are heavy on the rhetoric and thin on analysis. So we should proceed carefully, testing DeGirolami's arguments about what theory is, and asking ourselves whether we should accept them. And it is DeGirolami's more general claims about the meanings and shortcomings of "theory" that I want to test first, before proceeding to his criticism of punishment theory per se. If we can accept theory, or at least theory defined rightly, then we may be less persuaded that *punishment* theory is as wrongly directed as DeGirolami says it is.

What, then, is theory for DeGirolami? Let us look at a quote early on from DeGirolami's paper, where he describes how punishment theory today has become more theoretical (in a bad way):

Theories of punishment today . . . 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

ENGLAND, (London, MacMillan & Co. 1883) [hereinafter, HCL2]; James Fitzjames Stephen, *Variations in the Punishment of Crime*, 17 THE NINETEENTH CENTURY 755, 765 (James Knowles ed., 1885) [hereinafter, *Stephen Variations*].

³ See generally, ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM (Stanley G. Clark & Evan Simpson, eds. 1989); MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY, 240–63 (1986).

⁴ The answer to this seems to be "pluralism," but as I argue below, pluralism is also a theory; see *infra* pp. 5–6.

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 included and the excluded, in constructing fully rational justifications.⁵

Punishment theory becomes bad, says DeGirolami, when it becomes “systematic.” And systems are defined by their desire to rigidly separate those justifications which are preferred in some way and those which are not. In this way, they are “exclusive.” But it is hard to see why system in *this* sense is bad. Of course, theories of ethics should exclude those justifications which are politically illegitimate, morally unjust, and institutionally unnecessary. One would have thought that *no one* would want those in a theory of punishment. If this is the type of hard edged division—generally speaking, between good and bad arguments—that DeGirolami is objecting to, it is hard to see what he is getting at and why we should follow him.⁶

So too there seems little to find that is fundamentally awry in the idea that some justifications of punishment may be better than others and better capture the point of punishment. Those justifications which do capture the purpose of punishment will be at the “core” of any theory; those justifications which are less important, or could be dispensed with, will occupy at best that theory’s periphery. Of course, some theories may be wrong about what is at the core and what is at the periphery—this will be a source of controversy *between* theories—but the mere drawing of this line cannot be per se unacceptable. Similarly, if one denies that a proffered aim of punishment is not necessary to understand what punishment is, one needs to make an argument why that is so; one cannot simply balk at the very notion of a “necessary aim” for punishment.

More generally, moral theories generate normative judgments: that is what they do.⁷ If a theory did not tell us what was necessary for a punishment to be a punishment, or (alternatively) could not give us grounds to criticize some punishments as not punishments at all, then this would be good reason to reject that theory and to wonder whether it was a theory at all, rather than a description. DeGirolami may be objecting to this aspect of theories, but I doubt it. If he were, he would be saying that we could not say *anything* normative about the field of

⁵ *Against Theories*, *supra* note 1, (manuscript at 8).

⁶ *See also Against Theories*, *supra* note 1, (manuscript at 2), where DeGirolami accuses the methodology of systematization as “carefully distinguishing the reasons that should count from those that should not in constructing an integrated whole.” Although it may depend on what “integrated whole” means, it is hard to see what is wrong with carefully distinguishing reasons.

⁷ *See* Martha C. Nussbaum, *Why Practice Needs Ethical Theory: Particularism, Principle, and Bad Behavior*, in 57 *THE PATH OF THE LAW AND ITS INFLUENCE* (Stephen J. Burton, ed. 2000) (theories test the correctness of our judgments). As should be obvious to those who are familiar with it, I am deeply indebted to this essay and its understanding of “theory.”

punishment, which would not just be curious, but a practical disaster: it would leave us without the resources to talk about the ways in which our current practice is normatively indefensible, which it almost certainly is.⁸

Again, however, this does not seem to be DeGirolami's aim. He is not against critical thinking regarding punishment at all (nor was Stephen); his essay seems motivated by a desire to have us think better about what punishment's aims are and what a good justification for punishment would be. He wants us not to ignore certain aspects of punishment which are important to understanding that institution. In this respect, he has no brief against theory. But explicating punishment's true aims and purposes means drawing lines (even "hard edged" ones) and talking about what is in and what is out insofar as punishment is concerned. "Systematization" is just a "boo" word for DeGirolami, an ugly label that obscures clear thinking about the justification of punishment. It may be easy to rail against system, but harder to say *why* we should resist "careful" thinking about the necessary normative foundations of punishment in favor of some ill-defined alternative.

And indeed DeGirolami concedes that the role of systematization in "parsing, distinguishing, refining, excluding, and purifying ... is an important one."⁹ So what is the difficulty then? If systematization is defined simply and broadly as the job of normative theorizing, in precisely the way DeGirolami relates, one would indeed be hard pressed to deny its importance, and even its inevitability.

But DeGirolami says that there are three problems with the tendency towards systemization. I deny that these are problems, or at the very least, that they are problems internal to the task of systemization. They either betray DeGirolami's own theoretical commitments, or they are problems that are not rightly laid at the door of system. These problems are, in DeGirolami's ordering, 1) systematic theories are not useful to lawyers, judges, and legislators, 2) theory/systematization is monistic, reducing the range of values at play in punishment to only one or two, and 3) theory/systematization obscures our understanding of the history of theories of punishment.

There is, first, the question of the usefulness of theories. I would note at the outset that DeGirolami's emphasis—later in his essay—on pluralism in punishment may have a similar problem: of what use is it to judges and lawyers to say that there are many conflicting and incompatible values at play in punishment, without saying which ones are more important, or which ones will trump others in a given circumstance, or how to balance those judgments off one another? As DeGirolami notes in passing, the usefulness of a theory will depend on whether it gives instructions on how to decide concrete cases. Pluralism, as DeGirolami has

⁸ See generally Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 91–96 (2010); David Gray & Jonathan Huber, *Retributivism for Progressives*, 70 MD. L. REV. 141, 143–44 (2010).

⁹ *Against Theories*, *supra* note 1, (manuscript at 10).

it, just leaves us with a list of values and urges us to be sensitive to all of them.¹⁰ But sensitive *how*?

I will return to this point later in my conclusion. But DeGirolami’s complaint about the “scholasticization”¹¹ of punishment theory neglects the various ways theory might matter to practice. For initially, we might think that theory can work indirectly, and over time, as we get clearer on our ideas, those ideas might filter down in contingent ways and affect practice.¹² Some of these ways might be more direct than others. A book in defense of uniform sentencing guidelines written by a judge who is both smart and politically influential may make a lasting impact on the debate over how we should sentence people.¹³ Or the idea that punishment should be expressive and that shaming punishments well embody this ideal might move judges and legislatures to consider those punishments legitimate; a claim on the other side, that shaming punishments are inhumane and do not fulfill the ideals of punishment we should have, might move judges and policymakers to reconsider their decision.¹⁴

The ways in which theory will influence practice will often be a matter of chance, but this does not make theory irrelevant or unimportant. Theorists should still work to frame the debates correctly and contribute to that debate, using the arguments and ideas they deem best. Their theory may be more or less abstract, more or less immediately practical and relevant, of course, but these facts will not prevent that theory from being relevant in any sense or at some later time. It may be that theorists should pay more heed to how their ideas should be applied,¹⁵ but this does not mean that they should not do theory.¹⁶ They should just do it better, with more attention to detail and implication. Or some theorists may prefer to paint the broad picture, leaving others to fill in the exact details. They also serve the cause.

DeGirolami has us imagine a judge reading over philosophical and legal texts and then deciding on one theory or another to use in sentencing. This is meant to

¹⁰ *Against Theories*, *supra* note 1, (manuscript at 56) (“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.”).

¹¹ *Against Theories*, *supra* note, (manuscript at 10).

¹² Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1793–95 (1998).

¹³ MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972).

¹⁴ *See* Flanders, *supra* note 8, at 102 (summary of academic debate on shaming penalties).

¹⁵ Flanders, *supra* note 8, at 137–140.

¹⁶ Stephen stresses as much, in a passage DeGirolami quotes: “The construction of theories and their application to practice ought to go hand in hand; they ought to check and correct each other, and ought never on any account to be permitted to be long or widely separated.” *Against Theories*, *supra* note 1, quoting LEF, *supra* note 2, at 131. Strangely, DeGirolami takes this to be evidence of Stephen’s antitheoretical bent, when it is in fact no such thing: it is rather an explanation of *how* we ought to do theory.

be somewhat comical, I suppose, but some judges may actually do this.¹⁷ And even if they do not, it does not mean that these theoretical ideas cannot be brought to the judges' attention through briefs by the parties, or by conferences, or by conversations (or by law clerks).¹⁸ Certain ideas can be in the air, and theoreticians contribute to what ideas are in the air. They help frame the ways in which we think about certain issues, or at least they can. And judges and legislators may not think in whole theories; they may think in fragments of theories. But even these fragments can influence policy and practice. Nor do judges and legislators need to think in exactly the same terms as theorists, or with the same degree of precision.¹⁹

So I think the worry about a system's irrelevance to practice is overblown (and moreover, unfair, or at least unfairly targeted: if it is a problem, it is not a problem to punishment theory as opposed to contract or tort theory). DeGirolami's second worry, however, is not practical but conceptual. Basing his point on a long quote from Steven Smith, DeGirolami worries that punishment theory may make it impossible for us to appreciate "incompatible alternatives."²⁰ As DeGirolami elaborates, "[t]he capacity to support multiple otherwise logically conflicting notions of, say, retributivist justice, or varieties of retributivism and deterrence simultaneously . . . may well be a cost of the current methodological orthodoxy."²¹

It is difficult to see exactly what is meant here. If DeGirolami is saying that the best theory will enable us to make sense of a variety of values, then he may be right, but he will be at the same time endorsing a theory nonetheless. Call it "pluralism." Now, to a first approximation, there can be deep pluralism or shallow pluralism. Deep pluralism would say that some values are logically incompatible or incommensurable.²² Shallow pluralism would say that there are multiple values, but either they can be reduced to one value, *or* we can have a theory that tells us how to prioritize values, as well as the places where some values are more important than others; there is a way to organize values, if not reduce them entirely

¹⁷ A good example is the *Bergman* case, where Judge Frankel carefully analyzes what interests the state has in punishing Bergman: and he even cites Kant! *Bergman v. State*, 416 F. Supp. 496, 499–500 (S.D.N.Y. 1976). Some judges (or former judges) actually also write in the area of sentencing, *see e.g.*, Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 Yale L.J. Pocket Part 137 (2006), <http://thepocketpart.org/2006/07/gertner.html>; Michael McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665 (2006).

¹⁸ *See, e.g.*, *United States v. Allen*, 488 F.3d 1244, 1254 (10th Cir. 2007) (citing the work of Douglas Berman); *United States v. Gementera*, 379 F.3d 596, 604-06 (9th Cir. 2004) (citing work of scholars on shaming punishments); *United States v. Jackson*, 835 F.2d 1195, 1199 (2d Cir. 1988) (Posner, J. concurring) (citing theoretical work on deterrence).

¹⁹ Theorists can also bring attention to what ways current practices rely, if only tacitly, on certain theories.

²⁰ *Against Theories*, *supra* note 1, (manuscript at 12).

²¹ *Against Theories*, *supra* note 1, (manuscript at 12).

²² I borrow from DeGirolami here but do not pretend to be giving an exhaustive definition of any sort of pluralism. *See Against Theories*, *supra* note 1, (manuscript at 49).

to one. I suspect DeGirolami favors a deep pluralism, at least sometimes, and so he would reject theories that embrace only a shallow pluralism.

But this is not an objection to theory that DeGirolami is making, then: he is making an argument in favor of a particular theory. He is saying that there are plural values that we have to use in making punishment decisions, and that monistic theories cannot accommodate this diversity. That is a knock against one theory made by another theory, not a knock against theory per se. There is nothing that says that the only theory, that is, the only theory that counts as “theory,” is monism. Pluralist theory is theory, too.

If pluralism is not what DeGirolami means here, then he seems to be embracing logical conflict for its own sake, and this is scarcely desirable. The more charitable interpretation, I think, is that oftentimes there will be many values at play in a decision. But to rest on this point is unsatisfying, and we should press on and see if there is any theoretically sound way to reconcile those values, or to create institutions that preserve both values in a satisfying way, one that avoids tragedy.²³ We should not try to reduce values that are distinct of course, but that should not relieve us of the obligation of analyzing those values and seeing whether they fit together, and how. Logical conflict is not a place where the mind (or a society) can rest comfortably. Moreover, there is a practical difficulty to such ad hocery. It is very hard to review. If a judge simply says, well, it’s a complex combination of values, how are we to test whether she has gotten it right, other than to investigate the values separately, see what they are and see if the judge has struck a reasonable balance between them? But to do this requires a theory.

DeGirolami lists as the “final danger” of systematization that it may obscure to us certain ideas about the purpose and point of punishment that “flourished in the past.”²⁴ He cashes this out as meaning that we may tend to distort the ideas of past thinkers, when trying to fit them into our present day categories. But this, it should be noted, is a danger with any historical investigation, that we will read the past through the lens of the present, and remake it into our image.²⁵ This is not a danger intrinsic to theory but to historical inquiry generally. And of course it is a risk we should be aware of, and try to avoid.

DeGirolami wants to make this point especially with regard to Stephen: he wants to show us how we have distorted his thought. He makes several, quite correct observations about how Stephen has been received, and how he has been put in boxes that do not fit him altogether well. It should be said that some of these efforts were meant to be charitable to Stephen (some explicitly so), to take his sometimes meandering and rhetorical observations and tidy them up, put them into some coherent order. This is not altogether a bad thing, and it is certainly the

²³ See Nussbaum, *supra* note 7.

²⁴ *Against Theories*, *supra* note 1, (manuscript at 13).

²⁵ As Nietzsche puts it somewhere, the risk is that we as scholars dig up what we ourselves have buried. See the reference in ALLAN BLOOM, *THE REPUBLIC OF PLATO* xiv (2d ed. 1991).

right of philosophers to put a person's theory in the best form it can be, at least the best form as it seems to them. (I say more about this in my conclusion.)

Nonetheless, I do not want to defend every philosopher who has attempted to characterize Stephen's thought, either fairly or unfairly. This is too great of a task, and anyway not necessarily one that is worth taking: who ultimately cares if some people got Stephen wrong?²⁶ What we should be concerned with is if we can make sense of him, and how we should make sense of him, and most important, whether we agree with him. This is what I want to do, below, in the next Part of my reply.

II. STEPHEN'S LEGACY

The real heart, and the challenge, of DeGirolami's paper comes in his discussion of Stephen, whom he champions as a kindred anti-theorist. Stephen disliked and distrusted theory, according to DeGirolami, and his writings testify to that. Moreover, because we are in an age of theory, we risk misunderstanding Stephen and miscategorizing him. And it is true that at times Stephen seems to resist theory, to prefer the ad hoc judgment to the rule. Certainly Stephen's rhetorical style lends itself to such an assessment. Like Nietzsche, to whom he bears comparison,²⁷ Stephen will favor the zinger, the witty *bon mot*, to push his point across. In this way, perhaps, he is again a resister of system, much like Nietzsche perhaps was.²⁸ He is delightful to read in the same way Nietzsche was, too. (Unfortunately, he also sometimes has the strained and galling machismo that Nietzsche had a tendency toward.²⁹)

But as one who favors theory,³⁰ I find it hard to understand Stephen outside of the context of certain theoretical debates and to see him as a party (witting or not) to these debates. And even if Stephen did not understand himself to be doing theory, (I am not sure this is right) I feel it is how we can *best* understand him. We start with the categories we have, and try to see how he fits within them, what moves he is making. Sometimes this distorts, but sometimes it can clarify. The proof of the pudding is in the eating.

I want to fix on three areas where DeGirolami investigates Stephen's thought, and where I think we can see clearly what theoretical position Stephen takes, and also why we are better off leaving Stephen behind, for the most part: (1)

²⁶ I exclude historians from this, of course. But I assume DeGirolami's interest in Stephen is not simply historical.

²⁷ For good examples of Stephen's style, see Richard A. Posner, *Foreword* to JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* (3d ed. 1991).

²⁸ ALEXANDER NEHAMAS, *NIETZSCHE: LIFE AS LITERATURE* (1985).

²⁹ Martha C. Nussbaum, *Is Nietzsche a Political Thinker?*, 5 INT'L J. OF PHIL. STUDIES 1 (1997).

³⁰ Chad Flanders, *Can We Please Stop Talking About Neutrality? Koppelman between Scalia and Rawls*, PEPP. L. REV. (forthcoming 2013).

the question of whether it is right to feel hatred towards criminals, (2) the relationship of morality to the criminal law, and (3) the role of judicial discretion in sentencing. Stephen had definite positions on each of these issues and gave reasons in support of them. The question is whether we should find those reasons persuasive. This is another way in which theory is inevitable and necessary: when someone takes a position, we need to see if there is a justification for that position, and then to see if we agree with it. This is the path normative theory takes.³¹

A. *Hating Criminals*

DeGirolami rightly tries to limit the scope of Stephen’s infamous remark that it is a morally legitimate thing to hate criminals. Stephen was only referring to a subset of crimes, DeGirolami correctly notes, and only the very worst crimes.³² In those instances, Stephen said, it *is* right to hate criminals. Here, resentment is a virtue and not a vice and punishment confirms the rightness of our hatred. This seems clear enough, but it has spawned a host of misinterpretations of Stephen’s true motives. DeGirolami corrects the prevailing wisdom to this extent: Stephen does not offer hating criminals as the only justification for punishment, and it does not mark him out clearly as a retributivist or a consequentialist. Rather, the idea of hating criminals seems to stand on its own, as a potentially independent observation about the nature of punishment and about its goodness. I do think, however, that such an observation ultimately works best within a consequentialist framework, both because our hatred of criminals serves to vent societal anger (a safety valve function) and also it acts to deter others: no one wants to be hated, to incur the wrath of others.³³ In general, Stephen thinks that hating criminals does a good job teaching *us* that criminal acts are hateful.³⁴

But even with all this being said, we are left with Stephen’s firm insistence that it is morally right to hate criminals, and that this is part of the foundation of criminal justice, even “the principle” that it “proceeds upon.”³⁵ What are we to make of this? We should start by noting that Stephen is making a normative point here, not a descriptive one. He is not saying that it so happens that we hate criminals; if this were his observation, then it would be hard to disagree with him. Of course we will tend to hate criminals when they do terrible things. The

³¹ As DeGirolami concedes, *Against Theories*, *supra* note 1, (manuscript at 4) (“If we are to adopt Stephen’s ideas, they must be politically and morally attractive—they must be justified.”).

³² *Against Theories*, *supra* note 1, (manuscript at 16).

³³ Here I agree with Alice Ristroph and her interpretation of Stephen. See *Against Theories* *supra* note 1, (manuscript at 23); Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1156–57 (2011). See also HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 37 (1968) (noting that Stephens does not defend punishment merely as a means of revenge but rather claims that “punishment is justifiable because it provides an orderly outlet for emotions that, denied it, would express themselves in less socially acceptable ways”).

³⁴ Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1157 (2011).

³⁵ HCL2, *supra* note 2, at 81.

question is rather whether we *should* hate them, or better, whether gratifying that hatred should be one of the “objects for which legal punishments are inflicted.”³⁶

First we have to point out a few confusions that Stephen is guilty of, and which require some conceptual clarification. Stephen, I think, initially misfires when he attempts to justify the emotions of hatred and anger per se, as if these were at issue. It is one argument—we might call it the “humanitarian” argument—that hatred and vengeance are wicked in themselves. It is another thing, something which Stephen attempts to defend, that hatred and vengeance should be a rationale for public policy. It would be a non sequitur to say that because hatred and vengeance are permissible moral emotions, they should be the basis for punishing, anymore than saying that love is a good emotion that it should be the basis for, e.g., welfare policy.³⁷ The fact that hatred and vengeance might be permissible or even laudatory emotions in *some contexts* does not mean that they will be so in every context; in fact there are good reasons to restrict certain emotions from politics, where passions run high and calm deliberation is comparatively rare.³⁸

More particularly, Stephen also makes a mistake in what he contrasts his defense of hatred and anger *with*. He limits his conceptual options, so that it seems that the choice we have is between a theory that looks at punishment only in Benthamite deterrence terms and one which acknowledges that we have an interest in punishing criminals for the wrong they have done to us by gratifying our hatred. Stephen writes dismissively of those “modern writers” who regard the criminal law “as being entirely independent of morality.”³⁹ For these modern writers, the goal is to deter crimes, not to condemn them so that if it were enough to deter a man from killing to fine him one shilling, then this would be enough. Indeed, on the Benthamite view, we would not be justified in punishing (or threatening to punish) any more than this. What this misses, Stephen says, is the actual moral hatred we feel against the murderer, which a fine of one shilling would not be adequate to express.

But I think there is another conceptual possibility that occupies the space between expressing our hatred through punishment and looking at punishment in deterrence terms only. That option is what is filled by theorists of retributive justice, who work hard to distinguish their theories from theories of revenge, which

³⁶ HCL2, *supra* note 2, at 83.

³⁷ Except, perhaps, as a metaphor. See ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 83 (1996) (describing the ideal welfare state as “an institutionalization of love”).

³⁸ See especially James Whitman, *A Plea against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 93 (2003) (“Most ordinary human beings are simply not capable of sober deliberative reasoning where crime is concerned. When ordinary people talk about crime and criminals, fear and contempt rapidly overwhelm their faculties of reason. Indeed, I would suggest that criminal justice simply cannot be a proper topic of public discussion in a true deliberative democracy.”). I think Whitman goes a bit far here, but he is generally on the right track. See generally Chad Flanders, *Retribution and Reform*, 70 *MD. L. REV.* 87 (2010)

³⁹ HCL2, *supra* note 2, at 79.

is not far from what Stephen is advocating.⁴⁰ For Stephen, punishment is a vehicle for satisfying the hatred we feel for certain criminals. For most retributivists, punishment is the state meting out some form of deserved suffering.⁴¹ It need not be accompanied by any emotion, other than possibly a sense of injustice being remedied.⁴² Now, it may be that at the end of the day retribution is indistinguishable from revenge, that retribution is simply revenge under a different name, and that retributive punishment cannot be understood, let alone justified, without understanding it as a means of gratifying our hatred. It may be that Stephen is just more honest than modern-day retributivists.

This may be true,⁴³ but I think there is a firm distinction to be made between accepting that we might hate criminals and thinking such hatred might motivate us in punishing them according to their desert and *validating* these feelings (we should have “a proper hostility to criminals”; vengeance is felt by a “healthy” mind),⁴⁴ or even *encouraging* them, as Stephen does. Indeed, Stephen worries that in the society of his time, people were getting too soft, that

[I]n the present state of public feeling ... there is more ground to fear defect than excess in these passions. Whatever may have been the case in periods of greater energy, less knowledge, and less sensibility than ours, it is now far more likely that people should witness acts of grievous cruelty, deliberate fraud, and lawless turbulence, with too little hatred and too little desire for deliberate measured revenge than that they should feel too much.⁴⁵

I suspect that we have more to fear, now anyway, about the excess of our passions against those who have committed crimes rather than that there is too

⁴⁰ The *locus classicus* attempt at this distinction is ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366–368 (1981).

⁴¹ This need not be simply or only physical suffering; I include deprivation of liberty as a form of (objective) suffering the state can impose on offenders. See Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010).

⁴² Stephen writes that a criminal should be understood as “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.” HCL2, *supra* note 2, at 76. Retributivists should be wary of the idea that punishment should be of those who are *wicked*, when this is meant as something more than that they have broken the law and injured the interests of society. See Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 945 (2010).

⁴³ To be clear, I emphatically believe this is *not* true, and moreover I deeply *hope* it is not true, although I think the line between retribution and revenge can be very hard to draw in practice

⁴⁴ HCL2, *supra* note 2, at 91.

⁴⁵ HCL2, *supra* note 2, at 82, 93.

little of it.⁴⁶ That a retributivist should, and will, worry about this excess is an important point of contrast with Stephen. And it is precisely because of this risk—of excess, of retribution spilling over to revenge—that we should worry about bringing such “hot” emotions into the politics of punishment.⁴⁷

Nor should we forget that Stephen endorsed many illiberal or inhumane punishments, including flogging and (I would add) the death penalty. He talked of the need to “destroy” the wicked, in extreme cases, and also asserted that on “the view” he took “of the subject would involve the increased use of physical pain, by flogging or otherwise, by way of a secondary punishment.”⁴⁸ Not only should flogging be made more common, Stephen said, it also “should be made more severe” for “[a]t present it is little, if at all, more serious than a birching at a public school.”⁴⁹

These sentiments strike me as not only nonsense, but vicious and cruel nonsense. Fortunately, we have distanced ourselves from them, or transcended them altogether,⁵⁰ with the idea that some punishments are impermissible, based in part on the norm that human beings, however bad, ought not to be treated in certain ways. But Stephen does not simply accept the use of certain illiberal punishments, he welcomes them, and such welcoming seems to stem from an idea that it is both inevitable and perfectly alright that we hate criminals and see them as “the natural enemies of inoffensive men, just as beasts of prey are the enemies of all men” or that some criminals are no more than “wolves” who should not be allowed to live in a civilized country.⁵¹

Can Stephen’s theory of (one of) punishment’s purposes exclude these types of consequences? Are there limits we can put on gratifying the hatred of criminals? It seems not. Stephen says it is a purpose of punishment to express our hatred for criminals, and these punishments will do that job.⁵² At least retributivism *in principle* can put a limit on punishment, both its type and its duration, however hard it will be to draw that line. Moreover, retributivism of a suitably well-worked out form will show that there is space to acknowledge the legitimate feeling we have that criminals ought to be punished, without confusing that with hatred. This is why retributivism, for all of its flaws, seems to me a much

⁴⁶ Although another problem may be that we are for the most part indifferent to the suffering of the many who languish in our prisons and jails (separated from us not only physically, but in most cases also by class and by race). But whether we hate too much, or care too little, the problem certainly is not that we *hate too little*.

⁴⁷ Whitman, *supra* note 34.

⁴⁸ HCL2, *supra* note 2, at 92.

⁴⁹ HCL2, *supra* note 2, at 91.

⁵⁰ For the most part. *But see* PETER MOSKOS, IN DEFENSE OF FLOGGING (2011).

⁵¹ HCL2, *supra* note 2, at 91, 92.

⁵² HCL2, *supra* note 2, at 83 (“In criminal legislation the distinction is of greater importance, as one of the arguments in favour of exemplary punishments (death, flogging, and the like) is that they emphatically justify and gratify the public desire for vengeance upon such offenders.”).

more promising and progressive research agenda than does Stephen's vindication of hatred. We are right to move beyond his idea that hatred ought to be one of the motivating features of the criminal law.

B. *The Source and Scope of the Criminal Law*

DeGirolami also wants to save Stephen from the common interpretation that he promoted "legal moralism," defined (very roughly) as the idea that the state should enforce moral norms through the law. When phrased this way, it is very hard to disagree with! *Of course* there are certain moral wrongs that the state is justifying in punishing: murder, rape, and the like. No one should deny the importance of legal moralism in *this* sense, although there will be some dispute about which moral norms the state should enforce, and how those moral norms become enforceable by moral sanction rather than by other, social sanctions.⁵³ Legal moralism of the objectionable sort might be that *any* and *all* moral norms *should* be enforced, but very few people hold this position.

So let us start, first, with the question of what moral norms should be enforced, and here we come to a very famous debate between Stephen and Mill in the 19th century and between Hart and Devlin in ours.⁵⁴ Stephen, and Devlin after him, acknowledged the possibility that the law could be used to regulate and ban certain self-regarding behaviors. Stephen, indeed, pushed hard against the very idea that some actions could be merely self-regarding.⁵⁵ Mill, of course, disagreed.⁵⁶

Now DeGirolami is right to caution us against misreading Stephen here, but I want to insist that there is still a real point of dispute between Mill and Stephen, and that Mill has the better of the argument. DeGirolami makes essentially two points defending Stephen. The first is that Stephen is clearest, and most insistent, that the main area where morality and the criminal law overlap is with the very worst crimes. It is the case of the grosser harms to others that we see most clearly how the criminal law upholds our moral ideals. And it is hard to disagree with Stephen here: it is true that in cases of the worst moral wrongs (murder, rape), we agree that the criminal law should prohibit them, and punish those who flout the norms against them. But saying that these types are at the core, and provide the best example of the overlap of the criminal law and morality, does not say what else the criminal law could *also* cover when it comes to moral wrongs.

⁵³ Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. (forthcoming 2012).

⁵⁴ LORD PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963)..

⁵⁵ See LEF, *supra* note 2.

⁵⁶ See JOHN STUART MILL, *ON LIBERTY* (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

This is where DeGirolami's second caveat about Stephen enters in: there may be other areas where morality should be enforced via the criminal law, but the criminal law is a clumsy way to enforce proscriptions against most moral wrongs. As Stephen writes (and DeGirolami quotes), the criminal law is a "rough engine."⁵⁷ It may be hard to prove some moral wrongs, or it may be too expensive to go out and prosecute them all.⁵⁸ Stephen is especially insistent that crimes, to be prosecuted, must have some overt act, but this seems less founded on a principle of freedom of thought, than on the idea that crimes without conduct are hard to discover, and not worth prosecuting—better to focus on the really serious stuff, if we are to bring the heavy machinery of the criminal law to bear on it.

So it may happen that as a contingent matter, Mill and Stephen would agree that certain self-regarding wrongs will not, and should not be punished: Mill as a matter of principle (liberty of thought and action) and Stephen as a matter of pragmatics.⁵⁹ But this is unsatisfying, because it means only contingently can we say that e.g., the punishment of such things as sodomy is wrong, and should not be the object of criminal sanction. And in fact Stephen seemed unbothered that English criminal law at the time treated as crimes some acts "which need not be specified ... merely because they are regarded as grossly immoral," such as sodomy.⁶⁰

The problem is that, at the end of the day, Stephen is not so much a moralist, but a conventionalist about the content of the criminal law.⁶¹ Vice can be punished, and the only restrictions on this are what things people regard as vices and the possibility that punishing them will do any good. Against this is the idea that there are certain norms which constrain what things can be punished. Mill and later Hart gave expression to one version of this idea, which is that those acts which are purely self-regarding and did not cause harm to others should not ever be the subject of criminal law. Of course pressure can be put on such an idea, viz., that there are some harms that are *merely* self-regarding, and Stephen puts pressure on it (as have people ever since Stephen). But at least it raises us up above conventionalism on the criminal law, so that there is some antecedent normative constraint on what we can punish (and also on how we can punish).

Moreover, conventionalism as a theory—for that is what it is, a theory about the content of criminal law, what it *should* contain—is especially risky when it

⁵⁷ LEF, *supra* note 2, at 140.

⁵⁸ As Stephen colorfully writes, he has no objection to an Inquisition *as such*, if it is enforcing true morality. The only question in his mind was whether "the means used to promote [the Inquisition's doctrines] were ineffective, or that their employment was too high a price to pay for the object gained." LEF, *supra* note 2, at 87.

⁵⁹ LEF, *supra* note 2, at 140-41.

⁶⁰ LEF, *supra* note 2, at 154.

⁶¹ *Against Theories*, *supra* note 1, (manuscript at 37) ("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.").

comes to the criminal law, where passions run high, and “moral panics” can lead to harsher penalties beyond what is warranted by the possible social harm.⁶³ At the very least, what things should count as crime should be constrained by some norms, and not merely by practical constraints regarding what people happen to believe, and what they want to punish. This is what a good theory of the criminal law should attempt to do.

C. *Judicial Discretion*

DeGirolami has done us a great service in pointing attention to Stephen’s essay on *Variations in the Punishment of Crime*.⁶⁴ The essay is a small gem, well-written and provocative on a key subject: the question of how much discretion should be left to judges in determining sentences. But DeGirolami misleads when he suggests that Stephen’s belief in judicial discretion means that he is against theory when it comes to punishment. For claiming that sentences should be based in part on the judge’s own opinion on the matter betrays theoretical commitments in two ways: first, it shows that Stephen has a theory about the division of responsibility for sentencing, that is, where decision-making power should reside,⁶⁵ and second, that Stephen has a theory about what factors are appropriate for judges to consider when they sentence. To defend these two points, Stephen has to give a justification for them, and must necessarily oppose theories that would either eliminate judicial discretion, or those that do not agree with Stephen about what factors judges should be able to consider when sentencing. In short, Stephen has to do theory when defending his vision of sentencing, and in fact, he does.

There are roughly three areas of controversy when it comes to judicial discretion: (1) whether discretion is inevitable in sentencing, (2) whether it is a good thing, and (3) if judges either as a matter of inevitability or of rightness *do* have discretion, what considerations ought to move them.⁶⁶ Now, as to the first area, Stephen makes a strong case that some discretion will be inevitable in sentencing. But he makes his case too strongly.

Stephen argues that “there is no absolute relation between any crime and any punishment.” He concludes from this that “[e]very punishment, therefore, which is allotted to any crime will be found to stand in an arbitrary relation to it.”⁶⁷ It is hard not to see some rhetorical license being taken here. Certainly we can rank the severity of crimes in some non-arbitrary way, and that being done, match severe

⁶³ See generally, MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* (2004). Sentences and sanctions toward sex offenders seem especially to fit in this category.

⁶⁴ Stephen *Variations*, *supra* note 2.

⁶⁵ HCL2, *supra* note 2, at 88.

⁶⁶ The literature on the advisability *vel non* of sentencing guidelines is now mammoth. See, for a good overview, KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING* (1998).

⁶⁷ Stephen *Variations*, *supra* note 2, at 761.

crimes with more severe punishment.⁶⁸ Even if there is no absolute relation, there still can be comparative relationships in punishment, which can give us some sense of what punishments are proportional to what offenses. This may only be true at a rough level, but at this rough level we can block at least the descent to total arbitrariness.

Nor should we confuse arbitrariness with discretion, which Stephen may be doing. *If* appropriate penalties were merely arbitrary, this would not mean we should give judges the discretion to decide arbitrarily what they should be. As Stephen admits, we could imagine making a finely wrought judicial code that could come close to removing any trace or possibility of discretion. There may even be good reasons for such a code; the point is, it shows that the question of the goodness of discretion is analytically distinct from the question of whether there is any meaningful (i.e., non-arbitrary) way to rank punishments. We could summarily fix punishments, and leave judges only the job of mechanically applying sentences. This would remove *discretion* from punishment, but for all that, the assignment of punishments could still be *arbitrary*.

But then surely the prior question is whether we ought to limit judges in this way, or whether we should allow judicial discretion to a greater or lesser degree because there is some good in allowing it. And I think there is some good in discretion, for some of the reasons Stephen articulates. It is difficult, if not impossible, to write a criminal code that prescribes “in minute detail the punishments to be inflicted in different cases.”⁶⁹ Some differences between crimes will be such that the law covering the crime will not be able to capture those differences and yet they may be relevant. Stephen is quite convincing, even compelling on this point but again he takes his point too far. The fact that we cannot have an *exact* criminal code that will fit every possible variation in a crime does not prove that every case is exceptional and so that writing a criminal code is useless. As DeGirolami himself notes, Stephen was a proponent of the codification of the criminal law.⁷⁰ The question then, as always, is a matter of degree, and also a matter of on what basis discretion should be exercised.

On this last point, Stephen is much less compelling, and it is here that we might want to more clearly distinguish ourselves from him. Stephen denies that there is any problem with disparate sentences per se, that if one criminal gets a lighter sentence as a matter of luck, then the prisoner has no right to complain “[s]o long as a given punishment is not unusually severe....”⁷¹ But we know better now: if unequal punishments are given on the basis of race, or some other arbitrary factor, then it is not enough that an unequal punishment is not severe for it to be unjust. It is enough that a disfavored reason has resulted in meaningfully different

⁶⁸ For an attempt at doing this, see MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME* (1992).

⁶⁹ Stephen *Variations*, *supra* note 2, at 763.

⁷⁰ *Against Theories*, *supra* note 1, (manuscript at 27).

⁷¹ Stephen *Variations*, *supra* note 2, at 759.

sentences. Further, Stephen allows that it might be justified to make an example of an offender, if an offence has become common. In that case, it may be necessary “to check it by a severe example.”⁷² This strikes me as a rather problematic reason for a sentence, at least if it is presented as an unlimited principle. General deterrence may be a permissible factor in sentencing, but it should not be a central one, nor should it lead to too great of a variation between punishments in order to make someone an “example.”

So Stephen is more persuasive here, on the whole, although he gets carried away. But the broader point surely is that he is making a theoretical argument, one that we are, or ought to be, intimately familiar with: it is about the possibility of determinate sentences, about the need for judges to exercise discretion, and about the factors judges can consider. This is theory, and it is systematization, and there is nothing wrong with that. Stephen is making distinctions, saying what things are favored or not, what things are right as a matter of morality, and drawing conclusions from them. To be pro, rather than anti-discretion is not to do away with theory; it is merely to have a different theory.

III. CONCLUSION: HISTORY AND PLURALISM

DeGirolami worries that punishment theorists collectively have gotten Stephen almost entirely wrong, that we want to fit him into a particular box, when he resists categorization. I think this claim is exaggerated, or at the very least fails to give due deference to the role of theorists vis-à-vis historians. Historians are trying to get at what the thinker really thought, warts, inconsistencies and all. The theorist is trying to give the best account of the thinker, or failing that, to bring out what is truly distinctive in that person’s thought.⁷³ When this involves unfair distortion that makes a thinker to be not worth taking, this is a bad thing. But it is bad for a different reason than when the historian gets things wrong. It is bad because it leaves us with a less worthy opponent (or ally) in our quest to get things right.

For at the end of the day, that is all that matters. History can show us routes that we should have taken, or can help us to clarify our own positions on matters.⁷⁴ When we ignore someone’s distinctive contribution, this is our loss, because we have lost an opportunity to think freshly about a topic. Stephen’s ideas about hating criminals fit into this category. Of course it does not exhaust Stephen’s thought. He also thought punishment served a deterrence function, but the so-

⁷² Stephen *Variations*, *supra* note 2, at 764.

⁷³ Hart is exemplary in this respect. H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963).

⁷⁴ As DeGirolami expresses the view (he does not endorse it): “[I]f intellectual history really is the tool of normative theory, 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.” *Against Theories*, *supra* note 1, (manuscript at 48).

called “assaultive” aspect of his thought is something that often has been missed by retributivist and utilitarian thinkers alike, and it is important to think about.⁷⁵

I have urged that ultimately we should reject it; certainly what we need less of now is punishment’s dehumanizing and alienating aspects. What we need more of is the idea that criminals are our fellow citizens.⁷⁶ Yet Stephen forces us to rethink what we ought to believe about criminals, and challenges retributivism to prove that it can be more than simply a nice way of talking about revenge. That is an important contribution, but it is, at least in Stephen’s case, more negative than positive. I do not think we can or should take seriously as a recommendation the idea that it is morally legitimate to hate criminals, to view them as animals that at the limit ought to be destroyed.

DeGirolami at the end of his essay presents his own recommendation about theory, which is that we should be pluralists (I am doubtful that Stephen was a pluralist, but leave this to one side). I have already alluded to the way in which DeGirolami’s pluralism affects his own understanding of theory. For him, theory tends to be monistic, which would make pluralism the opposite of theory. I think this is a mistake. Pluralism is a theory about the nature of value, about what values there are, and how they fit together. Moreover, we should be careful not to assume all pluralism is the same.

Kant, to a certain extent, was a pluralist: he believed in both the right and the good. Bentham was probably a monist, although he believed that pleasures could differ in intensity and duration. Mill certainly believed that there were distinct kinds of value, which did not just differ in degree; to this extent he was surely a pluralist. But Kant and Mill were certainly theorists, because they did not rest merely with the idea that there are different values, they thought hard about the questions: how do we order values? In what contexts and circumstances should we favor one value over another? Is there anything general we can say about how values fit together?

If pluralism is simply the idea that there are many values, it is still a theory about the nature of value, but it is incomplete as a normative theory unless it tells us what we should do about the existence of plural values, what this means for what we ought to do.⁷⁷ This seems especially important in law, where we at some point simply have to *make a decision*; we cannot stop at the recognition that there are a lot of values out there. If it says we can do nothing, because values conflict and are incommensurable and it is a matter of arbitrary choice which value to favor, then this is saying something more, but it is a very unhelpful and pessimistic something more. Certainly it falls prey to DeGirolami’s complaint about theories

⁷⁵ JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS & MERCY* (1988).

⁷⁶ R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001).

⁷⁷ I’m inclined to put Cahill in this category. See *Against Theories*, *supra* note 1, (manuscript at 50). Cahill himself is cagey about where he stands. See Michael T. Cahill, *Punishment Pluralism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 25, 26 (Mark D. White ed., 2011).

not being able to offer guidance, because it amounts to saying there is none to give.⁷⁸

I think theory has an obligation to give something more than this—but of course it needs to be shown that pluralism of the pessimistic sort is false (I think this can be done). Theory needs to be able to give guidance, and yes, it needs to do this while still being honest about the diversity of considerations at play. It needs to say at what level some considerations become relevant, and how much weight we should give to each of them. For instance, a retributive theory may allow that the cost of a punishment (that prison is more expensive than probation) can matter in determining sentences, but that this is best left to the legislature, and that judges should mostly worry about the desert of the offender.⁷⁹ Pluralism can be accommodated by noting the diversity of values that correspond to different places in the criminal justice system. And theory can also accommodate pluralism by showing that multiple values might be at play in sentencing, but showing that some are more important than others, that some are at the core and others at the periphery.

DeGirolami admits that any pluralism will have to do something like this. But this inevitably brings him into the realm of theory, with its own risks: will he recognize all the relevant values and in the right way? Will he ignore the ways in which values can in fact be accommodated and systematized? These might be the blindnesses that pluralism is susceptible to, but of course these are matters of degree. Systematizers may have their own blindnesses, but this may be as much a matter of the kind of theory you hold as it is of the personality of the person holding the theory (as DeGirolami admits⁸⁰). And surely systematizers will want to accommodate all real values in their theory, and not leave anything out.

When we do theory, we to some extent abstract from the status quo because we want to get a critical distance from the status quo.⁸¹ Theory has to be informed by practice, but it cannot uncritically defer to practice, which Stephen in his conventionalist moments does. If there is any place where we need a radical critique of everything existing, it is in the area of punishment, where we should not be content to interpret our practice, but should want to change the awfulness of the status quo.⁸² Insofar as the history of ideas helps us to do this job better, we should

⁷⁸ Compare also DeGirolami's work in religious liberty, where he sometimes seems content just to point out the conflicts between values, without indicating how we ought to resolve those conflicts. Marc DeGirolami, *No Tears for Creon*, 15 *LEGAL THEORY* 245 (2009).

⁷⁹ See Flanders, *Cost as a Sentencing Factor: Missouri's Experiment*, 77 *MO. L. REV.* 391 (2012).

⁸⁰ *Against Theories*, *supra* note 1, (manuscript at 52).

⁸¹ Chad Flanders, *Review of STANDING ON PRINCIPLE*, 32 *J. LEGAL MED.* 337, 341-42 (2011).

⁸² See, e.g., Anthony Appiah, *How the Future Will Judge Us*, *WASH. POST*, Sept. 26, 2010, at B1 ("We already know that the massive waste of life in our prisons is morally troubling; those who defend the conditions of incarceration usually do so in non-moral terms (citing costs or the administrative difficulty of reforms); and we're inclined to avert our eyes from the details.").

use it, but when it simply gives a gloss to ourselves at our worst, as Stephen sometimes does, we best leave it behind.