

Winter 1938

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Recommended Citation

Logan Wilson, Public Opinion and the Individualized Treatment of Criminals, 28 *Am. Inst. Crim. L. & Criminology* 674 (1937-1938)

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PUBLIC OPINION AND THE INDIVIDUALIZED TREATMENT OF CRIMINALS

LOGAN WILSON¹

In their concern with many points of view, most criminologists have neglected a very important one—that of the layman. The criminal has been subjected to so much probing that the non-criminal may be said to have become the forgotten man. Furthermore, it is beginning to appear that the efforts to individualize treatment are inevitably headed into a *cul-de-sac* unless more attention be given to certain basic public sentiments. These underlying attitudes may be circumvented but they cannot be ignored, because in them is found the crux of many problems which baffle an effective program of action. It is not the intention of this study to find fault with a program which offers the best known palliative for a societal disease which has no apparent cure, but rather to ascertain what must be dealt with by the criminologist if he is to enlist public support. Likewise, there is no implication that reform is faced with a Hobson's choice, but merely that expediency must be made a major ground of judgment and that ends are nonsensical without means.

One may object that the criminologist is a specialist and that he is therefore directly concerned with neither the non-criminal nor his point of view. Such is the tendency of the theorist—yet the average criminologist is an applied sociologist or psychologist, and society has a particular suspicion of specialists who would minister to the body politic. Especially is the public distrustful of those who would alter institutions or single out for innovations of treatment a very significant group without due regard for the opinions of the majority. While the public may be skeptical concerning the practicability of specific programs of action, it nonetheless realizes that it must turn to the theorist and research worker for knowledge. The essentially conservative nature of public opinion in ordinary circumstances is prompted by a desire to maintain the social equilibrium and it is self-evident that popular sentiment should view with misgivings and even hostility any threat to disrupt the *status quo*. This fact accounts for its attitude toward crime *per se*

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and also partially explains its hesitancy to adopt reforms in criminal procedure and treatment.

The criminologist, on the other hand, too often takes little cognizance of existent public opinion, even though his thinking within his own immediate field may be of the most realistic kind. For conclusions to be made effective, however, the public must be considered. The whole situation is tersely put by Professor Sheldon Glueck in a speech before the New York State Conference on Social Work:

You no doubt realize that during the past few years the more liberal correctional devices, such as probation, parole and indeterminate sentence, have been under attack. This is an old phenomenon. Every few years there seems to be a swing of the pendulum between the extremes of a repressive point of view toward crime and a curative and rehabilitative attitude. Administration of humane and sensible devices becomes careless and men seek refuge in patent medicine crime cures, such as fourth offender laws. These mechanical devices are found to be unworkable and we swing back to the opposite extreme. Hardly has one point of view been implemented and allowed to demonstrate its validity when the other supersedes it. The American legislator seems to suffer from penologic jitters. The press and public are impatient. When an atrocious crime is committed by a probationer or a parolee, the institutions of probation and parole are bitterly assailed. Proponents of these instruments rush to the defense by citing not altogether accurate statistics of "success." Both sides have part of the truth, but each insists the other is wholly wrong. In the meantime the administration of justice suffers from the confusion and uncertainty of those who enforce the laws. . . . Both groups seem to overlook the fact that the real issue is not of severity versus leniency, but of an effective versus an ineffective administration of justice.²

Most investigators are not unaware of the impatience of the press and the public, yet little etiological inquiry has been made. Even among some of the more objective thinkers within the field, there is no little confusion, and a badly muddled case has been laid before public opinion. This unfortunate state of affairs has resulted in a wide breach between theory and practice.

The pure theorist may neglect to take account of popular sentiment, but the legislator or social engineer cannot. The extreme of this point of view, however, does not infer that a realistic stand involves one in abstractionism or anti-intellectualism. Rather, it infers that criminological theory cannot be founded upon an em-

² *The Future of American Penology: The Call for More Discriminating Law Enforcement*, Albany, New York, State Department of Correction 1936.

pirical basis unless it considers what Pareto calls the residues and derivations as important variables. The criminologist as well as the legislator, in the choice of sanctions, must reckon with sentiments, attitudes, and prejudices of the age. An attempt to conform to them may result in a logical dilemma. What expert judgment deems to be the most efficacious treatment may fail to enlist the sentiments of the community. Past experience has shown that punishment which is too hard causes reaction against the law and leads to the acquittal of criminals, while other treatment which may be approved may have no deterrent effect. Oppenheimer, in his *The Rationale of Punishment*, traces the perennial perplexity:

To steer a safe course between the Scylla of public opinion and the Charybdis of the criminal mind, indeed, is one of the most difficult tasks which the modern statesman has to accomplish, and practical experience alone can teach how to adjust penal sanctions in so delicate a fashion that, without violating the one, they operate upon the other.³

Various students of criminology have noted the conflicting penal theories in statutory law,⁴ but the confusion is not confined merely to criminal statutes. There are confused attitudes in criminological theory, in the statutory law, in penological practice, and in public opinion, and as if this were not enough, there is considerable incompatibility in the mutual relationships of all four.

While criminological theory has gone on to individualization, public opinion has advanced little beyond the Beccarian dictum that "Crimes are only to be measured by the hurt done to society." Popular notions still expect punishment (*not* treatment, except in instances of very obvious mental irresponsibility) to conform to the relative gravity of the offense. The public still zealously guards order and views with alarm any encroachment upon it. Arbitrarily established sanctions may within time, of course, modify prevailing sentiment, so that the penal code, while theoretically a result of public opinion, may in turn be a means of educating the people. In his more rational moments the average man may acknowledge

³ Heinrich Oppenheimer, *The Rationale of Punishment*, London, The University of London Press, 1913, p. 287.

⁴ "The survival of the traditional aims of punishment within the supposedly individualized types of punishment is not expected. . . . Such adherence to the past, on the other hand, possesses a high degree of social utility, for it prevents hasty and unreasoned changes, and makes it possible to maintain a stable social order. There is need for alarm only when the law tends to preserve the *status quo* when it might be improved, or when the law becomes so reactionary as to impair the opportunity for social advance."—Quoted from Mabel Elliott, *Conflicting Theories in Statutory Criminal Law*, Chicago. The University of Chicago Press, 1931, pp. 238-239.

that society is responsible for the production of crime and that many delicts are not responsible to society, but rather are malignancies upon the whole social body. When criminal justice goes into action, however, society is likely to revert to the Hebraic dictum of plucking out the offensive member. In theory the public is willing to grant to the criminologist that crime is symptomatic of a more complex social disorganization, but in actual practice it often proceeds upon another basis. Its general interest may be in prevention, but its immediate interest is still too often in traditional punishment.

Almost unique in sociological thought is the point of view held by Pareto concerning the relation of common sentiment to crime and its variables. He says:

It is certain, moreover, that the general status of sentiments in a community has its effect on crime. There are communities of thieves, communities of swindlers, communities of murderers, and so on. In other words, the groups of sentiments, *a*, *b*, . . . differ according to peoples, places, and time, and often there are compensations between the various genera.

* * *

To infer, for another example, that the so-called probation law is innocuous from the assumed fact—the real fact is probably different—that it has not increased the number of second offenders, is almost to reason erroneously. Modifications in sentiments take place slowly, sometimes very, very slowly. Generations must pass before the effects of that law, or any other law of the sort, can be known with certainty. Recidivism, moreover, is not the only factor to be taken into account—there is criminality in general. The effect of the probation law extends beyond the criminal whom it protects. The population at large grows accustomed to thinking that a first crime may be committed with impunity; and if that manner of thinking becomes ingrained in sentiment, diminishing the aversion for crime that the civilized human being instinctively feels, criminality may increase in general without any corresponding increase in recidivism.⁵

Pareto thus raises anew the old and interesting question of the repercussion of the penal code upon human behavior. He would draw attention away from the individual criminal to the phenomenon of criminality in general with reference to long time consequences. In his treatment of criminality his stress is upon what he infers is a realistic attitude toward expediency and a reminder that in the practical application of a code or theory it must not be forgotten that the derivations which must be used are altogether

⁵ Vilfredo Pareto. *The Mind and Society*, New York, Harcourt, Brace and Company, 1935. Vol. II, pp. 1283-1284.

different from the logico-experimental reasonings which served to discover the plan or law best suited to a given end. Ends themselves depend upon the interests and sentiments and it is only by influencing or yielding to the latter that theory may be put into force.

The rather cold-blooded attitude of Pareto toward humanitarianism is again a reflection of a widely held opinion outside the field of theoretical criminology:

As regards the repression of crime, the "individual"—to use the jargon now current—was once sacrificed to "society"; nowadays "society" is sacrificed to the "individual." Authorities in former days were not so sensitive about punishing the innocent provided no guilty person escaped. Today people make nothing of letting a culprit escape, not only to save the innocent, but just to pamper humanitarian sentiments.⁶

Although the preceding jibe is directed principally at the late nineteenth and early twentieth century humanitarians who had little realistic knowledge of actual conditions, in another place he takes a cut at modern theorists:

Modern theorists are in the habit of bitterly reproving ancient "prejudices" whereby the sins of the father were visited upon the son. They fail to notice that there is a similar thing in our own society, in the sense that the sins of the father benefit the son and acquit him of guilt. For the modern criminal it is a great good fortune to be able to count somewhere among his ancestry or other relations a criminal, a lunatic, or just a mere drunkard, for in a court of law that will win him a lighter penalty, or not seldom, an acquittal. . . .

The concept of "solidarity" that makes the good incur the punishment of the wicked appears here and there in antiquity. . . . As it is, the criminal only is looked after and no one gives a thought to the victim.⁷

Most modern criminologists, and particularly psychiatrists in the field, would have little sympathy for Pareto's sarcastic outlook, but it is one, prejudiced as it may be, which cannot be lightly dismissed, for it is shared by a large section of society today. Individual responsibility for misconduct is still a point of departure between expert and popular opinion.

The masses, particularly in a Western democracy, are yet unwilling to give up the illusory doctrine of freedom of the will in the placement of social responsibility. The popular mind still considers the neurotics and psychotics to form a small minority, and insists

⁶ *Op. cit.*

⁷ *Op. cit.*

that the majority of offenders are "normal" criminals and should receive their just deserts without benefit of psychiatry or psychoanalysis. Hesitancy on the part of the public to accept the diagnoses and recommendations of psychiatrists and social workers is due in some part to the contradictions and conflicting testimony presented by the experts themselves when making court pronouncements. A comment pertinent to this point has been made by Professor Glueck: "The principle is self-evident that in a wise legal order we should proceed cautiously in absorbing methods or attitudes from outside the law. But it must be said that the disagreement between experts has been 'greatly exaggerated.' On fundamental symptomatology of the various mental and behavior disorders most psychiatrists are agreed." (*Principles of a Rational Penal Code*, p. 464.)

To turn now to another aspect of popular sentiment in relation to criminality it is interesting to note the contentions of Alexander and Staub. They hold that whenever the common sense of justice is sufficiently offended there are two possible psychological consequences: the individuals of a given class think this might happen to them (identification), and the equilibrium between social restrictions and anti-social impulses is disturbed. This disturbance favors the impulses which hitherto had remained inhibited. Alexander and Staub unduly simplify the basis of justice by making it rest upon the pleasure-pain dichotomy, but they do demonstrate conclusively that the sense of justice is one of the foundations of social life.

These two authorities give the following role to public opinion:

The judgment as to what is to be considered a crime and what should be done with the criminal is left in the hands of specially trained jurists; however, the actual dispensing of justice remains under the constant control and is carried out with the strict participation of the public. There is hardly any other part of public life which is watched with so much suspicion and zeal as the work of the machine of justice.⁸

Especially do they consider that present day criminal justice is faced with a crisis because it has lost much of its authority and is exposed to much public criticism. The task of the criminologist is vastly more complicated than it was when the aim was mere punishment, and the work of the judge is no longer simply a matter of consulting paragraphs in the penal code.

⁸ Franz Alexander and Hugo Staub, *The Criminal, The Judge, and The Public*, New York, The Macmillan Company, 1931, pp. 14-15.

The psychoanalytic approach to criminality holds that the sense of justice does not rest upon an entirely rational foundation, and in this respect finds itself in agreement with the sociological point of view. A psychological understanding of the delict does not remove the public demand for atonement. Retaliation and retribution are by no means dead issues. Furthermore, the psychoanalysts maintain that the institution of punishment "presents a socially acceptable outlet for our own aggressions, the asocial nature of which prevents them, as a rule, from being lived out freely. . . . Hence, the institution of punishment represents a compensation." All of these motives stand as obstacles to a rational penal code, or one which embodies the individualized treatment of the criminal. It is apparent that opposition to individualization is deeply rooted in the public mind and may not be attributed solely to ignorance or stubbornness.

Still another point of difference between current public sentiment and the most advanced ideas of treatment is involved in the means-end scheme. The gap between logicality and utility has not been adequately bridged, in that the system of logical action devised by the expert does not always fit into the social system. Unit acts do not exist atomistically without relation to each other, though logical action defines the norm of the unit acts. The norm becomes extended to a system by means of a chain. Ends may be tangential in this means-end chain, but eventually one comes to the ultimate end. In criminology, as in pure economics, the allocation of ends is a central problem in view of limited means. There is the economic aspect in criminal procedure as well as in other forms of social engineering and activity. And it is the very problem of the allocation of ends, which is of extreme importance to the whole society, which has been slighted by theoretical criminologists, particularly by some of the most ardent advocates of individualization. Scarcity must be dealt with, and cost must be related to efficiency.

Economic and technological considerations are independently variable in determining any given course of action, and very generally we do not use the best technological alternatives. The usual result is that we adopt a compromise procedure to get the optimum combination which represents neither the cheapest nor the most efficient. Of course, a completely rational system of action in criminology or in any other complex human activity is merely a useful fiction, but the theory of marginal utility implies a logical relationship among ultimate ends. On a theoretical basis, the maximum

of utility (for a collectivity involves a standard of distributive justice) necessarily calls for the sacrificing of minority to majority interests.

Since human society is neither non-rational nor rational, it does not treat criminality in an entirely consistent manner. If it were rational it would pursue the most efficient means of reducing criminality (or perhaps by definition such a society would have no crime), and supposedly this is what criminologists are striving for. Being to a large degree non-rational, however, society wishes certain ends pursued with the minimum reasonable cost. Criminality is only one of the many problems of social disorganization which must be handled by the state, and in the allocation of means there are limits to the attention which can be given to any minority group.

The economic concept of scarcity acts as a check upon the full development of individualization at this focus just as it does in any public welfare activity. Even in the matter of public education of the young, the public either cannot or will not meet the costs of the best possible means of instruction. Instead, it tries to effect a compromise in the public school program, and likewise feels that this should be done in connection with a group in whose personal welfare it is much less interested.

It is doubtful, then, that the public is intent upon the same ultimate ends (though ultimate ends are always in the process of formation and are never final as long as social values are not crystallized) as the criminologist. Intermediate ends are less vague in the public mind and bring forth the question of means. The public naturally takes a naive view of intermediate ends and in many cases thinks that incapacitation of the offender solves the problem.

Michael and Adler give a pointed treatment of means and ends:

. . . One might, perhaps, add to retributive justice and the protection of society financial economy, the satisfaction of popular attitudes toward crime and criminals, the humanization of the modes of treatment, and even other ends. However, the humanization of treatment does not seem to be the final end of criminal justice. The end of humanization seems to presuppose punitive methods of treatment and to involve their amelioration. . . . The end of financial economy presupposes either a punitive or non-punitive system or a combination of the two. It does not affect the character of the system although it may influence our choice of methods of treatment. We may prefer less efficient methods because they are cheaper to administer. Financial economy therefore seems to be a tangential and not an ultimate end of criminal justice. In so far as a punitive system is, as has been said, a system of organized

vengeance, the satisfaction of the desire for vengeance may be said to be the ultimate end of a punitive system.

* * *

It is important to repeat in this connection that a means may be considered in relation to different ends; and this is true of the processes of criminal justice. For example, the efficiency of any method of treatment may be measured either by its effect upon the behavior of actual and potential offenders, or in such terms as its financial cost, security against escape, and the convenience, comfort and welfare of officials and offenders. . . . Moreover, a means may be highly efficient in relation to one end and extremely inefficient in relation to another . . . it is, for example, a meaningless question to ask if the police are efficient or the grand jury is efficient or the prosecution of offenders is efficient, unless we are told in relation to what end the question is asked.⁹

The whole subject matter of criminology is so tied up with practical considerations that it cannot be divorced from administrative problems without emasculating its contents. Hence the inefficiency of justice is a concern of the broader aspects of theory. Enforcement of aims brings with it the attendant question of tangential ends, and somewhere in the process there is an inevitable compromise.

Because many criminologists have given little attention to tangential ends, and have regarded them largely as problems for practical administrators, their systems often rest upon fallacious assumptions and fail to take cognizance of matters of vital importance in the public eye. The public, for example, is very much more interested in the certainty and celerity of administration than in the more fundamental considerations of causation. Another tangential end which is a point of departure between the public and those who enforce the law is what Dean Pound calls "checks upon prosecution." These safeguards for the innocent are too often loopholes for the wary and experienced criminal, but public opinion in the past has demanded them.

One should not conclude that public opinion is always a sort of vicious dog in the manger which blocks the way to a more scientific application of the best ideas of modern criminology. Undoubtedly, though, many of the obstacles to improvement are traceable to this source. Dean Pound has stated:

As one reads the discussions in the reports of bar associations he

⁹ Jerome Michael and Mortimer J. Adler, *Crime, Law, and Social Science*, New York, Harcourt, Brace and Company, 1933, pp. 21-22.

can but feel that a chief obstacle to improvement is in the democratic tradition; in what we must pronounce false ideas of democracy.

* * *

Another obstacle, it may as well be said frankly, will be found in the attitude of the press in the United States toward criminal investigation, prosecution, and trial . . . ¹⁰

Nonetheless, public sentiment may lead to reform. Richard W. Child cites the importance of public opinion in instigating the famed Cleveland Crime Survey. The brief published by the Cleveland Foundation opens with the sentence:

The Cleveland Survey of criminal justice marked the culmination of a long period of growing public distrust in the quality of law enforcement in Cleveland.

And the same publication ends with these words:

The survey was intended to do no more than analyze the problem in its entirety, to point out the essential improvements, and to show the way by which such changes can be brought about. More important still, it has an educational value. It was intended to capture public interest, to get a large number of people to think simultaneously about this specific problem and to use this public interest to insure a permanent result. It was intended from the beginning not merely to rouse interest, but to use an aroused interest to promote permanent and intelligently directed facilities for informing and releasing public opinion.

The public must be shown that there is economy as well as justice in the individualized treatment of the criminal, but the criminologist in his zeal for improvement should not fail to take account of the *Wesenwille* as well as the *Kürwille*. To say that the crux of the whole problem lies in public opinion may be going too far, but group sentiments do form an important variable in the vast complexity of the whole phenomena.

¹⁰ Roscoe Pound, *Criminal Justice in America*, New York, Henry Holt and Company, 1930, p. 198.