Journal of Criminal Law and Criminology

Volume 4 | Issue 4 Article 10

1914

Reviews and Criticisms

REVIEWS AND CRITICISMS.

DER ABERGLAUBE IM RECHTSLEBEN. By *Dr. Schefold und Dr. Werner. Juristisch-psychiatrische Grenzfragen,* Marhold, Halle, Bd. VIII. 1912. S. 1-64.

The banishment of error from human beliefs is an essential condition of progress, and is the aim of scientific and philosophical investigation. Complete attainment of the goal is infinitely far away; and such definite knowledge as has been acquired is accessible and comprehensible to comparatively few, so that everyone in some respects, and most people to a large extent, entertain mistaken beliefs. Some of these are sufficiently gross to justify calling them superstitions. Superstition is always a disadvantage, slight or grave, to its possessor; and sometimes, even in these days of rapidly increasing enlightenment that is uplifting even the humblest and most ignorant circles in civilized lands, it still becomes inimical to human life, peace and prosperity, and thus comes into intimate contact with the law.

This question of the relation of superstition to the law was discussed at the ninth meeting of jurists and physicians at Stuttgart, on the 19th of May, 1912—in its legal aspects by Dr. Schefold, and in its medical aspects by Dr. Werner. Their papers, together with a brief following general discussion, are given in the pamphlet under consideration. Both authors give numerous references to the sources wherein the question is treated in a more detailed and thorough manner. Within the limits of such papers, only a general outline of the subject is to be expected. More particular information, and matters of serious dispute, must be sought in the larger works.

According to Dr. Schefold (pp. 3-42), superstition may lead its possessors to the commission of criminal acts or violations of common law; or may lead others to the exploitation of the superstitious; or knowledge of it may serve to assist or to hinder the detection of crime, or help in its prevention.

The most serious superstitions are those that lead to the sacrifice of human life, to bodily injury, or to the disturbance of corpses. Among the beliefs that may lead to these results, the following receive more or less extended mention: that supernatural beings exist who must be propitiated by human sacrifice, in order to secure the stability of buildings, or to guard against pestilence or failure of crops; that supposed changelings must be tortured in order to bring back the rightful child; that possession of the human body by demons or by the devil is possible, who may be exorcised by maltreatment; that human blood possesses a curative power or other magical properties; that sexual intercourse, especially with children, may cure serious, particularly sexual, diseases; that there are witches, persons with the evil eye, vampires, ghosts; that blood, or portions of a corpse, may heal, may lead to the discovery of hidden treasure, may confer the power of flying or of invisibility, or may guard against discovery in cases of crime; that various forms of

ordeal reveal guilt or innocence. To the same class belong the numberless forms of superstition in medicine, so prevalent today. There is hardly one of all these errors that does not still exist and lead to the serious consequences mentioned; and the author cites numerous examples from recent times.

Another class of crimes results from belief in the magical efficacy of stolen goods, in charms and spells for purposes of cure, love, luck, or the gaining of lawsuits, in fortune-telling. Lawsuits, based on other than criminal grounds, such as claims for damages, may arise as a result of a large number of superstitions.

Superstition hinders the just execution of law through leading witnesses to incorrect perceptions or judgments, or to superstitious concealment of truth. On the other hand, a judge acquainted with superstitions is often helped in the detection of guilt. A criminal who believes in the efficacy of ordeals may be led to give himself away; the possession of talismans supposed to protect against the consequences of crime may incriminate; the belief that something left behind (excrement, etc.), at the place of crime prevents discovery, may lead to detection. Knowledge of the many superstitions connected with the act of perjury, guarding one against its consequences or fastening them upon a "scapegoat," is naturally of great advantage to the judge.

Infractions of law arising from preying upon the superstitions of others—swindling, extortion, blackmail—occasion great injury and are difficult to detect. They are dangerous, not only in themselves, but because their perpetrators often combine their art with other dirty work, such as pimping, abortion, etc.

In his final pages, Dr. Schefold discusses the present attitude of German law toward superstition, and changes that might be desirable. Superstition is no excuse for failure to carry out the terms of a contract, unless gross criminal negligence is the only question involved, and superstition cannot be classed as such. When superstitious practices are used to facilitate the commission of a crime, the superstition deserves little consideration. But in many cases the existence of superstition may be of importance in deciding the question of guilt. Many cases of murder and injury arising out of superstition cannot be punished as intentional. It is not the person injured who is assailed, but, for example, the supposed changeling, ghost or possessing demon. In some such cases, only criminal negligence can be alleged. Even this degree of responsibility may be doubtful, in case of persons who seriously believe their superstitious delusions; for stupidity and ignorance as such are not punishable. The author is of the opinion that in cases of murder, where extenuating circumstances are not admitted, its occurrence as a result of superstitious delusion should be regarded as justifying milder punishment. In all other cases, extenuating circumstances, including superstition, are sufficiently allowed for.

In the struggle against the exploitation of the superstitious, present laws are inadequate. It is extremely difficult to prove the connection between the trickery and the resulting injury; the acts are often done

in entire good faith; chance and suggestion give the charlatan frequent actual success; the injured are often exceedingly reluctant to give testimony. More definite and effective laws seem to be called for against the use of superstitious practices and the circulation of superstitious publications.

Dr. Werner (pp. 43-62) also regards a knowledge of superstitious beliefs and practices as important for all who may be concerned in any way with their legal consequences. He first discusses at length the belief in the supernatural origin of diseases and superstitious practices that follow. Mental disorders are not the only ones so treated; there is not a single bodily disease that is not still combatted by magical methods. Fortunately the methods used are for the most part relatively harmless, though occasionally this is not the case, and even the most harmless method of charlatanry may work mischief indirectly by preventing the timely use of legitimate methods. Books of magical healing, from one of which he gives interesting extracts, are widespread. Serious injuries to health result from superstitious practices, and unfortunately most of them are successfully concealed. Even when known, the responsible charlatan can rarely be punished, because of the difficulty of establishing that the injury follows solely from the superstitious treatment. Though superstitions concerning healing cannot themselves be eradicated by legal enactments, yet this is not true of the deceptive exploitation of superstition and of injuries to health through charlatanry; and effective laws should be enacted against these.

The belief in possession by demons still exists in most religions, excepting the Jewish, but fortunately seldom leads to practical consequences. Hysteria and epilepsy are the diseases that have especially led to the assumption of possession, though occasionally any other bodily or mental disorder may serve in the same way. When the belief arises, it may lead to attempts at exorcism, which sometimes are carried out with brutal recklessness and may lead to the killing of the "possessed."

Spiritism, like its predecessor, somnambulism, stands in closest relation to abnormal psychical conditions. It must not be assumed that in all cases the deceptions practised by mediums are conscious and intentional. It is hard to determine where unconscious deception ceases and conscious trickery begins, for almost all mediums are neuropathically and psychopathically affected.

Superstition may occur in all psychoses, since all involve sense-illusion or delusion; but some kinds furnish especially favorable conditions for its occurrence, particularly those accompanied by depressive emotions, by self-accusations, religious scruples, tendency to subtilizing, etc—such, for example, as melancholy, depressive phase of circular disturbance, lighter forms of dementia precox, paranoiac states.

The legal questions involved in cases complicated by the presence of superstition are those of responsibility, of capacity for business, of ability to give witness or take oath. In all these cases the existence of superstition alone is not decisive. Whether or not it is complicated by disqualifying mental disorder is important, and often difficult to deter-

mine, for superstition itself is a delusion and symptoms arising from mental disease may give the impression of merely superstitious ideas, or the contrary may occur. Thus serious errors in judicial procedure may arise. A sure decision in some circumstances may be possible only after protracted observation.

The question has often arisen as to whether superstition alone may not constitute a diseased mental condition, but it is to be answered in the negative. The superstition of mentally sound persons, as a motive to acts having forensic consequences, should not be judged in any other manner than other motives of healthy men.

With reference to the judgment of forensic, especially of psychopathic, superstition, it would be desirable to introduce the conception of "diminished responsibility" into future legal procedure.

The best means for diminishing superstition must lie in enlightenment through the influence of school, home, church, and press.

In the discussion (pp. 63-64) that followed these papers, the chief questions raised were as to whether or not extenuating circumstances should be recognized in cases of murder; and if not, whether in such cases the fact that murder arose through superstitious error should itself be considered a justification for the infliction of a lighter penalty. A considerable diversity of opinion was apparent.

Brown University. E. B. DELABARRE.

DIE SOGENANTE WIEDERNATURLICHE UNZUCHT. By *Dr. Arthur Muller*, Karlsruhe, i. B. Separatabdruck aus dem *Archiv für Strafrecht und Strafprozess*. Bd. 59, H. 1-4. Pp. 53.

This monograph represents an attempt at a critical discussion, from the standpoint of the jurist, of that part of the proposed new German Code which deals with the subject of sexual offenses.

The note which permeates the author's thesis is one to which even the most ardent advocates of more lenient laws for this class of offenders could have no objection. The author first concerns himself in a very masterly and learned manner with the subject of definitions. What is meant by normality in matters sexual, and at what point do deviations from this concept of normality reach a degree constituting sexual perversion? Does normality in sexual activity depend upon the proposition that sexual life has for its ultimate and only object reproduction, or is there any cognizance to be taken of the biologic necessity for sexual activity, without regard to this ultimate idea of reproduction?

If we agree, as agree we must, to the proposition that sexual activity between two individuals of opposite sexes is still normal even though no thought is had concerning the question of reproduction; if we agree that sexual activity *per se* is a biological necessity irrespective of its ultimate object, how can the homosexualist be considered an offender against the law for merely gratifying this biologic necessity in his own peculiar way?

In other words, what is it that determines in a given case what is the normal way of gratifying this biologic demand? If it is even as-

sumed that the homosexualist is a deviation from normal man and in that sense is abnormal, wherein lies the excuse of bringing the subject within the province of the law, being as it is a purely medical subject.

Is the homosexualist to be considered an offender against the law if by mutual consent he becomes a party to a homosexual act, to him the only natural way of expressing the biologic sex activity?

These are some of the questions the author discusses in a very masterly way; one must, however, read the monograph in full to get the benefit of this learned jurist's views.

He objects to Par. 250 of the proposed Code, which makes sexual relations between man and man a punishable offense, and shows his preference for Par. 124 of the proposed Swiss Code of 1908, which restricts itself to sexual offenses against minors. Further than this the monograph does not lend itself very well for review, and an English translation of it would be highly desirable.

U. S. Public Health Service. BERNARD GLUECK, M. D.

SPOUSE WITNESSES IN CRIMINAL CASES. By *Herman Cohen.* Stevens & Haynes, London. Pamphlet of three pages, s. 1½ net.

This pamphlet is a very clear and analytically exhaustive discussion of the question (not very clear under the English Statute and decision) when one spouse will be compelled, and also when permitted, to testify in criminal prosecutions for or against the other.

The pamphlet follows the growth of the law and the statutory changes on this subject resulting in the conclusions which seem to follow from the discussion that the present state of the English law is as follows:

One spouse may be compelled to testify for or against the other only in cases of personal injury (including threats and attempts) and of forcible abduction and marriage.

If willing to testify, the evidence of one spouse is competent against the other in the foregoing cases and also in certain others, to wit: vagrancy, violation of married woman's property rights, cruelty to children, offenses against the person, incest; in Scotland poor law offenses, and also the offenses mentioned in the "Criminal Law Amendment Act 1885" (Chapter 69, 48 and 29 Victoria) which we have not at hand to ascertain the particular offenses named.

If willing to testify, one spouse is competent for the other in all cases without exception.

Wausau, Wis. C. B. BIRD.

LE CONGRES INTERNATIONAL DES TRIBUNAUX POUR ENFANTS; ACTES DU CONGRES. Par *M. Marcel Kleine,* Paris, A. Davy. 1912.

To M. Ed. Julliet and his vigorous co-workers in Paris was due the success of the first international Congress for the discussion of juvenile courts. This volume contains the names of officers and members, the reports from many countries, the debates and the conclusions. As this Congress was held in July, 1911, the reports do not give a full account

of progress up to the present time; for example, Belgium has given a legal foundation for the new procedure since the meeting, and other countries have introduced some factors of the method. Nevertheless the document will have a permanent value, not only as a historic monument but also for its discussion of fundamental principles. In almost every instance the reports did full justice to the United States and to the original founders of the institution. On the other hand Americans can study these papers with profit, for we have still much to learn from Europe. It will be impossible here to give even abstracts of the discussions, but the resolutions summarize the points on which agreement was reached, although in some cases the Continental legal ideas are expressed in terms not quite intelligible to us.

On the first question, the Specialization of Jurisdiction for Minors, it was agreed as follows:

Below the age determined by the laws of each country, no judicial prosecution shall be initiated against a child. In case of any violation of the Criminal Code, the child under the age fixed shall appear before a special court called a "Juvenile Court," composed preferably of a single judge who is of the rank of magistrate, and who is specially designated to inquire into all matters relating to children, who possesses the particular knowledge and other qualifications for dealing with children, and who is kept in his position for a long period. This judge, in dealing with such children, shall employ no measures except those of protection, preservation and assistance.

Young persons under 16 years, charged with violation of the criminal law, shall also appear before a special tribunal. They shall be tried under rules different from those governing the trial of adults.

The trial judge in case of a minor should proceed to a careful inquiry in respect to the person concerned and his surroundings, and should subject him to a medical examination. Provisionally the young person may be given over to his family, if it offers guarantees of firmness and morality, or to a person or society devoted to the care of children, or he may be kept in an establishment or special quarter rigorously separated from adults and from older youth. During the examination and trial, if the minor is provisionally at liberty, he remains under the supervision of the judge. From the beginning of the trial an advocate shall be provided. In the specialized court the presence of the public Ministry shall be optional. The minor shall be aided by an advocate, member of the bar or of a society approved by the Court. Every case shall be heard in a special chamber and at special hours. The minor shall appear alone. Publicity shall be restricted; only persons designated by the law may be present at the hearing. Reports of the hearing are to be prohibited under penalty of a fine, and also all publication and pictures relating to the trial of the minor. Publicity is allowable in cases where adults are implicated with minors.

The Court may return the minor to his family, or place him at liberty under supervision during a definite period, or send him to an institution for his reformation, or confide him to a society devoted to

helping children. The judge may at any time modify his first decision, according to the varying conduct of the minor.

The Court may pronounce a sentence of a fine or of imprisonment against parents who, by negligence or otherwise, are responsible for the bad conduct of their child, and may require them to pay the expenses of maintenance in the institution to which he is sent. It is desirable that all matters relating to the minor, as parental correction, deprivation of parental control, guardianship, shall be determined by the children's court.

Role of Charitable Institution.

On this point the Congress voted:

That the judicial and administrative authorities should co-operate in facilitating the intervention of charitable and educational institutions, public and private, in the working of juvenile courts; and,

1. Before the hearing, the representatives of institutions which may be called on to take charge of young delinquents should be permitted to visit them in the establishment (asylum or prison) where they have been provisionally placed.

2. The accredited representatives of these institutions should be able to be present at hearings of minors and be permitted to speak in the interest of the child.

3. The judicial authority is to have a free choice among the institutions regularly constituted which offer their co-operation.

4. The institution judicially intrusted with the right of bringing up a minor has full scope in the accomplishment of its task, but ought to be submitted to the control both of the judicial authority and of the administration.

5. The institution should obtain, as part payment of its expenditures, contributions of the State or of persons legally obliged to support.

6. Any modifications in the decisions of juvenile courts may be suggested by the institution which has accepted supervision of the minor.

Supervised Liberty or Probation.

1. Among the measures which may be employed with a minor who appears before the juvenile court, one of the best adapted to his improvement is placing him at liberty under supervision in his own family when the character and antecedents of the child permit it.

2. This measure should not be applied except when the child and his family offer sufficient guarantees of hope that he will not repeat his offense.

3. This measure may be ordered in every case by the authority charged with deciding the disposition of the child.

4. Supervision is to be exercised under the control of juvenile courts by the delegates (probation officers), men or women, carefully recruited by the judicial authority and selected by it, the juvenile court being always free to designate as probation officer the person who shall seem to be best adapted to secure the improvement of the child.

5. The probation officers ought to watch over the child in his

family, in the school, or with his guardian; they should strive to win the confidence of the child and as far as possible his affection.

6. The probation officers may be chosen among the members of public or private institutions; they may be remunerated.

7. Liberty under supervision shall normally continue until the child comes of age; yet the court, to which the probation officer should make a detailed report on the conduct of the child as frequently as possible, may either change this measure to one more severe, or order release from supervision after a sufficient period of trial.

The Congress expresses the opinion that men and women appointed as probation officers shall as far as possible, be prepared for their task by a course of technical education.

The Congress expresses the opinion that the proper authorities seek to gain above all the co-operation of teachers in the task of supervision, and that these be assured a moral and material reward in accordance with the merits of their service in this field.

University of Chicago. CHARLES RICHMOND HENDERSON.

UBER DAS STRAFPROZESSUALE VERHAFREN IN SCHWEDEN BEI WEGEN VERBRECHEN ANGEKLAGTEN PERSONEN ZWEIFELHAFTEN GEISTESZUSTANDES NEBST REFORMVORSCHLAGEN. Von *Dr. med. Olaf Kinberg.* Carl Marhold. Halle a. S. 1913. Pp. 152.

We have here a pamphlet presenting a thorough statement of the extent and conditions under which mental abnormality and criminalism are found related in individuals appearing in the courts and penal institutions of Sweden. In connection with the survey of the facts the author has not been sparing of his own research into the literature, and altogether presents a scholarly as well as a practical work. Definite recommendations are offered for betterment of the whole situation.

It seems that in Sweden, as elsewhere, there is no guarantee that when an individual is charged with a criminal offense his mental abnormality will be discovered even when it really exists. Kinberg insists that in prison life a much greater percentage of offenders are found to be mentally abnormal than one would gather from statistics of the courts. Yet, of course, from many standpoints knowledge of the mental condition is very desirable during the trial, as well as afterwards, in order that the right social attitude toward the offender may be taken. Then, whatever shall be proven practicable in court work in the way of studying the offenders, at least prisons should be developed as clinics for study of criminalism and of the individual offender. This author insits upon the great social bearing of the whole problem and the relation in his mind of the body politic to criminalism is shown in the frequent repetition of the word *Kriminalpolitisch.*

Kinberg is insistent upon the need for special training in abnormal psychology on the part of all prison physicians. He believes they should all have been not only instructed in psychology but should have served as physicians in hospitals for the insane and also have spent at least six months as assistants in some institute for the study of criminal types,

or in a prison where research is especially carried on. Then finally they should be acquainted with forensic psychiatry.

The work that may be done by well trained men is hardly delimited by Kinberg, but he makes minimum demands and these are that there shall be adequate psychopathic study of (a) all those who have committed crimes which can be regarded of a pathological nature; (this classification is interpreted in the light of the Swedish code); (b) recidivists; (c) all those offenders who are under 18 and over 60; (d) all those who show social incapacity such as vagrancy; (e) all cases in which the offense seems to be the expression of an altered personality of the accused, and (f) in every instance where there seems to be some exceptional or pathologic motivation for the offense.

Herein lies the road, says Kinberg, to the establishment of a rational and scientific method of dealing with criminals. You must first find out what they are before you can successfully cope with them—such seems to be the keynote of his work. The studies he suggests will give us a basis, he thinks, for successful reformation of the criminal law. His work, even with its constant local references, is acceptable as a careful study by workers elsewhere.

Chicago. WILLIAM HEALY.

WILLENSFREIHEIT UND VERANTWORTLICHKEIT. Von *Dr. Alexander Graf zu Dohna,* a. o. Professor des Strafrechts in Königsberg-Bonn. Carl Winter's Universitatsbuchhandlung. Heidelberg, 1907. Pp. 26.

In this lecture before the *Kölner Vereinigung fur rechts und statts-wissenschaftliche Fortbildung,* the writer offers a lawyer's view of the relations of "freedom and responsibility." Distinguishing between determinism and materialism, by indicating that determinism says that all things are casually explicable while materialism insists that all things are mechanically originated, so that materialism is logically a special case of a wider determinism, the writer points out that the determination of human action lies in motivation, and that the efficacy of motives varies through all degrees of intensity. They form the basis of willing and are the stuff and root of human personality from which all concrete willing springs.

Such personality is not a creation *ex nihilo,* but is the joint product of heredity and environment—it is the persistence and enduring motives which constitute a character. These do not, of course, exhaust its individuality, with its unaccountable uniqueness. But it is enough for practical purposes, and they negate "freedom" insofar as freedom attributes to the human will the aboriginal spontaniety of the uncaused.

Praise and blame and responsibility have nothing to do with freedom. Morally, at least, determinism is higher. We should hardly find the same loftiness of spirit to admire in Socrates if we believed that he could have behaved pettily and like a coward. Conduct springs from character, and an undetermined is only an indeterminate character. Society rests only on the determinate, and responsibility goes with inward deter-

mination. Luther's "Here I stand, God help me, I cannot do otherwise," expresses what is typical of all conduct.

There is a tradition which identifies this with the destruction of all responsibility. Men being the effects of time and place, their sins and virtues are only the sins and virtues of time and place, and for such, reward or punishment become meaningless and irrelevant. This position involves, however, a confusion of the determinism of *explanation* with the determinism of *valuation*. But it is clear that the origins of a thing are not identical with its goodness or turptitude; nor the standards of conduct with the causes of conduct. Now social standards are applied to personality, and an individual is responsible for his actions insofar as these flow from his integrate personality. "Personality must be held responsible for those actions only which it has the power to effectuate" (p. 24). This is all that is meant by the "free will" of the law books. All willing which lies outside of this would be abnormal. Men are responsible, normally, only in so far as they are able to do what they *should*, and "to be able" is to be free.

Thus determinism and indeterminism are both harmonized and the law vindicated. But the harmony and vindication are the results of a historic sophism concerning the radical difference between causation and valuation. In terms of evolution valuations are themselves both effects and causes, and do not belong to a different universe of discourse. They can be so understood only as a methological artifice and not ultimately. Ultimately your value to me is your intrinsic and instrumental effect on my life. That is entirely the summation of your history. Your value will vary with your history, and the two cannot be divorced. As the difference between the two is the crux of this monograph, the monograph fails as a philosophic defense of certain legal conventions.

University of Wisconsin. H. M. KALLEN.

PRISON LABOR IN THE PARTY PLATFORM OF 1911-1912. Prison Labor Leaflets Number Seven. National Committee on Prison Labor, New York. Pp. 26. 10 cents.

The direction of public opinion on the question of convict labor is well set forth in Prison Labor Leaflet Number Seven, of the National Committee on Prison Labor. This pamphlet is composed of excerpts from the party platforms in state and nation during the campaigns of 1911 and 1912. Judged by this evidence, there seems to be a fairly uniform demand for two reforms, namely, the abolition of the contract system of employing convicts, and the payment of the earnings of the prisoner to his dependants, or in some cases, to the prisoner himself at the expiration of his term. In place of the contract system some form of state use is recommended, as the building of public roads, or the production of such articles as are used by the state, county or municipal institutions.

These reforms are not the proposals of any one party, as they have been adopted in one or more of the states by all four of the leading parties—Republican, Democratic, Progressive and Socialist—although they

appear with greater frequency in the Socialist and Progressive platforms than in those of the other two parties. However, the proposals can not be regarded solely as socialist measures, as the Democrats include at least one of the proposals in nine, the Republicans in ten, and the Progressives in thirteen state platforms. In addition to this all of the parties except the Republicans had a clause touching upon these reforms in their national party platforms in the campaign of 1912.

Two ideas can be perceived as the basis for the demand for these measures. The first is humane and reformatory. It has in view the adaptation of the criminal during his period of imprisonment to organized society, and his restoration at the expiration of his term a useful member of society. To do this it is necessary to equip the convict with the means of meeting the economic competition which he has to encounter when he again becomes a free man. This requires some form of industrial and educational training. It is also advocated to pay him wages over and above his keep, partly to relieve society from caring for his dependants and partly to enable the prisoner to re-establish himself when freed. The Socialists in two states—Montana and Nebraska—demand the payment of wages at the union scale for the same kind of work which is paid at the point nearest to the prison.

The second idea is to prevent the competition between prison and free labor. For years organized labor has opposed the entrance of prison made goods upon the competitive markets as a means of lowering wages. In attempting to remove this menace to the conditions of the working classes, organized labor has not always seen clearly, nor has it at all times advocated a consistent plan. However, the effects of the competition of prison made goods have been real evils. Conclusive evidence has been repeatedly presented to show that competition did exist and that its obvious effect was injurious to free labor. But it is not quite clear to the reviewer just how the use of convict labor in the production of articles used exclusively by the state and other public institutions completely relieves free labor from this competition. For articles thus made would otherwise have to be purchased by these institutions from the productive efforts of free labor, unless it can be conclusively shown that the articles made by the convicts under the state use system would not otherwise have been brought into existence, and that therefore society gets the benefit of the productive efforts of the convicts which would have been lost had the convicts not been employed in this way. The argument of organized labor on this question of the competition with free labor is, in fact, only a phase of "the-lump-of-work" argument, which has played so large a part in the reasoning of laborers on all questions of production.

The question of convict labor has other phases than that of the competition with free labor. Society owes some responsibilities to the criminal, and besides it must assume the responsibility of protecting itself against those who do not conform to the laws of organized society. These responsibilities must be reckoned with in, dealing with the problem of convict labor. To the laborer as a wage earner, in distinction to

his interest as a member of society along with the rest of the community, the important consideration is that the productive efforts of convicts shall not be used as an immediate means of undermining his efforts to improve the working conditions of free labor. That competition will continue to exist, there can be little doubt. Therefore free labor is primarily concerned with the administrative control of convict labor. It has a right to demand how and under what conditions convict labor is to be used. The kind of work which organized labor suggests for convicts does, in most cases, have the advantage of ease of administration together with that of appearing not to enter into competition with the products of free labor. However, instances are not unknown where organized labor has remonstrated against the state's teaching convicts a trade other than they knew when imprisoned, on the ground that, when freed, these men would overstock the market and thus lower the wage scale. This argument was made by the printers, but might just as well have been made by any other craft, and it furnishes a clear instance of the statement above that, unless efforts of convicts be turned toward entirely new enterprises, it is impossible to escape competition with free labor, whatever the line of activity may be adopted.

However, the National Committee on Prison Labor is rendering a valuable service in bringing before the country in convenient form what is being done in respect to this important question.

Northwestern University. F. S. DEIBLER.

THE BLOOD OF THE FATHERS. By *Dr. G. Frank Lydston.* (The Riverton Press, Chicago, 1912. Pp. 241.

Under the guise of drama, Dr. Lydston here sets forth strongly his ideas on the control and regulation of marriage. His plea for matrimonial discrimination is primarily a plea for the protection of society and of the unborn by the sterilization of degenerates, though the sterilization in the play itself is accomplished by the suicide of the socially unfit wife. The Doctor protests also against persecution of social outcasts, maintaining, as does John Galsworthy in his much stronger play, "Justice," that crime is a disease, just as pitiful as smallpox, and sometimes just as contagious; though some people will think that it is stretching a point in "The Blood of the Fathers" to insist that kleptomania may be inherited as readily as diseased blood, and in spite of a counter-active environment of good breeding, assured social position and perfect physique.

However that may be, we are coming at last to see that we must treat the criminal with all the patience and kindness and scientific remedies that we bestow upon his brother in the public hospital, who is suffering from deformities of bone tissue or from hereditary infection of the blood. They are all the same in origin; they are all the harvest of earlier ignorance, or sin, or mal-nutrition. Why show mercy to one, and shut the other up like an unclean animal, as if *he* did not need the sunshine and the care and the consideration infinitely more? In the author's own words, in the preface:

"But society will not listen—society will not learn. We go on marrying and giving in marriage criminals, lunatics, epileptics, inebriates and syphilitics and breeding more of their kind! We go on hanging and jailing criminals and ignoring the children from whom criminals are made! We go on paying out for the cure of crime and its evil congeners more money than we spend for our children's education! We go on with maudlin sentiment and savagely oppose practicality and common sense in matrimony—society's very corner stone! And we pretend to be an intelligent social system!

"A recent editorial in a Chicago newspaper, in taking me to task for my views on marriage regulation and control, said, 'Love is not a bad guide, either.' This is true and inspiring. Love *is* not a bad guide—to the jail, the asylum, the hospital—and to Reno. When love comes in at the door, reason flies out of the window. Love is the greatest transmuter of human base metals. With his magician's wand and a skill that Hermann himself might have envied, the little blind God blithely transforms an epileptic, a gonnorrheic, a lunatic, an imbecile, an inebriate or a criminal into a rosy ideal.....

"Shall the blind go on leading the blind into the pit, and shall society foot the bills, or shall society 'rope off' the pit, protect the fools from themselves, society itself from the fools, and, above all, protect from society generations yet unborn?.....

"'Gloomy and pessimistic,' say you, dear reader? Is, then, the man who hangs a red lantern on the mass of boulders that highwaymen have placed upon the railroad track, a gloomy fellow? Is the physician who passes upon your disease and suggests remedies a gloomy fellow?

"No? Then why should the 'social surgeon,' who cuts deep into the heart of things, be called a gloomy fellow or a pessimist?"

The story of the play is that of a young doctor, deeply interested in such social improvements as the author himself has been fighting for, for many years, who marries unknowingly the daughter of a professional thief. She is not interested in his efforts to help humanity, desiring only to become one of "the Four Hundred." When she does attend her first great social function, she steals a valuable jewel, is suspected, and finally takes poison to escape the disgrace. The Doctor has a good woman friend, already in love with him, and entirely in sympathy with his work, whom the author implies that he should have married, and whom, we may infer, he does marry eventually. There are other characters who contribute theories and advice and occasionally real dramatic action: one, the father of the Doctor's wife, who tells of the evil heredity and environment that contributed to his own tragic end; and another, Matsada, the butler, ostensibly introduced for comic relief, but failing to be either original or funny.

As a play, it must be confessed that the book is not altogether a success; but as a sociological document it contains such good passages as these:

"'The world has failed to better itself because it has never been thoroughly in earnest—because it has tried to *cure* social ills instead of preventing them by combating causes. I'm going to do what I can to help set matters right. And the case is not so hopeless as you think. (Stops and faces Hartwell.) Why, man, the time will come when the horrible results of passions will be looked upon as evidences of semi-barbarism—of ignorance and bad health. Bad nutrition, bad heredity, dirt and social imbecility are the devils that underlie crime. Well-nourished, clean, happy, and intelligent human beings are instinctively honest and

peaceable. Not out of preaching, but out of sound bodies and disciplined minds will come at last, peace on earth, good will to men.'"

To this, Ross Hartwell, the wealthy, sporty man-about-town replies, with a touch of characteristic humor:

"'Well, after all, it's nice to have some rascally ancestor or a bad digestion to fall back on. (Sarcastically.) If it were only possible to hang or imprison your great grandfather, or fine your liver ten dollars and costs.'"

But the Doctor goes on:

"'Every child has a right to be well born, and we must help him to come into his own. He can't select his own parents, hence we should do some selecting for him. It is for society to say whether the marriage license shall be a ticket to hell for souls unborn, or a passport to the only heaven we are sure of—a happy, wholesome life. Society should protect the unborn. Some parents have no right to have children—many prospective children have the right not to be even conceived. The sins of the fathers are visited only through the blood of the fathers. Even the sinless bad blood of one generation may be the criminal bad blood of the next. Good, clean blood will wash the devil off the map.'"

Northwestern University. EDGAR WHITE BURRILL.

BEITRAGE ZUR OFFENTLICH-RECHTLICHEN BEGRIFFSKONSTRUKTION, Von *Dr. Herr Rudolf Slawitscheck.* Rothschild, Berlin, 1910. Pp. 29.

This brochure contains a solidly packed abstract argument, which in outline is as follows:

Private law borrowed a terminology from a dead language and a dead culture, and it is only the dead that have unchanging concepts, and words of changeless meaning. Public law is still confronted with the full difficulty of forming for itself an adequate, and generally acceptable terminology. The difficulty lies in the fact that public law is itself included in the process by which what has been, changes unceasingly into that which is to be; and it is necessary on the one hand to avoid empty formalism, and on the other to escape taking color from indefinite and unsettled economic and political tendencies.

The solution lies in the fact that there are universals in social tendency, such as Spencer and Gumplowicz have pointed out. The state is only "a special case within the great domain of society."

Laws are included in a social psychic life, and subject to the generalizations which apply to that life. That life includes ideas which are temporary and changing, adapted to existing conditions, growing out of inter-group influences, affecting while they last the social life of many peoples, wide in their spatial application but limited in duration. These may be called age-thoughts—it includes also, social factors that endure through ages, but are peculiar to the people among whom they originate. These may be called folk-thoughts.

To these permanent psychic tendencies Kant and Herder gave a metaphysical interpretation, allied to the informing *ideas* of Plato. Lamprecht has brought this vaguely perceived reality to clearer apprehension. He teaches that when many persons have sentiments, ideas, and a will in common, the result is not a mere sum of individual feelings, ideas and volitions, but a combination in which the individual

parts are other than they ever could have been in isolation, and the whole a kind of reality requiring to be conceived in terms that do not apply to the individual activities of which it is compounded. There is nothing transcendental about this complex reality.

Age-thoughts arise because, although the nation is the most conspicious of social realities, yet the social causal interrelationship rises above nations (as well as operating on many a smaller but significant scale) and embraces world-history. The social psychic life of every culture-period exhibits a characteristic habit which passes slowly, and by a distinct method, and in a necessary order into the habit peculiar to the succeeding period.

The notion of a folk-thought is made clearer, if guided by Spencer's statement of the nature of evolution, we note that races do not merge into homogeneity but issue out of the indefinite mass of humanity into even clearer individuality. This, as Bastian also says, is what history actually discloses. The elements within a population influencing each other, work out those generally accepted ideas which constitute the hereditary treasure, and distinctive character of a people. These common products and possessions of a people are not to be confined (after the manner of the old folk psychology) to language, customs and myths. They include all public organizations (Cf. Cooley) which are in fact only folk-thoughts modified by age-thoughts. Moreover, since social relatives differentiate and evolve by reason of their mutual interrelationship, therefore each single idea can be understood only in its systematic connection with the whole.

Age-thoughts are generally recognized, as illustrated, by such a catch-word as Zeitgeist. They have been treated by G. Vellinek in his *Kampf des alten mit den newen Recht.* Once he declares that the struggle of law against law is in reality a struggle of thoughts against thoughts.

As to the amenability of the *age thoughts* to natural law, that is a subject for special sociological research. Here we should need to give heed to Tarde's law of extra-logical imitation; and we might be tempted to interpret his statement that custom imitation diminishes as civilization advances to mean that folk-thoughts give way before age-thoughts, or world-thoughts. That, however, would hardly be true to the facts, for thoughts of both types continue their interplay, the age-thoughts mediating group contacts that afford the conditions for the rise of ever new ideas which but for such contacts would have been impossible to the folk-groups in which they originate.

Ideas, even those which we call folk-thoughts, take shape in individual intelligences, but the process, subjective as it is, has more than a personal significance. The development of these ideas is not a merely personal process, and once formed, they unite into social agreements and disagreements, and objectify themselves in legislation, and in other forms of social practice, which in their turn go on modifying each other.

To apply this sociological interpretation to the formation of a terminology for public law, one must distinguish:

(1) Folk-thoughts, the fundamental realities.

(2) Age thoughts, the abstracted common elements in contemporaneous concepts.

(3) Subjective concepts, the notions formed in individual minds by the intersection of the folk-thoughts and age-thoughts, in presence of which the individual lives and thinks.

(4) The objectification, or visible fixation of these social ideas.

(5) Discussion, and the tendency to extend the chain of social concepts beyond its present stage of development and adaptation.

The work above outlined is one more interesting example of the growing tendency among European writers to adopt the point of view and guiding concepts which have been worked out by students of sociology. Its contrast between folk-thoughts and age-thoughts is to a degree original.

Whether the sociological concepts have already taken their proper shape or not, it seems clear that the facts pertaining to social life as such and as a whole, which sociology attempts to formulate, have fundamental importance for every special social science. For a really scientific interpretation of political facts it is essential to recognize that more significant than written constitutions and official practices is that unwritten social constitution of which written constitutions and official practices are but one manifestation; to recognize that government and the state are only parts of the social whole, and that they are to be interpreted by reference to causal principles that operate throughout that whole; to recognize that the social constitution is composed of psychic realities; to recognize that these psychic realities by their causal interrelationship inevitably organize themselves into complex unities, which have as truly a natural evolution as do flora and fauna; and to recognize that the simplest of these psychic unities, as well as complex organizations, into which they form themselves, are social, in the sense that their production would be totally impossible to isolated individuals, and even that the life of an individual fit to be counted as a member of any society is composed of elements which he owes to the previous or contemporaneous activity of many associates or predecessors.

University of Illinois. EDWARD C. HAYES.

DIE BESTRAFTEN IN DEUTSCHLAND, NEBST EINEM KRIMINALSTATISTISCHEN ATLAS. Von Dr. jur. *Karl Finkelnburg,* Direktor des Koeniglichen Zellengefaengnisses Moabit. J. Guttentag, Berlin, 1912. Pp. 48 and xxxiv.

This monograph is a statistical study of the number of violators of the German national code of laws (*Reichsgesetz*) from 1882 on, when the governmental records were authorized and begun. By adding the number of first offenders annually from 1882 until 1910 and then subtracting the approximate number of deaths and emigrations as well as several other smaller items, such as allowance for incompleteness of

the records, etc., the author arrives at the conclusion that on the first of December, 1910, when the last census was taken, there were among the 65 million inhabitants nearly four million persons who had violated the *Reichsgesetz* at least once. If the one million foreigners who live in the empire and the 7½ million children under 12 years of age be excepted, we find that in general about one person out of 12, and in particular one man out of 6, one woman out of 25, one boy out of 43, and one girl out of 213 (these latter between 12 and 18 years old) have violated the law. This result agrees very well with similar statistics from smaller localities, as Berlin, Görlitz, and Bavaria. Many tables, charts, and diagrams are presented to illustrate certain details as to the frequency of the various offenses, their relation to the sex, age, and occupation of the offenders, the number and nature of the penalties, the influence of the seasons on the course of crime, and the statistics of the military and revenue delicts.

Among the conclusions which the author draws from his material we mention the following. The fact that a person has once come in conflict with the law should not, as it now usually happens, determine his social value and standing, because nobody is faultless. The offender is not, as some criminologists would have us believe, the abnormal member of society, for to err is human. Civilization cannot be advanced by increasing the number of laws and expanding their realms of application, but by positive social reforms and by levying penalties sparingly, especially in cases of first and light offenses.

The author adds also a number of recommendations for improving the present methods of gathering criminal statistics.

L. R. GEISSLER.

University of Georgia.

ESSAI SUR LA REHABILITATION: DROIT COMMERCIAL ET DROIT PENAL. A Doctoral Thesis presented to the Faculty of Law of the University of Geneva. By *Paul Logoz,* Licencié en droit, Avocat. Geneva, Imprimerie J. Studer, 1911. P. 386 + XIX.

The disconcerting query which Sir Thomas More propounded to the omniscent Doctor of Bourges—whether cattle taken in withernam were repleviable—introduced a topic scarcely more foreign to the Continental jurist than would be most of the questions dealt with by Dr. Logoz, to the English or American lawyer of the present day. That criminal bankruptcy ("banqueroute") should be attended by deprivation of citizenship rights, in virtue of its status as a criminal offense, is of course to be expected. But it is somewhat difficult to adjust ourselves to the notion that non-criminal bankruptcy ("faillite") likewise entails a "diminutio capitis" of more or less severity. In France, for instance, the bankrupt cannot vote at national or municipal elections; his political disability is complete. Among his civic disabilities, he cannot serve as a juror, nor act as witness to a notarial instrument, and is debarred from holding any place of public employment. Of his commercial disabilities, the most important is his exclusion from the Bourse (pp. 18-26). Similar incapacities affect him in Germany, but here, for the

most part, they cease with the termination of the bankruptcy proceedings (pp. 30-35, 128).

The present essay is a study of the bankrupt's restoration to the lost or suspended rights. Dr. Logoz's aim, as set forth, in his preface is to do for commercial rehabilitation what Dr. Delaquis in his "Rehabilitation in Strafrecht" has done for penal rehabilitation. In Part II, after detailing the various incapacities affecting the bankrupt in France and Germany, the author outlines the legislative history of his subject in both countries. The positive law of Germany of the present day (except in Alsace-Lorraine) does not concern itself with commercial rehabilitation, because of the temporary character of the bankrupt's disabilities in that country, but the institution was present in the Prussian "Konkursordnung" of 1855, and attempts have been made to render necessary its existence in the imperial law—first in the preliminary draft of the "Gemeinschuldordnung" of 1873 and later by Herr Rintelen in 1893 and 1898 (p. 128 *et seq.*) Part II is devoted to a discussion of the theory of the institution, inclusive of its related procedure, from the standpoint of comparative law. A curious diversity of legislation exists as to the prerequisites of rehabilitation. Although payment by the bankrupt of all his debts in full is everywhere a means of obtaining this relief, in a few countries only (among those being Egypt, Belgium and Costa Rica) is it insisted upon. In some states rehabilitation may be had by payment of dividends under a composition agreement; in a smaller number, by judicial approval ("homologation") of a composition agreement; in others again, by a release of debts on the part of the creditors; while France, Argentina, and two of the Swiss cantons permit the bankrupt's disabilities to be removed by mere lapse of time (p. 176 *et seq.*).

The author strongly urges the identity of commercial rehabilitation with that of the penal law. Both he thinks should by regarded as a matter of right and not of grace; both should be admissible post mortem; and both should be regarded as cancelling the judicial proceedings which render them necessary.

Dr. Logoz has succeeded in bringing within a convenient compass the learning of an exceedingly intricate and technical topic. Not the least valuable is the comprehensive bibliography which is appended. The book can hardly fail to earn the thanks of Continental lawyers.

Alien as is the direct subject-matter to our own legal system, the essay is bound to impress on the reader the scientific way in which restoration to lost or suspended rights is treated on the Continent, in contradistinction to our own slipshod methods in that regard. Soo too, the author's references to the "casier judiciaire" (the record kept in the "arrondissement" of an individual's birth place showing what Garraud calls his "judicial biography") remind us that there is room in our institutions for some means whereby a complete history of the offender's previous criminal career can be expeditiously procured when the need arises.

Chicago. ROBERT W. MILLAR.