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The Individualization of Punishment

BY RAYMOND SALEILLES

Professor of Comparative Law in the University of Paris and in the College of Social Science

WITH AN INTRODUCTION BY GABRIEL TARDE

Late Magistrate in Picardy and Professor of Philosophy in the College of France

Translated from the second French edition by

RACHEL SZOLD JASTROW

With an Introduction by

ROSCOE POUND

Professor of Law in Harvard University

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INTRODUCTION TO THE ENGLISH VERSION

WHEN Sir James Stephen spoke, not without praise, of the absence of general theories good or bad which distinguished the law of England, he stated a half-truth only. It is true that in Anglo-American law, more than in other systems, juristic theories come after lawyer and judge have dealt with concrete cases and have in some measure learned how to dispose of them. But it is also true that such theories go before our law-making, as they precede law-making elsewhere. They are developed consciously or subconsciously before the legislator, or under our system of case law the judge, formulates the rules by which future causes are to be governed. Hence we have a general theory of crime and of punishment in our Anglo-American common law and in our penal codes; and, although we are coming to have legislation here and there proceeding upon other theories, the latter fits with difficulty into a system of legislation and of judicial decision in which that general theory is consistently developed. Moreover, thinking men have agreed long ago that it is not a good one. For the theory of our common law and of our penal codes is the classical theory. This theory, intrenched in our bills of rights and in common-law juristic thinking, as well as formulated in our penal codes and the decisions construing them, is to-day a formidable obstacle in the way of modern legislation, as the conflict over construction of statutes requiring action at one's peril, the fate of the statute of Washington as to the defense of

insanity, and the constitutional difficulties encountered by probation laws abundantly bear witness. Not many years ago a learned Supreme Court released a child from a reformatory on the ground that a reformatory was a prison, that commitment thereto was necessarily punishment for crime, and hence that such commitment could be warranted only by criminal proceedings of a formal type, conducted with due regard to constitutional safeguards. The rise of Juvenile Courts, justified to the lawyer by the fortunate historical circumstance of the jurisdiction of the Chancellor over infants, has now accustomed us to courts of criminal equity for the youthful offender; but attempts to introduce any system of individualization for the adult will have to wrestle a long time with constitutional provisions.

Professor Saleilles' account of the relation of the classical theory to French penal legislation should be of especial interest in America. Substantially all that he says as to the Penal Codes of 1791 and 1810 applies equally to our criminal legislation. For the New York legislators had the French Code of 1810 before them. Livingston's discussions, based on French sources, were known to them, and the theories on which the French legislation proceeded were familiar and congenial. It follows that the American criminalist has little to add. Perhaps two points deserve notice. In the first place, the desire to preclude arbitrary judicial action was especially strong in America because in the hands of appointees of the Crown the criminal law had been found an efficient engine of political and religious persecution. Unhappily, our law as to misdemeanors had developed in the court of Star Chamber, and the contests between the common-law courts and the Crown in the seventeenth century had convinced the next age that there was no safety except in hard and fast legal formulas applied mechanically. So sure of this were the lawyer and the publicist of the end of the eighteenth century, that in our bills of rights they gave us political and philosophical charts, to which all future governmental action must be made to conform, and they believed them to be merely declaratory of doctrines inhering in the

very idea of justice. The popularity of the common law in America did not extend to the substantive part of the criminal law. Very early by legislation or judicial decision our commonwealths began to adopt the doctrine that there must be chapter and verse of the written law behind every punishment. Thus the unfortunate political conditions that have made the Star Chamber a synonym for arbitrary and oppressive administration of punitive justice will long stand in the way of a revived "court of criminal equity." But in France also the classical theory was a reaction against abuse of absolute power. In consequence the American reader will find the author in sympathy with the views which have come to us through our legal history. For our experience has not been unique. It is an inherent difficulty in the administration of punitive justice that criminal law has a much closer connection with politics than has the law of civil relations. There is no great danger of oppression through civil litigation. There is constant fear of oppression through the criminal law. Not only is one class suspicious of attempts by another to force its ideas upon the community under penalty of prosecution, but the power of a majority to visit with punishment practices which a strong minority consider in no wise objectionable is liable to abuse and, whether rightly or wrongly used, puts a strain upon criminal law and administration. All criminalists must reckon with this difficulty. Perhaps American lawyers insist upon it unduly, to the exclusion of other points of no less importance. But revolutionary France had the same ideas, and by consequence the author canvasses the very objections and discusses the very requirements of legal policy which we also must consider.

Secondly, we must take account of the part played by Puritanism in the development of Anglo-American law. The relation of Puritanism to the common law is quite as important a part of the philosophical history of our legal system as the relation of Stoic philosophy to Roman law is part of the history of that system. In each case we have to do with the dominant fashion of thinking upon fundamental questions during a critical period of growth. The two grow-

ing periods of our legal system, the two periods in which the rules and doctrines that obtain to-day were formative, were the classical common-law period, the end of the sixteenth and beginning of the seventeenth century, and the American common-law period, the period of legal development in America that comes to an end after the Civil War. But the age of Coke was the age of the Puritan in England, and the period that ends with our civil war was the age of the Puritan in America. Indeed, he had his own way in America. Here he was in the majority and made institutions to his own liking. It is no accident, therefore, that common-law principles have often attained their most complete logical development in America. Hence the contribution of individualist religious dogma to the criminal law was much greater in America than in France. The individualization in practice which was permitted by the canon-law conception of searching and disciplining the conscience was wholly alien to the Puritan. For above all things he was jealous of the magistrate. If moral questions were to be dealt with as concrete cases to be individualized in their solution, subordination of those whose cases were decided to those who had the power of weighing the circumstances of the concrete case and individualizing the principle to meet that case might result. His idea of "consociation but not subordination" demanded that a fixed, absolute, universal rule, which the individual had contracted to abide, be resorted to. "Nowhere," says Morley, "has Puritanism done us more harm than in thus leading us to take all breadth and color and diversity and fine discrimination out of our judgments of men, reducing them to thin, narrow, and superficial pronouncements upon the letter of their morality or the precise conformity of their opinions to accepted standards of truth." But this is exactly the method of the classical theory in criminal law. Indeed our common-law jurists have taken it to be fundamental in legal theory. Thus, Amos says: "The same penalty for a broken law is exacted from persons of an indefinite number of shades of moral guilt, from persons of high education and culture, well acquainted with the pro-

visions of the law they despise, and from the humblest and most illiterate persons in the country." And, be it noted, he states this as a matter of course, with no hint that we may attain anything better. Thus political events and the Puritanism of nineteenth-century America tightened the hold upon us of a theory which on other grounds for a time was accepted everywhere. For to find a proper mean between a system of hard and fast rules and one of completely individualized justice is one of the inherent difficulties of all administration of justice according to law. And in the movement to and fro from the over-arbitrary to the over-mechanical, the eighteenth and nineteenth centuries stood for the latter.

More recently throughout the world there has come to be a reaction against administration of justice solely by abstract formula. In France it appears as a newer and freer method of interpreting the codes. In Germany it takes the form of agitation for "*freie Rechtsfindung*." In England it is manifest in Lord Esher's farewell speech, in which he thanked God that English law was not a science, in Sir John Hollams's protest against treating the private controversy between John Doe and Richard Roe, not as a cause in which justice is to be done primarily, but primarily as a means by which to settle the law for other litigants, and in the wider discretion which is now accorded to the bench in order to give fuller power of doing justice. In the United States it is manifest in a tendency toward extra-legal attainment of just results while preserving the form of the law. To a large and apparently growing extent the actual practice of our application of the law is that jurors or courts take the rules of law as a general guide, determine what the equities of the cause demand and contrive to find a verdict or render a judgment accordingly, wrenching the law no more than is necessary. Occasionally we find a judge owning frankly that he looks chiefly at the ethical situation *inter partes* and does not allow the law to interfere therewith more than is inevitable. Many appellate courts are suspected of ascertaining what the broad equities of a controversy require and justifying a result in

accord therewith by the elaborate ritual of a written opinion. Complaint of this is not uncommon wherever lawyers discuss recent decisions among themselves, and at least one bar association has made it the subject of a resolution. The movement for individualization in criminal law is but a phase of this general movement for individualizing the application of all legal rules.

The chief reliance of our system toward individualizing the application of law is the power of juries to render general verdicts, the power to find the facts in such a way as to compel a different result from that which the legal rule strictly applied would require. Probably this power alone has made the common law of master and servant tolerable in American jurisdictions in the twentieth century. Yet exercise of this power, with respect to which, as Lord Coke expressed it, the jurors are chancellors, has made the jury a most unsatisfactory tribunal in many classes of cases, and, in view of the practice of repeated new trials, which this power has in large part occasioned, a most expensive one. In criminal causes this is even more marked. Exercised in homicide cases, it led to the situation Mark Twain satirized when he called upon the legislature to make insanity a crime. In order to be able to procure convictions at all in cases of homicide, many of our jurisdictions leave the penalty to the jury. The penal code of California has such a provision, and a collection of criminal cases published recently by the chief of police of San Francisco enables us to see how the power has been exercised. As one studies the cases he can see to a certain degree that broad lines were drawn by the juries, even if crudely. But one of these lines which is most apparent is between picturesque murder, however brutal, and brutal murder without the picturesque element. Then, too, the cases show that the choice of penalty depends very largely on the temper of particular juries. For example, Goldensen, a boy of 19, who suddenly killed a girl of 13, was hung, while Hoff, who brutally murdered a woman who had employed him, having been sentenced to be hung on the first trial, on a second trial, granted for an error of procedure,

was imprisoned for life. In the cases of murder for gain or incident to robbery this is even more apparent. The so-called "gas-pipe" murderers, who were robbers, were hung. So was Kovalev, an escaped Siberian convict, who murdered for gain. But Sontag and Evans, professional bandits, who had committed a long series of train robberies, had killed many and shot many more, were imprisoned for life. So in the case of Dorsey, a stage robber and murderer. Experience elsewhere has been the same. Obviously the crude individualization achieved by our juries, and especially by leaving the assessment of penalties to trial juries, involves quite as much inequality and injustice as the mechanical application of the law by a magistrate. Unchecked jury discretion upon the whole is worse than the unchecked magisterial discretion from which the classical school sought to deliver us.

What we have to achieve, then, in modern criminal law is a *system* of individualization, and that this is possible we have the warrant of the experience of courts of equity. In equity we have a system of legal individualization. Every rule has a margin, more or less wide, which admits of discretion in its application to individual causes. As Lord Eldon put it, the doctrines of equity "ought to be as well-settled and made as uniform almost as those of the common law, laying down fixed principles but taking care that they are to be applied according to the circumstances of each case." In equity, too, we have a system of judicial individualization. There is not, as at law, a stereotyped form of judgment which must needs be rendered in every case; but the court has wide powers of adapting the decree to the concrete cause and of doing what will most subserve the ends of justice therein. For the individualization in equity in our system is in its administration rather than in its substance, except as its substance allows this. That rights of property, which are constantly involved in our equity litigation, have not suffered in any wise under such a régime, argues that rights of personal liberty, of which we are at least no less tender, do not require hard and fast formulas administered mechanically in order

to receive full protection. We must not overlook that to-day publicity is the most effective check and balance upon the magistrate. There is much less need of the elaborate tying-down to which our fathers subjected him.

It will be urged that there are constitutional provisions which preclude any system of legal or judicial individualization in criminal law in this country. But Professor Saleilles seeks to guard the very interests which our bills of rights are designed to maintain. Hence in large part his discussion of the means of attaining a system of individualization are applicable to us also. Moreover, "unconstitutional" is ceasing to be a word to conjure with. Not long ago we were wont to say "unconstitutional" as Mr. Podsnap said "not English." To-day we are not so sure that the end of the eighteenth century spoke the last word on all fundamental questions of our polity. Where but a short time since it was a commonplace to say that amendments of the federal constitution came only through civil war, we now contemplate complacently speedy and peaceful alterations therein without any pressing exigency. As to State constitutions, which are chiefly involved, we are likely to see change become quite easy enough in the near future when there is anything which reasonably demands it.

With respect to the author, it should be noted that he is primarily a lawyer, writing from a lawyer's standpoint and appreciating, as sociologists and lay criminalists do not at all times appreciate, the purely legal problems of which the lawyer is so acutely aware. As professor in the Faculty of Law of Dijon and afterwards in the Faculty of Law of the University of Paris, his chief labors have been in the field of comparative law, in which he has published, among others, the following important works: Étude sur les sources de l'obligation dans le projet de code civil allemand (1889); Du réfus de paiement pour inexécution de contrat; Étude du droit comparé (1893); Étude sur la théorie générale des obligations dans la seconde rédaction du projet de code civil allemand (1895, 2d ed. 1901); Les accidents du travail et la résponsabilité civile (1897); De la déclaration de volonté (1901); De la

...on des meubles; Étude de droit allemand et de droit ... (1907). As to his sociological teaching at the Col... des Sciences sociales, it will be enough to refer to ... appreciation by M. Tarde in the preface to the first ... of the present work.

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