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Reviews and Criticisms

ZUR FRAGE DER ANRECHNUNG DES IRRENANSTALTSAUFENTHALTES AUF DIE STRAFZEIT EIN BEITRAGE ZUR REFORM DER STRAFPROZESSORDNUNG. By *Dr. Peter Rixen.* Juristisch-psychiatrische Grenzfragen. IX Band, Heft 7/8. Carl Marhold Verlagsbuchhandlung. 1914. pp. 91. M. 2.22.

The problem is whether persons who develop a mental disorder during the period of punishment should have to stay in a hospital for the insane counted as part of their penal service or not. In 1825 and 1841 the question was so decided that the period of stay at a detached hospital for the insane was so counted if the attack developed during the penal service and was recoverable. In the discussion of the imperial code (1877), the rule was conditioned by the question whether or not the person had induced the attack with the intention of interrupting the penal service. It was, however, possible for the executive authorities to suspend the punishment for the time being by a temporary discharge from the prison. This clause led to contradictory interpretations, and (pp. 31-34) actually contradictory decisions according to whether the patient was sent to the hospital with the request to be returned to the prison or without such a request. Moreover, the question was raised whether a person with mental disease could under any circumsances be considered fit to serve a term of punishment. In the actual practice the Prussian procedure used the temporary discharge (partly because there the insane are cared for at the expense of the poor-authorities, while the prisons are run at the expense of the State), while in other States the time spent in hospital was included.

Rixen is decidedly in favor of counting the time spent in hospitals for the insane; where the prisons have adequate provisions for mental cases the question does not arise, and where no provisions exist the prisoner should not be made to suffer additional detention.

ADOLF MEYER.

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TRAITE THEORIQUE ET PRATIQUE DU DROIT PENAL FRANCAIS. By *R. Garraud,* Advocate at the Court of Appeal and Professor of Criminal Law at the University of Lyon. 3rd edition, volumes I and II, Paris: Larose and Tenin 1913 and 1914. pp. 813 and 851.

Two years ago Professor Wigmore in a review published in this Journal of M. Garraud's great work on the "Theory and Practice of Criminal Instruction and Criminal Procedure," referred to the fact that the book which is the subject of the present review had superseded all others and was now recognized as the leading treatise on French criminal law. The first edition of this notable treatise appeared in 1888 in six volumes and was awarded the Wolowski

prize by the Academy of Moral and Political Sciences as being the most important treatise in public law that had appeared during the preceding six years. The first edition was soon followed by a second and for the past three years there has hardly been an available copy in any book store. A third edition is now appearing and the first two volumes, aggregating nearly 1,700 pages, are out of press. The new edition is not merely a reprint of the old work corrected and brought up-to-date, but it is very largely a new work and as such it is easily the most important contribution to the French literature of criminal law that has yet been made. It is not only monumental in its scope but in its method of treatment it represents French scholarship at its best. And here it may be added that no race of scholars has made more notable contributions to legal literature in recent years than the French. The works of Garraud, Esmein, Glasson, Brissaud and Saleilles are fully up to the standard set by the best German scholars, if they do not indeed surpass them in some respects.

M. Gerraud's work is by no means a treatise merely on French criminal law but a very large part of it deals with the general principles of criminal law—its origin and evolution, its relation to sociology and penology, its sources, etc. It is therefore a book not merely for the practicing lawyer but for the student of historical and sociological jurisprudence as well. As such it is a very timely treatise because, as the author points out, French criminal law has reached a crisis in its evolution and the old codes are being overhauled and brought into harmony with modern conditions.

It is impossible in a brief review like this to give even a sketch of the wide range of subjects treated in a work so comprehensive as M. Garraud's. It must suffice to say here that it is as exhaustive as any treatise on the criminal law can well be, that it bears every evidence of patient labor and ripe scholarship and that altogether it is a treatise that no student of criminal law can ignore. It is in every way a credit to French scholarship and deserves a place in every well equipped law library.

JAMES W. GARNER.

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GESETZ, GESETZESANWENDUNG UND ZWECKMASSIGKIETSERWAGUNG. ZUGLEICH EIN SYSTEM PER UNGULTIGKEITSGUNDE VON POLIZEIVERORDNUNGEN UND VERFUGUNGEN. EINE STAATS UND VERWALTUNGSRECHTLICHE UNTERSUCHUNG By *Walter Jellinek*, Priv. Doz. in Leipzig. J. C. B. Mohr, Subigen, 1913, pp. 375. M 12.

This volume contains a careful exposition of the underlying principles of German police laws and regulations, including the grounds on which regulations may be sustained and the grounds on which they may be set aside. The text is enriched by many practical examples. The volume is divided into three parts. The first part is devoted to the law, the second part to the application of the law and the third part to a consideration of the interpretation of the laws by administrative officers.

The volume is valuable as a contribution to German legal police literature, and is interesting to the student of comparative administrative law. It possesses no practical value, however, for the American police officer and the American criminologist.

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DIRITTO PENALE E SNOI LIMITI NATURALI. By *Ugo Conti,* Societa Typographica, Sardia, 1913. pp. 61.

This monograph, which was first published in Studi Economici-giuridici (Vol. VI Anno 1914), is a very interesting study. In his earlier writing Conti considered the limits of criminal law, which he believes to be not crime but "the likelihood of a man of becoming the author of a certain crime." He would take up the possibility of crime from both a social and an individual point of view. Every crime has two elements: the criminal fact and the criminal man. Then the criminal propensity of the man must be considered in punishing every crime. But even beyond this, criminal propensity *per se* is dealt with by the judge in cases of abnormality or attempts. In these cases as in the juvenile court, the act is administrative not judicial. As government is divided into the legislative, the judiciary, and the executive, so these three phases are reflected within the sphere of penal law. And the administrative or police function is not by any means the least important. Of course, all police pwer is not within the sphere of criminal law, but there is a large portion, where administrative criminal law performs a socially defensive function which is that of the police.

This is but another way of approaching the question of imputability, with its connection with the punishment of the delinquent by penal statutes. To allow or require the judge when he finds not guilty, either through failure of execution or lack of mentality, to consign the defendant, as dangerous, to some place for the protection of society, may be considered as an administrative act of police, or as a function of penal law, *viz.:* social defense. It is a new way of facing the now old question of delinquency *versus* guilt.

JOHN LISLE.

Philadelphia.

MAGGIORE ON RESPONSIBILITY. Volonta o Responsibilita Saggio di Imateoria Idealistica dell Imputabilita Penale. By Guiseppi Maggoire, Il Progresso del Diritti Criminale, Jan.-Feb., 1914.

Responsibility is, philosophically, property in an action. A man is responsible for his own acts. The difficulty is in the determination of the objective. This question St. Augustine, with his doctrine of grace and Rousseau with his social responsibility have both failed to solve: for, how can either man created by God, or man, as pictured by determinism be responsible? Neither concept gives man any determinative quality or force. Creation implies predestination. Determination excludes free will. And the antimony is not destroyed by

any of the many compromises of orthodoxy and materialism "compromises which recall one of the most complex questions discussed before Salisbury in the XI century; whether the pig led to market was led by the rope or by the man, which problem when solved did not alter the fate of the poor animal." But, all moralists and criminalist in dealing with responsibility, have preferred to deal with the rope, *will,* and whether they consider it free or bound, autonomous or heterogenous, they have considered it distinct from mind and knowledge and make it the cause. Not only the classical school and the positivistic school, but all the intermediate theories of freedom of intellect, voluntariness, intimidability, normality, personal identity and social resemblance have all followed this plan. Philosophy must show the error in looking upon will as a distinct faculty. "Will and intellect, therefore, in so far as we think of them as opposed, are two powers (empty possibility of knowing, and empty possibility of acting). The absolute knowledge is where action does not exact a knowledge action. Real will is even in vulgar deception, nothing but the actuality of my being. My will is what I am and do. That other will which we often call intent, hope, a bundle of good intentions (which paves a well-known path) is non-reality to which we lend a certain moral value, p. 21. Will, as distinct from thought, is no bridge for imputability to cross. It cannot be subjective. *Facultas agendi* may be called will but then it is not action. Action may be called will, as it is, but this will is no longer distinct from thought Action is but a phase of human life. "Man lives in his acts and action is the sum or living universality of man" (p. 22), and thus the subject is merged with the object. Thought is action, without any surplus. The agent must be a part of the action imputed to him. Without this immanence, no man should be made to answer for an act. This immanence does not end with the accomplishment of the facts; for the agent still lives in the existing consequences. "I am not to be called to account for having at some other time committed a robbery or a murder, but because notwithstanding the lapse of time, forgetfulness, repentance and pardon, I am the man whose existence is stained by robbery or murder, indelible even by all the waters of the ocean" (p. 22).

Responsibility is nothing more than the intimacy of my facts with my being or the indissolubility of my acts and my spiritual being. "I have done this" results in this being my act, a part of me. Thought and idea are always present, actuality is always absent; they are the same thing from two points of view. The omnipresence of thought supposes the omni-absence of the thing thought. Either, everything, including will, is thought, which justifies responsibility or else everything, especially will and action, are out of the realm of thought and their responsibility is an illusion. Thus responsibility is a concomitant of consciousness. Auto-consciousness is also *auto-will.* Hence, responsibility is universal, but this does not mean that it will result in equal tests for all. Universal is not identical in effect. The old maxim *"sum cuique tribuese"* will still be applied.

There is no mere physical imputability distinct from the psychic or moral (p. 25). For responsibility is based on auto-consciousness, which unites act and intent. Duress as a plea is then explained. But what of the case of so-called unconscious action, where, for example, a sleeping mother smothers her child? Is this not her act? If so, is she not responsible? But the answer is clear. As in the case of duress, *quamivie si liber essem, noluissem, tamen co-actus volii*, so in the case of unconscious action, precaution could have been taken. The agent *volens*, did the act in every case, and it is imputable to him because of the *voluntas*, but regard for human frailty makes us both irresponsible, where foresight could (sic) not have foreseen or duress is real.

"If responsibility is the inseparable essence of being, irresponsibility is a *non-esse*" (p. 25). Thus facts, not acts, are casual. But, no fact being uncontrolled, it follows that a fact unconnected with mind is non-existent. This destroys the theory that punishment is social defensive reaction. That responsibility is universal (but not identical) simply means that everyone must bear the consequences of his act. This is true. Social defensive reaction is generally taken to mean, that without imputability everyone must answer for certain acts. The error is apparent.

There is imputability, because he (the subject) is a part of the acts (predicate). Social defensive reaction is a phrase used to overcome the undue leniency shown criminals today by the superficial followers of St. Augustine or Rousseau. And, as social defensive reaction would punish all, the lame, the halt, and the blind, but with a difference, in the name of society, not requiring proof of more than physical imputability, so Maggiore would punish them, holding that the physical imputability through his theory of man's existence in his act, shows the existence of full imputability.

"Responsibility is not quantitatively but only qualitatively divisible" (p. 29). Punishment should be qualified to suit the delinquent. But, its quantum can always be disregarded. It is the quality which effects the cure. And a man, whose auto-consciousness has entered into crime is never what he was before. In some form he should be distinguished, as he in fact is throughout his life. This is the natural conclusion.

Penal responsibility should be governed by the same rule as in the civil courts. Irresponsibility should be made the exception. Whatever a man did, he should be made to pay the consequence of it, and because of delinquency, his punishment should be qualified for his cure.

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MANUAL FOR PROBATION OFFICERS IN NEW YORK STATE. *By the State Probation Commission.* 1913, pp. 251.

This book is not a dry set of rules or formulae for the guidance of probation officers, but it is a compilation of the laws of both general

and local chronologically arranged with an exhaustive discussion of their application, with numerous references where the courts have construed them, or where opinions have been handed down by the Attorney-General. The work has been done so well that it can be used as a guide and adapted by other states in the various aspects of probation work.

The book is divided into three parts. Part I, citing the general laws with the date of enactment, and the local laws for the cities of Buffalo, New York, Rochester, Syracuse and Yonkers, also for the counties of Ontario and Monroe, the text of these laws being given in appendix A, Part III. The wonder is that the State Solons could not enact a general law for cities of the same class, and uniformity for all counties.

Part II gives an analysis and explanation of probation laws as they pertain (a) to the appointment of and compensation of probation officers; (b) to court procedure and practice concerning probation; (c) to duties, powers and methods of probation officers; (d) to records, reports, forms, accounts and statistics; (e) to the State Probation Commission; (f) to miscellaneous provisions of the law.

In the seven appendixes of Part III are given the text of the laws; statistics showing the growth of probation in New York State; Illustrative Case History; Literature published by the State Probation Commission; Sample set of questions used in written examination for probation officers, etc.

Probation will be a success or a failure according to its application; then it may be well to look into what is required of the probation officer and the probationer as set forth in the manual. The text is silent on the subject of the qualifications of the court. Is this a negligible quantity?

All salaried probation officers must qualify for their places through civil service examinations, in city positions through the city civil service commission, for all other positions through state examinations. Again it looks as if it would be better if all were required to take the same examinations. The appointment of probation officers is made by the court, and the candidate holds his office during the pleasure of the court.

The statutory duties of probation officers are: (a) when so directed by a court or magistrate, to inquire into the antecedents, character and circumstances of defendants and the mitigating or aggravating circumstances of their offense, and to report thereon in writing; (b) to furnish probationers with a statement of the period and conditions of their probation, and to instruct them concerning the same; (c) to keep informed concerning the conduct and condition of probationers; (d) to aid and encourage probationers by friendly advice and other means to bring about improvements in their conduct and conditions; (e) to report in writing at least monthly to the court or magistrate concerning the conduct and condition of each probationer; when a probation officer receives a probationer on transfer from a probation officer in another court, he shall report concerning the conduct and condition of such probationer at regular intervals

to the court or magistrate making the transfer; (f) to keep records of his work; (g) to keep accounts of all moneys collected from probationers, to give receipts therefor and to make at least monthly reports thereof; (h) to perform such other duties in connection with probationers as the court or magistrate may direct; (i) to make such reports to the State Probation Commission as it may require; (j) to act, when so requested by the county judge, as parole officer, over persons paroled under provisions of the Criminal Code.

Under ordinary court procedure no preliminary examination is made concerning the defendant and frequently the verdict of the court is an absolute miscarriage of justice. The purpose of the preliminary examination is to see whether the defendant should be put on probation or dealt with otherwise: If he is a child it may be ascertained if he attends school, has he a good or bad home, is he obedient, where does he spend his evenings, has he any bad habits, has he any mental or physical defect that tends to delinquency, if he is too old to go to school, does he work at profitable employment, is he truthful, does he drink or gamble, is he likely to become a menace to the community; in all these investigations the defendant need not give testimony against himself, and the facts are not learned for the purpose of obtaining conviction, but for the purpose of ascertaining what will be the best way to dispose of the particular case, for if the information is correct, the court can determine whether the offense was malicious or in a degree excusable and can make its findings accordingly.

The probationary conditions are clearly set forth and are worthy of careful consideration.

(a) That the probationer shall indulge in no unlawful, disorderly, injurious or vicious habits;

(b) Shall avoid places or persons of disreputable or harmful character;

(c) Shall report to the probation officer as directed by the court or probation officer;

(d) shall permit the probation officer to visit hi min a reasonable manner at his place of abode or elsewhere;

(e) Shall answer any reasonable inquiries by the probation officer concerning his conduct or condition;

(f) Shall, if a child, of compulsory school age, attend school.

(g) Shall, if an adult, or if a child but not required to attend school, work faithfully at suitable employment;

(h) Shall remain or reside within a specified place or locality;

(i) Shall abstain for a reasonable period from the use of alcoholic beverages, if the use of the same contributed to his offense.

(j) Shall pay in one or several sums a fine imposed at the time of being placed on probation;

(k) Shall make reparation or restitution to the aggrieved parties for actual damages or losses caused by the offense;

(l) Shall support his wife or children.

All persons will agree that it is just that the damage done through malicious mischief should be paid for, or if goods are stolen, they or their equivalent should be returned; care is taken not to make the court a collection agency, the primary object being to teach the probationer a practical lesson and to exert a reformatory influence. Whatever the psychic effect is on the probationer, the aggrieved party will be satisfied to have restitution or reparation in the case.

The plan of compelling a delinquent husband to work and to support his wife or children is both reasonable and humane, and more logical than to imprison him, thus causing the family to suffer for the negative deed of the father. Some plan should be worked out so that when the supporter of the family is put in prison for a term of years through the commission of one of the greater felonies, the culprit should be obliged to work at profitable employment and the proceeds of his labors should go to his dependents.

The Commission recognizes the value of reliable statistics and has a series of forms, for records, reports, accounts and statistics consisting of thirty-one blanks to be used by the probation officer. If these blanks are faithfully used, the result will be accuracy and uniformity in the statistics of New York on the subject of probation. What is needed next, is some genius, or some omniscient State Commission to devise a plan to get reliable and accurate statistics on all phases of crime, its causation, treatment, etc.

Probation applies to all persons not guilty of a previous felony, who are found guilty of a crime whose maximum sentence does not exceed ten years. The wisdom of probation is shown in the court procedure, criminal procedure is dispensed with and chancery proceedings are had; the suit is not styled the people of the Empire State against John Doe, aged 14 years, but the court proceeds on the sensible theory that the State can find better business than crushing a defenseless child, but does act upon the theory that said child is the ward of the State, subject to its discipline and protection, which the court should give the child under the conditions disclosed in the case.

The first probation law was passed April 17, 1901, and no fewer than thirty acts and amendments have followed it; the present State Commission was created on June 6, 1907. Statistics on probation for the years 1908-1912, inclusive, are given in appendix B, part III. This shows that 44,562 have passed from probation, 32,510, or 73 per cent, having shown beneficial effects from their probationary experience.

This report shows commendable results, and best of all, it re-established those delinquents without placing the brand of felons on them, a stain that it takes generations to wipe out.

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ACUTE POLIOMYELITIS. By *Dr. Ivan Wickman*, Stockholm. Nervous and Mental Disease, Monograph Series, No. 16. New York, 1913. Pp. 135. $3.00.

Infantile paralysis, or, as the disease is technically known, acute poliomyelitis, is one of the scourges of infancy and childhood. Its ravages are the more serious for the happiness of the child and its parents for the reason that it results in paralysis which cripples and deforms, more often than in death. By the investigations of Lansteiner, Flexner, Wickman and others the pathology of the disease has been fairly clearly worked out. The cause of the disease is an infecting organism which is very much smaller than the smallest of observed, known, pathogenic organisms. It is so small that it passes through certain filters by which ordinary bacteria are removed from solutions in which they grow. Flexner has shown that it is possible to transmit the disease to monkeys by inoculating them with filtered virus. The commonest pathway of infection seems to be the nasal mucous membrane. The exact manner in which the organism gains access to the central nervous system is not known. Once established in the central nervous system, the typical damage done is the destruction of the cell bodies of the large motor nerve cells which lie in the anterior portions of the gray substance of the spinal cord. It is from this feature of the pathological picture that the disease receives its name: acute anterior poliomyelitis, which may be paraphrased for the benefit of non-technical readers as an inflammation of the anterior portions of the gray substance of the spinal cord. The symptoms of the disease are the logical concomitants of the pathological causes. The fever, malaise, nausea, vomiting which precede the appearance of the paralysis are indications of the invasion of the organism. The paralysis and atrophy of the muscles result from the destruction of the nerve cells. Recent study of the epidemic forms of the disease compels the recognition of other manifestations of the disease than those usually described. A curious form of paralysis, known as Landry's ascending paralysis, is characterized by a paralysis of the lower extremities which gradually creeps up the body, with a final involvement of the respiratory mechanism that results in death. Again, the brain may become involved, with the production of an encephalitis which, if it does not kill, results in feeble-mindedness. Fortunately Flexner has produced a serum which is promising good results.

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DIE NATUR DES ECHTEN UNTERLASSUNGSDELIKTES UND DIE FOLGERUNGEN DARAUS. Von *Dr. jur. Adolf Rohde.* Leipzig, Verlag von Veit & Comp., 1913. Pp. vi, 100.

The philosophical analysis of recent years, together with the results of historical investigation and the revelations of sociology with reference to the dependence of crime upon general social, political, and economic conditions, have led to the downfall of the older theories of

natural rights and *laissez faire*. We are today emphasizing afresh the fact that the state is not merely a great police force, but that it has certain very positive tasks and ends and that it therefore imposes upon its members duties to do, as well as commands to refrain. The subject of *Unterlassungsdelikte* is, therefore, a very timely one. The author of the present treatise, however, is not concerned with the more ultimate problems suggested by his subject, such, for example, as the final intent and purpose of positive laws, and whether the state can by any possibility do more for its members than merely to remove hindrances to their development, either directly by breaking down these hindrances or indirectly by setting up hindrances to hindrances. The treatise confines itself to the matter of fact point of view that we actually have positively formulated laws as well as prohibitions, and that an individual, therefore, may be guilty of omission as well as of commission. Even when the problems that arise in the course of discussion seem of themselves to invite to a somewhat broader consideration, the author steadfastly refuses to follow them beyond what he regards as the strictly legal, as contrasted with the sociological and the philosophical field of interest.

An illustration of his point of view and its limitations is offered by his argument that, both from the standpoint of existing law and from that of the individual, positive laws possess a character peculiar to themselves—that a "thou shalt" is not perfectly convertible into a "thou shalt not," or vice versa. A prohibition, he maintains, requires no definite results and thus may be obeyed either by remaining passive or by occupying oneself with other matters; it is disobeyed only by the doing of that specific act which is forbidden. A positive command, on the other hand, can be carried out only by appropriate activity, and may be violated by passivity as well as by other modes of activity. At first sight, indeed, there appear to be many exceptions to this, as, for example, the ordinance "vehicles to the right," which is statable as "no vehicles are allowed on the left." Such apparent exceptions rest on the fact that the command is not strictly intended to be categorical, but to presuppose the hypothetical "if you wish to act at all," and thus to stand in contrast merely to some other mode of activity with which it stands in a relation of mutual exclusion. Presupposing "if you act at all," "act in this way" is, of course, equivalent to "do not act in this other way," where there are only these two ways of acting. Now, the author is undoubtedly correct in contending that it is only in a disjunction whose members are mutually exclusive that an affirmation of the one is equivalent to a denial of the other; and, so long, of course, as we do not pass beyond the bare statement of the law, these conditions are only rarely present. Nevertheless, it remains an interesting and an arguable question whether the law, just in proportion as it constitutes a rational system, does not rest on and imply such disjunctions, and whether the individual would not so understand particular laws just to the extent that he came to understand their true meaning and purpose and was not merely conscious of them as existing commands imposed by a power capable of compelling obedience.

Passing to the organization of the treatise, we find, in addition to an introduction and a fairly extensive bibliography, three parts, entitled "Command and Duty," "The System of Positive Duties," and "Conclusions for Criminal Law." Each of these parts is divided into a number of sections, which in turn fall into innumerable subsections, their divisions, subdivisions, etc., etc. As a result of this method of treatment, there is not only considerable repetition, but the effect is very choppy, and while quite a variety of problems are touched upon, few are analyzed in careful detail or with due consideraton of upon, few are analyzed in careful detail with due consideration of their their various implications. Obviously it is impossible, within the compass of a brief review, to give a resume of the various points that are dealt with in a treatise of this nature. The distinction, however, of which most use is made, both constructively and in criticism, is one between *Zuwiderhandeln* and *Nicht (anders) handeln*, between intentionally acting in a way contradictory to a positive law or so as to make action in accordance with it impossible, on the one hand, and simply not acting at all, or perhaps, more accurately expressed, doing things out of all relation to the required duty. The former are really crimes of commission (*Begehungsdelikte*); only the latter are crimes of omission (*Unterlassungsdelikte*) in the proper sense of the word. Here, again, the law commanding a thing to be done may either more or less arbitrarily set a time limit or the time when the act is to be performed may depend upon undeterminable empirical conditions, as, for example, when the law prescribes that the police be notified by an individual as soon as he gets knowledge of a contemplate crime. In the former case, it is a penalty rather than punishment that is exacted, and pressure of various kinds may be brought to secure compliance with the law, even after the expiration of the time limit that had been more or less arbitrarily set. In the latter case, however, punishment of some kind remains the state's only recourse, and for this reason it is here alone that we have *Unterlassungsdelikte* in the strictest meaning of the term.

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DIE RECHTLICHE NATUR DER ANSTIFTUNG. Von *Dr. Jur. Wolfgang Röhricht.* Strafrechtliche Abhandlungen, Heft 163. Breslau, Schlettersche Buchhandlung, 1913. Pp. iv, 55.

The fondness of the German mind for sharp, clear-cut distinctions, even though at the cost of a certain artificiality, is again suggested by this treatise on instigation. Whereas our own criminal law sometimes refers to all who are in any way concerned in the commission of a crime as accomplices and seems to differentiate only principal, co-principal, and accessory, the Germans have worked out a number of other distinctions for which we do not even seem to possess exactly equivalent English terms. Several centuries ago a sharp line was drawn between the *Täter* (principal) and the *sonstigen Beteiligten* (other participants) and somewhat later the latter were divided into *Mittäter* (co-principal) and *Teilnehmer* (accessory); gradually, also, the term *Akzessorität* came into use, and *Teilnehmer* came to be classified

more or less vaguely into *Anstifter* (instigator) and *Beihelfer* (helper, accomplice). The complaint of the author, however, is that *Anstiftung* and *Beihilfe* have been treated for the most part simply as specific cases of *Teilnahme,* without ever having been subjected to rigid analysis. But, apart from a demonstration that the two more specific terms are sufficiently alike to warrant their being subsumed under the more general concept *Teilnahme,* and discussed from this point of view, the traditional treatment of instigation is but a *petitio principii.*

If, however, the author has led us by this introduction to his treatise, in conjunction with the wording of its title, to expect a careful analysis of the nature of instigation in general and of its proper relation, from a legal point of view, to the other factors in crime, a certain disappointment must ensue. The various points which he attempts to make are not always clear; indeed, the exposition is frequently quite tangled. With the exception, moreover, of part of the second chapter, entitled "De lege ferenda," the discussion is of the nature of "nomosophy," to use Dean Wigemore's proposed terminology, rather than of "nomoscopy."

Under the first caption, "De lege lata," we have a discussion of the status of instigation in the existing German code. This code has been interpreted by some scholars, among them Bauer, as regarding instigation as an act complete in its own nature, without relation to any results that might spring from it. Instigation, however, is not punished unless a criminal act ensues. When this occurs, therefore, it would appear that the guilt of another is simply carried over to the instigator who must thus suffer for a crime committed by some other party. The author examines with some care the various arguments advanced in support of this view, and finds them invalid. One of the most significant criticisms that he urges is the failure of Bauer and his school to distinguish carefully between "punishable act" (*strafbare Handlung*) and "punishability of an act" (*Strafbarkeit einer Handlung*) as these expressions occur in various provisions of the code. It is true that an instigator is punishable, under German law, only if a punishable act is done by one whom he has incited; and it is true, furthermore, that under this code an act is punishable only when it is not merely in external violation of the law, but is also the deed of a person who was not physically overpowered and thus compelled to do it, nor threatened with violence to himself or his family and thus mentally overpowered, nor, in the third place, incapable of making a voluntary decision. Yet, even though an instigator is punishable only on condition that the crime to which he has incited has been committed by a person who is capable of free decision, this does not prove, as Bauer supposes, that the instigator is punished for the guilt of another. That this is not a correct interpretation of the law seems clear when we bear in mind that a punishable act does not necessarily involve the punishableness of the principal. Bauer has overlooked the fact that there are *straflose strafbare Handlungen*—acts that are punishable, but for which the principal, for certain reasons, is not punishable. In such cases, however, the instigator is punishable; evidently, therefore, he is punished independently of the principal.

Thus, while the author holds that the punishment meted out to the instigator is imposed strictly because of his own deed, he nevertheless refuses to accept the antithesis of Bauer's view held, for example, by Herzog and Kohler. These writers insist that instigation is punishable whenever it gives rise to an act which is in external violation of the law. Here the author agrees with Bauer in maintaining that there must first be a punishable act and that this involves, on the part of the principal, the three subjective conditions noted above. Thus the present treatise steers a middle course between the two extreme interpretations current in Germany, invoking in its support the authority particularly of Hugo Meyer and Birkmeyer as well as that of several judicial decisions.

Before pointing out in a concluding chapter that the dictrine of instigation which he finds in the existing code is also substantially maintained in the new penal code proposed for Germany, Dr. Röhricht breaks a lance in its defence by insisting on the unsatisfactory character of various divergent views. Both practical and theoretical considerations make impossible the notion that instigation is a crime in itself, complete both objectively and subjectively with the act of instigation, and therefore punishable quite independently of any act or attempted act on the part of a third party. The relatively recent Norwegian code has adopted still a different view, regarding the instigator as a co-principal. But it is not difficult to see objections here also. How can one who suborns another to perjury be himself, strictly speaking, a co-principal in the perjury, or a citizen who incites an official to a criminal breach of trust be a co-principal in a crime which cannot exist except for an official? Moreover, the Norwegian code is not successful in holding consistently to its view of instigation, for in dealing with the problem it also finds it necessary here and there to take into account various considerations with reference to the principal.

Perhaps the basis of these views, as well as of those of Bauer and Herzog, is the fear of construing the principal as a mere instrument in the hands of the instigator instead of as an agent possessed of free self-determination. Hence they all seek in their several ways to avoid tracing any connection between the will of the instigator and the crime that is committed by the one whom he has incited. Once, however, it is recognized that self-determination and the making of genuine decisions do not imply action without motives, there can be no difficulty in holding the doctrine of freedom, on which existing law is based, and nevertheless tracing to the instigator, as Röhricht does, a certain responsibility for the outcome. The deed, though realized by a third and a self-determined person, is nevertheless also an objective expression of the instigator's will and intent and for it the instigator may properly be held directly responsible. Yet, even so, certain difficulties remain. The actual crime, which apparently must constitute the basis of punishability, may differ widely from the end that the instigator had in view—it may not only be much more serious, or on the other hand, more trivial, but even of quite a different nature, depending, as it does, on the intelligence and general character of the third party as well as on the shifting empirical conditions with which he has to deal. More-

over, ought not an instigator to be punishable if he incites to crime a person whom he supposes to be normal but who proves, on later examination, not to be "capable of making free decisions?" But how is this reconcilable with the view that the punishability of the instigator should depend upon the commission of a "punishable act?" Furthermore, besides the question of the relation of instigation and its punishability to cases in which a third party has violated some law prohibiting certain acts, there are the perhaps even more difficult cases in which there has been merely a neglect to do certain things which the law commands. Is instigation here punishable? If so, how can it be maintained that its punishability depends upon the commission of acts of an objective nature? One feels that the author has contributed little to a real clearing up of the difficult problems connected with instigation. A suspicion arises that one of his handicaps is the exaggerated emphasis which his discussion implies of the retributive function of punishment.

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DIE BEDEUTUNG DER PSYCHOLOGIE FUR DIE UBRIGEN WISSENSCHAFTEN UND DIE PRAXIS. By *K. Marbe. Fortschritte der Psychologie und* H. 1. Pp. 5-62.

KINDERAUSSAGEN IN EINEM SITTLICHKEITSPROZESS. By *K. Marbe. Fortschritte der Psychologie und ihrer Anwendungen,* 1913, Bd. 1, *ihrer Anwendungen,* Teubner, Leipzig and Berlin, 1912. Bd. 1, H. 6, Pp. 375-396.

The last few years have shown a rapidly growing tendency to apply the results of exact psychological research to definite practical uses, and to undertake new researches directed specifically toward the solution of practical problems. As a consequence of this movement, a number of greatly improved methods have already been introduced into industrial activities; and there have appeared numerous papers, books and new periodicals dealing with useful applications of psychological principles. Among the new periodicals is the one cited above, "The Progress of Psychology and its Applications." In its initial number its editor, Professor Marbe, discusses "the importance of psychology for the other sciences and for practice." The subjects that he considers in their relation to psychology are science in general, the science of language, literature and philology, aesthetics, history, pedagogy, jurisprudence, political economy and industry, philosophy.

Every science that measures spatial and temporal divisions is affected by the fact that the tenths of a division cannot be accurately estimated, since a preference for particular individual tenths appears. Knowledge of reaction-times is essential for astronomy and all other sciences that record moments of time by means of bodily movements. After-images and contrast phenomena must be considered in photometry and physics. Subjective impressions due to fixation changes in the dark, to variations in impressions from minimal stimuli, and to false externalization of sensory images cannot be disregarded without leading to mistaken theories like that of the existence of N-rays. The facts of psychophysics, and especially of Weber's law,

must be known in estimating star-magnitudes, and by metric sciences in general. Talbot's law, and the fact that single phases of a movement suffice for arousing a movement-impression, lie at the basis of kinematography. The absurdities of phrenology would have been prevented by acquaintance with scientific psychology. Animal psychology is an aid to physiology. Anthropology and ethnology are helped by psychology, and must employ its exact methods.

For medicine, the facts of psychophysics are important, as in estimating blood-pressure. Attention-factors play an essential part in auscultation. Suggestion must be taken into account by medicine, researches in fatigue by hygiene, the mental influence of drugs by pharmacology. Kraepelin introduced into psychiatry numerous psychological methods: the exact determination of the mental processes of the mentally deranged by means of such psychological experiments as those in reaction, association, and memory; the investigation of artificially produced mental disturbances through bodily and mental overexertion, through insufficient sleep and nourishment, and through drugs; the precise determination of the influence of alcohol; the investigation of individual mental characteristics and of the curve of work. Others have made equally significant psychological contributions to psychiatry, among which may be mentioned the study of preferred associations and of the exact laws of memory.

The scientific study of language cannot dispense with a knowledge of child-psychology, of the relation between thought and speech, of the psychology of the understanding and misunderstanding of heard words and of analogy-formation. Philology, especially in connection with the critical study of texts, must be acquainted with the psychology of reading and copying, of mistakes and lapses in speech and writing, of the type of imagery of the copier. The study of style in literature involves such psychological problems as those of rhythm, of the relation of number of syllables to emotional effects, of differences in rapidity of reading, of melody. To the theory of music and other fields of aesthetics psychology has made valuable contributions.

The historian should be familiar with many facts of the psychology of verbal testimony, such as, for instance, that without further confirmation agreement in the testimony of independent witnesses is no evidence of their reliability, since there are universal tendencies to error, of which neglect of the unaccustomed and accidental, and overestimation of some and underestimation of other time and space distances are examples. Psychological investigations in regard to the similarity of psychical processes under like conditions explain the independent origin of similar myths and make unnecessary certain sociological assumptions, such as those of the group-mind or group-will, and the belief that similarities of thought, feeling and action in a social community must rest on interrelations between its members. Suggestion throws light on historically important epidemics like dance-mania and tulip-craze. Inheritance is important for the historian to understand; also the psychology of rumor.

Modern pedagogy seeks to found itself upon positive facts of experience. Both child-psychology and general psychology are essential

to it, as the author shows by numerous illustrations. Even the specifically pedagogical researches derive their method from psychology.

The jurist meets with acts of will, their causes and results, in connection with the making of contracts and other legal papers, in criminal acts, including those of omission, in the question of responsibility and diminished responsibility. The only science that deals with the normal course of human volitions is psychology. In reaction-time experiments it investigates the simplest acts of will, more complex ones in reactions involving recognition, discrimination, and choice. It introspectively analyzes the most complex volitions and seeks to determine experimentally their relation to thought and temperament. It determines the influence of alcohol, hypnosis, suggestion. It studies the psychology of crowds, the social and individual conditions of crime, the influence of race and religion, of occupation and social position, the relation of crime to prostitution, heredity, education, culture, age and sex. It clarifies the idea of responsibility, showing that free-will is in no way identical with indeterminism, and that the now indisputable theory of determinism furnishes a sound foundation for a criminal law based on freedom of the will. It is seeking to discover objective criteria of guilt and innocence, the best known method thus far suggested being the so-called association method, which the author describes and criticises. Though this method is by no means perfected, yet the jurist should have knowledge of its present development. Important for him also is the psychology of evidence. The best intentioned declarations of witnesses are not always reliable, and psychology seeks to determine within what limits they can be relied on. There are universal tendencies to falsify experiences in the direction of typical experiences, to remember best the facts that have aroused interest, to overestimate short times and underestimate longer ones. The testimony of children is less reliable than that of adults. The validity of testimony is dependent on the manner of questioning. Questions involving false assumptions possess a strong suggestive power. Psychologists have already been called in as experts in a number of trials in Germany.

In the field of industry many useful experimental researches have been undertaken. The relation of rhythm to work, the influence of fatigue, the fluctuations of attention during the day and the week, have been studied and usefully applied. The practical importance of psychology for the choice of occupation and for increasing industrial efficiency has been shown by remarkable examples.

For both the historical and the critical study of philosophy, an intimate knowledge of psychology is as essential as is a knowledge of mathematics for the physicist or of physics for the chemist. Volumes might be written on the theories of philosophers that are disproved by the results of psychological science, as the author attempts to show by definite examples.

Whoever may be interested in any of the matters briefly outlined above, will find in the original paper numerous references to the literature of the subjects and can thus inform himself further as to the extent of psychological progress in each field. In conclusion, the

author urges more wide-spread instruction in psychology, the founding of new psychological institutions, and great improvement of facilities in those already in existence.

In the second paper here considered, Professor Marbe applies psychological principles to a question of legal evidence.[1] He was called as an expert at the trial in 1912 of a certain unmarried school-teacher, forty years old, of acknowledged ability and of best reputation, accused of immoral conduct toward seven of his pupils, young girls nine to eleven years old. These children testified at the trial, after having been subjected to several previous official examinations. Only two of them held to their accusations without change throughout, and these two were shown to be entirely untrustworthy. Moreover, their assertions were contradicted by the physician's examination of their physical condition. None of the children told their own stories, but merely answered Yes and No to questions put to them. There was a faction in the village hostile to the teacher, the existence of which must have influenced the children to some extent. The defendant was acquitted.

In his report on the case, Professor Marbe draws attention to a number of important psychological principles and makes some definite recommendations. Suggestive questions lead to false answers and should be avoided. As one of the mothers remarked at the trial, "The attorney-general said it first, my daughter merely said it after him." Agreement in the testimony of independent witnesses cannot always be taken as evidence of truth, as experiments and numerous cases have proven. Children's testimony is unreliable, especially that of girls, and especially in regard to sexual matters, which are to them so mysterious that imagination is easily aroused and the child readily constructs personal experiences out of what he has only heard about. These facts are supported by references to experimental literature. There is an abundance of cases to show that autosuggestion leads to all sorts of assertions by children; and the author cites at length a number of these cases.

The statements of the children at their several examinations are subjected by the author to minute analysis and comparison. He demands important changes in procedure, whenever children are judicially questioned on sexual matters. Whenever possible, depositions should be taken at the home of the parents, with all possible care and delicacy, instead of bringing the children into court as witnesses and thus subjecting their moral ideas to inevitable damage. Affirmative testimony by witnesses as to the trustworthiness of children is to be accepted with great caution. The children should be examined but once, and never by any but the highest official or by an expert. Both questions and answers should be stenographically reported, and the report submitted, whenever this is demanded by either side, to the judgment of a psychological expert.

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[1] See last issue, page 147.