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Loeb-Leopold Case

Harry Olson

THE LOEB-LEOPOLD CASE—(Concluded)

F. A SYMPOSIUM OF COMMENTS FROM THE LEGAL PROFESSION

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The joint report makes no allusion to the heredity of either of these individuals. Such information might throw considerable light on this case. Often as much can be determined by a study of the heredity of an individual as can be learned from a clinical examination. For a diagnosis or an understanding of this case one should have the background afforded by a study of the heredity. I believe, from this report that the Leopold-Loeb case is not an environmental calamity, but a hereditary catastrophe!

The report says: "There is justification in stressing the uniqueness of this case if for no other reason than that it has created widespread panic among parents of young people." This case is not so unique from a psychological standpoint that it will not frequently repeat itself. On the contrary, it is very common in criminology where one of the parties is homosexual.

The part of the report referring to their contempt for women is interesting because it suggests homosexuality, to which no direct allusion is made.

The reference in the report to the "Emotional Life" gives an accurate picture of dementia praecox in which the normal emotions were lacking. From the description of their emotional life I believe that Leopold was a dementia praecox with paranoid trends, and Loeb was a dementia praecox hebephrenia, and from the character of the assault upon the Frank's boy, I would assume was an epileptic as well, as the killing in this case has a typical epileptic component.

That part of the report referring to Leopold's waking dreams relating to his peculiar religious interests and visualization of the crucifixion, and the reference to the so-called "phantasy" relationship, suggests sex Sadism and Masochism.

The reference to Leopold's attendance at a girl's school would indicate that he was effeminate, hence was sent to such a school.

There is nothing in the environmental life of these boys, as shown by the report, that would account for their mental condition, nor for the crime. It is my belief that that condition has a hereditary background, even though remote, which was not shown at the trial, for which there were obvious reasons.

Robert E. Crowe, the State's Attorney, investigated this case with great ability. He developed the facts with the utmost care and thoroughness, and is entitled to high praise for the initial energy and effectiveness of his investigation and prosecution. However, he prosecuted the case on the theory that the defendants were normal, or at least not insane, and demanded the death penalty, thereby ignoring all mitigating facts. This is disappointing, as the prosecutor had been at the head of the Crowe Crime Commission, which presented to the Illinois Legislature a law for the segregation of mental defectives, in which the definition of a mental defective was as follows:

"A person who has:

(a) a defect of intelligence; or
(b) a defect of *affectivity* or *emotion;* or
(c) a defect of will;

to such a degree that he has criminal propensities and while at large is a menace to the life and property of others."

This bill passed the Illinois Legislature, but was vetoed by the governor, principally on the ground that the bill providing an appropriation for a farm colony did not pass. Thus it will be seen that emotional defect was recognized (except in murder and rape) in the law of Illinois prior to the Leopold-Loeb case. By the passage of this law the people of Illinois through their legislature expressed the public policy of the state as being in favor of treating the emotionally insane differently from other criminals, and substituting segregation for life in a protective farm colony in place of the traditional penitentiary.

The weakness of the defense in this case lay, in my opinion, in a failure to present the heredity background of the case, if any, and in their failure to "call a spade a spade." They evidently did not want their clients sent to the insane asylum, but preferred to have them sent to the penitentiary. While they apparently sought to make their clients out mental defectives, they did not wish to go too far for fear they would get them in the insane asylum.

It is quite true these defendants knew the difference between right and wrong, but I doubt whether such knowledge was sentient, or that they had the power to choose, in view of their mental

condition, as disclosed at the trial, and thus might have been successfully defended as insane under the law ot Illinois as it now stands. Counsel evidently did not dare to take the chance with a jury in this day of slight public knowledge of psychiatry.

It is unfortunate for the administration of justice and for modern psychiatry in this country that the court in his written opinion apparently ignored the testimony which showed them to be emotional defectives.

It is true the court in one part of the decision said that the defendants were abnormal, and if normal would not have committed the crime, but he did not base his leniency and failure to hang them upon their mental condition. The courts may accept a plea of guilty as a factor in mitigating punishment, and also youth, but this murder was so aggravated and clearly proved, the defendants were about eighteen years of age, and in addition were college graduates, so that there is little or nothing here upon which to base mitigation. Clearly the only sound ground for failing to hang them was their mental defectiveness out of which the crime itself sprung. This failure to give weight to their mental condition was, in my opinion, a serious mistake, and has led to public confusion as to the soundness of the court's judgment.

The decision of the court that they be imprisoned for life was the only one he could properly and honestly give under the plea and evidence in this case. Drunkenness is no excuse for crime committed under its influence, but a court would err that excluded drunkenness as a defense, because the court and the jury may take the fact of intoxication into consideration in fixing the punishment. So here an abnormal mental status, probably amounting to dementia praecox hebephrenia, plus epilepsy, and dementia praecox paranoides, certainly must be taken into consideration by the court in fixing the penalty, as it will be only a few years until such grave mental aberration will be adequate defense in the courts against the charge of the crime itself, if it is not so already.

I doubt very much whether this was a kidnaping case at all. It appears to me that the ransom letter and pretended kidnaping was planned as an alibi to throw suspicion away from the perpetrators. Kidnapers do not destroy their victim. They keep him alive so that they will have something to sell for the ransom. In this case the killing occurred first and the ransom letter was sent afterward. The killing may have been accidental as a result of possible abuse of the Frank's boy, or it may have been done to silence him so that he could not tell of such abuse.

To sum up, I do not agree with the attitude of the prosecutor in ignoring the obvious emotional defects of Leopold and Loeb; I do not approve of the policy of the defense counsel in arbitrarily limiting the defense by the plea of guilty, and again curtailing it by accepting the report of the alienists with an omission of so significant a factor as the heredity of the defendants, and in pursuing the obvious, through excessive testing of the intelligence to the exclusion of the essential issue—*the emotions,* and I am not entirely satisfied with the written opinion of the learned judge, wherein he limits the mitigating circumstances in this case to the plea of guilty and the youth of the defendants, and places in the record the fact that he ignored the testimony of the alienists. He may have justified this, however, just because of the omissions and apparent generous use of artifice in the reports and testimony of the defense alienists. The obvious omission of elemental facts, and the stressing of non-essentials and invention of the teddy bear and cow-boy-suit psychoses conduced only to confusion. It therefore was most unfortunate for the administration of justice and the progress of modern psychiatry, that such omissions, half-truths, ignored facts and artifices beclouded the real issues in this case. As the defendants are alive, I leave it to time to substantiate the above comments.

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The opinions expressed by the alienists in the Loeb-Leopold case evidently had no influence upon the judgment of the trial court. The penalty quite properly was fixed without reference to the report of the psychiatrists. Although undoubtedly the defendants presented certain aspects of abnormality, a plea, based on insanity, would not have been justified and could not have prevailed.

The report indicates very clearly the full mental and legal responsibility of the defendants for their acts as measured by any standard known to present day jurisprudence.

Similar opinions could easily be secured with reference to any average inmate of our jails or prisons; or with reference to the

average person condemned to capital punishment. If this be true, it follows that the line of reasoning and investigation adopted by the experts, if approved by the courts, would overthrow our entire system of administering justice. It may be argued that this ought to be done; but it is not the function of either the judge or the state's attorney to do it. It may be that in some future stage of civilization, other standards will be set up. Whether crime is always an evidence of disease and should be treated instead of punished, is an interesting speculation; but it could have no proper place in the decision in this case.

In view of the foregoing, there remained for the trial court but one vital question, to-wit: Whether these boys should pay the death penalty, both being minors, after a voluntary plea of guilty. It is a grave responsibility to advise the interposition of a plea of guilty upon the part of anyone in a capital case. This responsibility is all the greater when such a plea is entered by or in behalf of a person so young that the law, in all other relationships of life, presumes him incapable of acting for himself in any crucial matter. In many jurisdictions, a plea of guilty to murder in the first degree, if it involved the possibility of the death penalty, would not be accepted from or in behalf of a minor.

It is my judgment that there is a growing opposition to the death penalty in any case. Personally, I do not believe in capital punishment, although, as a matter of duty, I have prosecuted murderers and have asked for first degree verdicts from juries. I notice, however, that juries are increasingly squeamish about such verdicts where death follows as a natural consequence; and many of our best jurors have conscientious scruples on the subject, thereby disqualifying them from jury service with a resultant loss to the state. It is fair to say that the tendency all along the line is to soften the ancient harshnesses of the criminal law; and the execution of two minors, after a plea of guilty and without a jury trial, would have been contrary to the modern view.

It is unfortunate that the wealth of the parents and the exploitation of the learning of psychiatrists should have delayed into weeks a hearing which should have been concluded in two or three days, thereby giving the appearance to the world that money and influence were tampering with justice. A swift sentence (like the one actually imposed), based entirely upon two factors—the legal infancy of the accused and the absence of a jury verdict—would have

met every requirement of justice and gone far to satisfy the public mind.

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A. The Judge's Sentence

1. In the judicial opinion giving reasons for imposing less than the extreme sentence for murder in the Loeb-Leopold case, the court was "moved chiefly by the consideration of the *age of the defendants*—boys of 18 and 19 years, . . . persons who are not of full age." Declaring that the court's judgment "is not affected" by the psychiatrists' analysis of the "physical, mental and moral condition of the two defendants," and dwelling exclusively on their age, the court points out that the mitigation of penalty based on that circumstance alone "appears to be in accordance with [1] the progress of criminal law all over the world and [2] the dictates of enlightened humanity." The opinion adds that the life-imprisonment penalty "may well be the severer form of retribution and expiation."

These astonishing pronouncements, with their incidental reference to "progress of criminal law," "humanity," "expiation," "retribution," evidently were logical consequences of some conceptions, in the judicial mind, of the purpose of the penal law. Let us therefore briefly glance at the well-known state of theory on that subject.

2. The theories of the basis of penal law are all reducible to four —Retribution, Reformation, Deterrence, Prevention. But the last of the four—the preventive basis—does not concern the law and the courts; it concerns the general social measures—such as education and eugenics—which will eliminate or diminish the tendencies to crime; hence it is here immaterial. There remain the theories of Retribution, Reformation and Deterrence.

The *retribution* theory was once dominant, centuries ago. It had a theological origin, but has long been discarded. Probably the last writer to advocate it frankly was Thomas Carlyle. In his Latter Day Pamphlets, he says, "There is one valid reason, and only one, for punishing" a murderer with death, and that is that nature "has planted natural wrath against him in every God-created human heart. Caitiff! we hate thee—not with a diabolic, but a divine hatred. In the name of God, not with joy and exultation, but with sorrow stern as

thy own, we will hang thee on Wednesday next!" But nobody defends this theory any longer.

Why, then, does the opinion in the Loeb-Leopold case refer to a life sentence as "the severer form of *retribution* and *expiation?*" Those terms are discarded—and discarded by the very "progress of the criminal law" elsewhere invoked in the same opinion.

There is indeed one aspect in which the retribution idea still legitimately has a bearing, viz., not in initially fixing the penalty, but in *rebutting a plea for mitigation.* "We do pray for mercy," says Portia, "and that same prayer doth teach us all to render the deeds of mercy." He who asks for mercy is met by the retributive answer, "You yourself showed no mercy." So in a homicide case: The atrocious killer, if he asks for mitigation, is answered: "Who are *you,* to ask for mercy, that showed no mercy to others?" From the killer's point of view the retribution idea is a sufficient answer. And so it should have been in the Loeb-Leopold case.

But *that* theory does not tell the law how to fix the penalty in the first instance. And so we come to the other two theories.

The *reformation* theory is the proper basis for shaping any and all penalties, so far as concerns the individual at bar. It may lead to permanent segregation from society, at one end, or to immediate discharge on probation, at the other end. All modern criminal law has been modified, in obedience to this theory. In the Loeb-Leopold case it would lead to no mitigation; for there was no evidence at all that these men would ever reform. The evidence was all to the contrary. Their philosophy of life was fixed; they had been developed by the highest education; their cynical, callous unscrupulousness revealed them as irreclaimable.

But this reformation theory affects solely the *individual at bar.* It takes no account of the mass of humans outside. The criminal law is quite as much concerned with social effects, i. e., effects on the community at large. And that is where the deterrence theory comes in. The opinon in the Loeb-Leopold case ignores entirely this basis of the criminal law. And that is its cardinal error.

The *deterrence* theory is the kingpin of the criminal law. The crimes contemplated but not committed bear the same ratio, or greater, to those actually committed that the submerged base of an iceberg bears to the portion visible above the surface; scientists say it is as 6 to 1. The fear of being overtaken by the law's penalties is, next to morality, what keeps most of us from being offenders, in one way or another. For the professional or habitual criminals, who have ceased to care for social opinion, it is the *only* thing. A lax criminal law

means greater yielding to the opportunities to crime. This is common knowledge.

So the main question here really was: Would the remission of the extreme penalty for murder in the Loeb-Leopold case lessen the restraints on *the outside class of potential homiciders?* The answer is *yes,* emphatically. And daily newspapers dispense us from laboring to offer any elaborate proof. On September 1, after the counsel's argument for the defense had been published, two 18-year-old girls were arrested in Chicago for assisting two youths of 16 and 19 (Bill and Tony) to kill cruelly an old woman whose money they coveted. And the girls on their arrest said: "A cop told me they would hang Tony. But they can't. *There's never been a minor hanged* in Cook County. [Note that the judge later cited this point in his opinion.] *Loeb and Leopold probably won't hang. They are our age. Why should we?"* These particular reckless dastards, it seems, "wanted money for our good times, excitement, clothes, and fun," and they don't mind killing because they won't hang. On September 2, a male and a female, 19 years old, were arrested for highway robbery in Alexandria, Va.; the robbery failed, by accident only, from being a murder; the female, when arrested, said, "I'm sorry I didn't get away with it; if *I had more experience, I would have."* (*New York Times,* Sept. 3, 1924.)

As everyone knows, today is a period of reckless immorality and lawlessness on the part of younger people, at the ages of 18-25. It is more or less due to the vicious philosophy of life, spread in our schools for the last twenty-five years by John Dewey and others—the philosophy which worships self-expression, and emphasizes the uncontrolled search for complete experience. Whatever the temporary cause of this behavior may be, it is in special need of repression. The instances above quoted show that such persons *are* amenable to the threats of the criminal law. If that law has no threat for them, they will the less try to repress their nefarious antisocial actions. Life imprisonment has no terrors to their minds. It takes not only imagination, but an experience of it, to sense any of that terror. But hanging is a penalty that needs no imagination and no experience. Everybody has sufficient horror of that—everybody except the crazy and the mere child.

And that is where we see the special, dangerous error of the court's opinion in the Loeb-Leopold case, in basing the mitigation on the offenders being "under age"—that is, under twenty-one. What has the twenty-one-year line to do with the criminal law? Nothing at all, nor ever did have. The twenty-one years is merely an arbitrary date for purposes of property rights, family rights, and contract rights.

For purposes of criminal law the only question is: *Are persons in general of the age at bar susceptible to the threat of the law's extreme penalty? Would it help to deter them?*

It certainly would. Those two clever female miscreants of eighteen that helped choke the old woman to death were smart enough to perceive the difference between hanging and imprisonment. Loeb and Leopold were clever enough to understand it; else why did they take such ingenious pains to avoid detection and to leave the country? As a matter of fact, the *only* thing that they did fear was the criminal law. Neither personal morality nor social opinion imposed any limit on their plans. The only repressing influence on them was the criminal law. To mitigate its penalty for them was therefore to "take the lid off" for all unscrupulous persons of their type.

And that is what the sentence of the judge in this case has done for Cook County!

B. The Psychiatrists for the Defense

I maintain that the reports of the psychiatrists called for the defense, if given the influence which the defense asked, *would tend to undermine the whole penal law.*

1. To perceive this, first note the expressions which reveal their point of view. These defendants were "peculiarly maladjusted adolescents." They had a "background of abnormal mental life." The qualities that "make their criminal conduct comprehensible have their roots in mental life, etc., during the years of early childhood." His "ego is all-important, right or wrong, his desires and will being the only determinants of his conduct." There is "instability of the nervous system." There was an "extraordinary moral callousness growing upon him." They were "*driven* in their actions by the compulsive force of their abnormally twisted life of fantasy or imagination." And so on.

Now all this is not the language of modern penal law. It is the language of biology. It points out that these cruel, ruthless deeds were simply the result of the parties' innate characters, as they developed even amidst the most favorable surroundings. The psychiatrists' description is just such a description as a botanist might give of a certain weed, as distinguished from a certain useful plant. What is their obvious logical conclusion, implied throughout?

It is this: If a party's life-history shows that his development as a human fiend was perfectly natural and inevitable—that he was "driven" (as they put it) by his character—then he should not receive the ordinary penalty for his misdeeds.

This is sheer Determinism. The vast complex of events that has brought you or me to the point of this criminal act makes it inevitable. Our character predetermined it. There was no choice for us, because all human acts are predetermined, and could be predicted if there were an omniscient observer.

2. Now, does Determinism eliminate moral blame, and therefore eliminate penal consequences?

These new-school psychiatrists answer, Yes. They do not say it, but they imply it in every sentence. And their answer applies just as much to the cruel murderer as to the petty window-breaker. He couldn't help it; then why punish him? As one psychiatrist said, who is attached to a court, speaking of delinquents: "We try to help criminals to get through the situation!"

Are these psychiatrists right? Emphatically, No. But their implications are dangerous, because their logic seems to eliminate penalties, and would, if applied practically, undermine the entire penal system.

Now this question of Determinism is an old one. In the 1800s, when the new biology was spreading, it was resented by the orthodox penologists, because it seemed to threaten the whole penal system. The Determinist criminologists were denounced by the orthodox.

But the answer was given by the Determinists themselves: Determinism leaves the penal law untouched. The measures of the modern penal law are not based on moral blame, but on social self-defense. When there is a weed in your garden, and you cut it down, you do not do this on any theory of the moral blame of the weed, but simply on the theory that you are entitled to keep weeds out of your garden.

So here. Society is entitled to use appropriate measures to repress anti-social acts. Society's right of self-defense is equally valid even when the human weed was predetermined by nature and environment to do just what he did. "Punishment," says Ferri (Criminal Sociology, § 219) "will no longer be retribution for a moral fault by a proportionate chastisement (ethico-legal phase), but a sum of preventive and repressive social measures which will protect society from the assaults of crime. . . . But the present spirit of penal justice, suffering from a double error, . . . and a *misunderstood application of the new scientific data, offers the most improvident impunity or indulgence to the more dangerous criminals.*"

Mr. Ferri has here struck at precisely the ominous error of the psychiatrists in the present case. This is the first instance in which their theories have been publicly advanced in an actual trial outside

the juvenile courts. They are preaching that, because of Determinism, the most dangerous criminals should be given indulgence.

And yet—this is the ominous feature—their theory *applies equally well to every man who comes to stand in the dock for a deliberate crime.* Look at his life history as fully as these learned gentlemen did in this case, and you will find that it was more or less the natural and inevitable result of his character. And (according to these gentlemen) the more natural and inevitable it was, the more indulgent should the law be!

3. I propose that the scientists who are advancing this theory go back to books like Ferri's (before writing more books of their own) and study the theory of penal law. As doctors and friends, let them sympathetically "help the criminal to get through the situation," by all means. But as advisers of a criminal court, let them learn that their Determinism is out of place, and that Society's right to eliminate its human weeds is not affected by the predetermined character of the weeds.

It is an excellent thing that these scientists have had their day in court thus publicly, because their theories have been going about in books and articles and have begun to affect public opinion. It is time that the issue be squarely faced in the open, before the whole administration of the penal law is undermined. Let public opinion look into the literature on this subject, and learn to discard that false sympathy and dangerous weakening that is apt to arise on first acceptance of the biopsychologic doctrine of Determinism.