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AMERICAN AND EUROPEAN CRIMINAL JURISPRUDENCE

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I. It is a very interesting undertaking to compare the results of the scientific works of different nations and countries, and especially so if these branches of science show distinct national characteristics and traits. This we can see in different branches of law and of jurisprudence; also in the criminal law, as, for example, the judgment of duels and suicides.

Comparisons of the results of American and European criminal jurisprudence will be made especially respecting the most civilized and the most important states.

We will attempt, first, to characterize the scientific results of those groups of states which we wish to compare; second, to compare the results of American and European criminal jurisprudence; and third, to draw conclusions from these comparisons.

II. First we will characterize the criminal jurisprudence as represented by the leading American writers—Bishop, Wharton, MacClain, Washburn, Crankshaw, etc.² Such representatives of American criminal jurisprudence we see in the American contributors of the *Journal of the American Institute of Criminal Law and Criminology*, and such manifestations of American criminal jurisprudence must be observed in the reports of the commission organized for codifying the criminal law of the U. S. of A., as well as in the codified American penal codes; for example, in the Penal Code of New York.

American law is closely related to the English law, in which field we have such well-known representatives as Stephen, Archbold, Harris, Kenny and Phillips.

And how shall we characterize the scientific results of these writers?

If we are quite sincere we must make the objection, as we believe, that these writers attach too great importance to the psychological, medical, and other problems of auxiliary sciences of criminal jurisprudence, and do not occupy themselves deeply enough with the study

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²It is a great pity, that in consequence of the economical circumstances, the European writers cannot study the newer editions and newest publications!

of criminal law itself; they do not settle limits between criminal jurisprudence itself and their auxiliary sciences.

To prove our objection we will refer to the following: The end and aim of science is to give definitions of universality and principles, the validity of which would last with an unvarying precision the longest time possible, and by which we should be able to decide single cases as well.

To realize this end and aim of science it is necessary that all these principles should be constructed quite abstractly. The American representatives of criminal jurisprudence will, perhaps, excuse our objection, but it is especially this abstractness of rules and principles that we miss in their works. To prove this we refer to the fact that in the most handbooks and manuals of criminal law we scarcely find any systematic, general, or preliminary considerations of criminal law; or in the best case they are too short and not deep and systematic enough.

An exception in this direction is the standard work of Bishop.

We will refer in this manner to some few other points of view also.

In the American criminal jurisprudence, for example, we do not find the problems of unlawfulness and the circumstances which exclude the unlawfulness of an act, self-defense or compulsion, treated profoundly enough; we miss the detailed treatment of the problems of trial and of the possible parties to a crime; for example, the treatment of the structure of the essential and processual conditions of crime.

Although all these problems are of very great importance, we can justly say that they have even a decisive influence on the judgment of crime. American criminal jurisprudence deals too briefly with these questions.

Perhaps linguistic obstacles hinder the American writers from taking advantage of the results of the scientific works of other countries. We dare not forget, however, that one nation cannot ignore the productions of other nations.

American writers propagate, to a great extent, the treatment of cases and prejudications. This is from a pedagogical point of view of great importance, but it cannot satisfy scientific demands.

III. European criminal jurisprudence regards the most important task to be the treatment of the juridical problems themselves—the clearing up of the juridical points of view, the explanation of ideas and development of conceptions, with their historical and logical connections.

The French standard works of Prins, Garraud and Vidal, and those of Liszt, Finger, Allfeld and M. E. Mayer, written in German, all wish to accomplish this purpose. In these works there is a contrast only in one direction; the French manuals are written more artistically and lightly, while the German treat their problems more systematically and deeply.

The standard work of the Dutch criminalist, Van Hamel, one of the three originators of the International Criminal Association, takes an intermediate position between these two groups. We believe no one work in the literature of the whole world can be compared with this excellent manual with its great depth and abundance of ideas, with its exactness, with its artistic elaboration of the problems, and with its utilization of the results of the literature of all leading civilized states.

But it would be prepossession and short-sightedness if we would not notice the decay of European science, especially in the European criminal legislative works. Although the most legislative works of the civilized states were formerly well enough constructed from the criminal point of view, yet we must now see a decay.

Before, for example, criminal laws were made for the defense of an exactly-fixed right—as private property, or the defense of human life, etc.

Now European legislations make a long series of such laws, by which they wish to punish certain facts; therefore they describe these facts, because otherwise it is quite impossible to determine the good or right of that interest which is to be defended. Such laws were made for the maintenance of social order, for the defense of the value of money, etc. No rights are defended, but plain facts are punished, a condition which is quite erroneous from the point of view of criminal jurisprudence.

The consequences of those legislative works show, too, that our objection is well founded.

On the 18th of January, 1917, the German Bundesrat had to make a regulation that if someone was not conscious of the unlawfulness of his act, the proceeding must be discharged. Only in this manner was it possible to avoid the greatest injustice!

IV. We saw that American criminal jurisprudence is in a great measure occupied with other problems than European science. Involuntarily we have to put the question, Does European jurisprudence do useless work, and can American science dispense with the treatment of all these juridical problems?

We think we must decide both questions in a negative sense.

America attributes a greater importance to practical problems, and in consequence, the writers occupy themselves with problems which are in a closer connection with practical life, and do not decide these in such a general sense as European science does. But in consequence of this, America arrives sometimes at the same result as an operative surgeon does, who wants to avoid learning surgical treatment in general, and hopes to obtain this aim by learning each separately, the surgical treatment of wounds on the head, on the neck, on the body, on the arms, etc. He will have much more trouble and will do superfluous work besides.

If we compare the extents of the standard works of the criminal law of Bishop and Liszt we have to come to a similar result.

We must not forget that, since we have fixed the general principles, with their help the decision and the judgment of each single case will be very easy.

But neither can we pass ever in silence an objection respecting European criminal jurisprudence.

Some European writers are disposed to speculations and artificial constructions. On the boundary between the demands of practical life and speculation there is already Max Ernst Mayer's German work of the General Part of Criminal Law. Wilhelm Sauer gives himself up entirely to speculation in both his works: *Grundlagen des Strafrechts* (Berlin, 1921) and *Grundlagen des Prozessrechts* (Stuttgart, 1919).

The result of our discussion is that both parts, the representatives of American criminal jurisprudence, as well as those of European criminal jurisprudence, have to learn much from each other.

The Americans must acquire more depth, much more abstractness, and more system in the treatment of their problems. On the other side, European representatives of criminal jurisprudence must avoid inclinations for speculation.