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PENAL HISTORY UNMASKED: DISENTANGLING CRIME AND PUNISHMENT DYNAMICS

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Abstract: This paper critically examines the evolution of crime and punishment through various philosophical, sociological, and economic theories. Historically, scholars such as Marx and Durkheim have argued that penal evolution reflects a political expression of power. However, this study challenges that traditional perspective by adopting a postmodern historiographical approach. It suggests that the meaning and ownership of penal history have become increasingly ambiguous, leading to an inversion of the traditional synthesis of penal evolution. As the significance of the penal system becomes saturated and the consequences of punishment grow incomprehensible, the paper argues that any coherent ownership of penal history has been lost, if it ever existed. This reinterpretation sheds new light on the complexities and nuances of crime and punishment, revealing the intricate and often contradictory nature of penal history.

Keywords: Penal evolution, Postmodern historiography, Crime and punishment, Political power, Penal history

INTRODUCTION

"After that, there remains only the journey itself, which is nothing but process through which we lose our ownership of it" Yukio Mishima, Confessions of a Mask.

This study introduces and defends a body of hypotheses that is contrary to what we can define as the "main paradigm of penal evolution". The historical synthesis of criminal law has become a somewhat obscure subject in which authors such as Hegel (1820) and Durkheim (1900) have made majors contributions, a subject that is part of the sociology of law, and the philosophy of history, law and economics. While these "evolutionary theories" were still presented as valid, or at least as deserving academic attention, in scientific journals until the 1950s (Patterson, 1951), they have now fallen in a state between pseudo-science (Popper, 1956; Aron, 1931) and common knowledge.

Those "contemporary views" of penal history, towards which academia as such an ambiguous attitude, are briefly explained in the first part of this essay. The study mainly discusses 'scholars' primary field of interest: the birth of modern penal law at the end of the eighteenth century. This part will also show that views of penal history all rest on the hidden paradigm that punishment follows the will of those who can control it, which explains why scholars mainly study intent and political discourse (Part 1). Against those views, this study maintains that the history of criminal law is characterized not by a supposed softening of sentencing or rationalization, but mainly by a progressive loss of ownership over criminal law's; meaning, direction, and consequences, an idea contrary to Posnerian, Foucaldian, and neoMarxist arguments. The study goes further to show examples of this

phenomenon throughout history, and provides insight into its meaning, by first questioning the centrality given to the Modern penal system (part 2) and by then developing the "penal history as a dispossession" of sociological law (Part 3).

THE CONTEMPORARY VIEWS OF PENAL HISTORY (Part 1)

In a single sentence, there are not many researchers interested in synthesizing the history of criminal law.

This task was merely attempted during the beginnings of sociology and in the Hegelian philosophy of history. It mainly belongs to the nineteenth century, and its oversimplifications, ethnocentrism, and reductionism can easily be seen. However, the exercise has a scholarly interest, not merely an educational one. The expression and synthesis within a single scale of mechanisms and dynamics that best express penal history, also serve as a way to address the question of the essence of penal law, forcing scholars to truly express their perspectives on what criminal law is and the meaning of the concepts they affix to it. In reviewing ideas on the subject, history of thoughts can vaguely describe two bodies (or rather, networks) and two ways of comprehending criminal history as a synthesis. Those "contemporary views" ignore the hypothesis defended in this study, that the history of criminal law is characterized not by a supposed softening of sentencing and rationalization, but by a progressive or exponential loss of control over its meaning, direction, and consequences.

Functionalist evolution

An early tradition proceeds from Durkheim's "affaiblissement progressif des peines" (progressive weakening of sentencing) (1900) and Von Jhering's "constant abolition" (1880) to Posner's march towards efficiency (1983); these authors assume or conclude that 'changes in criminal law are done in a way that is generally consistent with the interest of the majority'.

All these authors consider that the history of criminal law is that of a rationalization, humanization, and a softening of penalties. Even Foucault, who is strongly critical of the functionalist point of view, adheres to that premise: in his opinion, sentencing was gradually softened as law was being streamlined; even this progressive rationality is then seen as mere economic and political management of populations (1975). This branch of thought is characterized by its belief in the success of the reforms demanded by Beccaria (1764); namely that the effects of modern reform would conform to the objectives of enlightenment.

From a global point of view, the main direction (causa efficiens) of penal history is controlled (or at least it appears as such), by a sort of invisible hand, which, according to Posner, comes into play through the competition of norms or the way judges think (2008). The described history roughly corresponds to the purpose (causa finalis) of contemporary criminal law for its authors: 'law is a translation of a political discourse'. Nietzsche brilliantly criticizes this type of amalgam that often characterizes modern thought: power, meaning, aim, and direction are all confused in the concept of causation 1900.

Conflictual evolution

The second tradition is the legacy of Marxism. Traces of this rebel approach to legal history can be found in critical criminology, labeling theory, and feminist legal studies. Officially, this vision is denoted as an opponent of the functionalist and conservative view. Law would evolve to promote the interests of the dominant, and this again is either intentional, or is a result of the natural balance of political institutions as described by Chambliss and Seidman (1982). Because law enforcement and creation have no material interest in prosecuting the politically strong, law would always be designed to manage the danger represented to the dominant classes by the poor and ethnic minorities.

What do neo-Marxists have in common with the likes of Durkheim and Posner? For the neo-Marxist legal historian, the evolution of law is also seen as a controlled and directed entity. Penal law follows the path desired by those in power, and again the legal systems are a mere translation of a uniform and coherent political discourse. The only ultimate difference is the definition of power. However, the fact is that either power directly controls the history of criminal law, or this evolution behaves "as if" it was obeying a political will.

Someone owns the criminal law system: this is the paradigm of penal history. Thus, there remains a contrary and rarely considered hypothesis that penal evolution is independent from the wills forced upon it. If this hypothesis is plausible, then the theories of criminal history will have the effect of strengthening modern society's sense of control when it is actually being deprived of it.

The purpose of this paper is not to "prove" or "demonstrate" that penal history is nothing, or more than a loss of control. In a postmodern epistemological paradigm, it should be recognized that at the same time such a hypothesis, by standing aside the other products of common knowledge and of the pseudo-science of historicism, can and should cast a new light on the way contemporary societies may perceive their penal system.

AN OPTICAL ILLUSION: IS MODERN LAW THE CENTER OF PENAL HISTORY? (Part 2)

For two distinct reasons; the accessibility of data on the one hand, and contamination of the descriptive by the normative on the other; all contemporary thinking on penal evolution is focused on modern law, which began to develop in the eighteenth century, and rests on the classic principles of penal law as is known today: Nulla poena sine lege, no physical punishment, and individual liability. This construction is seen as the unique reference, the monist intellectual construct toward which all past history has been led, and from which contemporary history has stood out. It was a golden age that was preceded by primitive, irrational, and barbaric; and was followed by regression, breakdown, and post-modernism.

Within this history, researchers look everywhere for the origins of humanization and rationalization of law. Von Jhering (1880) analyzes the changes that separate the Twelve Tables from the Justinian Code as the first step in the of the European people, while Durkheim (1900), among the ancient Hebrews, saw the start of the softening process of sentencing. The feudal system is perceived by evolutionists (1873) and Marxists (1848) as the necessary and inevitable link between primitive and liberal or bourgeois law. To critical legal philosophy, the revolution brought by modern criminal law (even if its intents are criticized) has provided us with a model that proves men have controlled and shaped history, and may do so again in the future.

What did not happen during the eighteenth century?

The aforementioned view is based on a weak series of prejudices. An example is the supposed "rationalization of criminal law", a phenomenon accepted as given, by conservative authors like Posner or critical authors like Marx or Foucault.

What does the rationalization of criminal law mean? The idea is that, over the centuries, penal law has transformed from what seems to be an instinctive, passionate and mystical system to a rational, cold and calculated one. It means that as criminal law systems turn to individual liability and an overall management of penal economy, collective punishment and vengeance disappear because they are no longer adapted to modern ways of life (Posner, 1983). This phenomenon is supposed to be something that translates into a new Volksgeist, a new societal meaning. Of course, no one believes that this rationality is simplistic, unilateral, linear, but nonetheless, the idea is very prominent in all those texts.

The "rationalization of criminal law" ignores what may be called the dual nature of penal history. What is seen as "the history of criminal law," the one that was supposedly rationalized, encompasses in fact two distinct

histories, which, during some periods, were written by the same institution. Separating this history in two distinct components makes the socalled rationalization disappear.

The first component of what is usually called penal history is nothing but the history of retributive systems socially organized to identify a liable party when damage occurs, a party that will pay something (either symbolically but most of the time financially) to the victim, compensating the wrong done. Originating in the lex talionis and similar provisions that can be found in the earliest Mesopotamian texts, early Roman and Greek law, European "barbaric" law and Shari'a, this function is today assumed by tort law.

However, contemporary tort law is all but rational, especially in civil law countries. In French tort law for instance, just like in Hammurabi's Code: the parents are liable for the children, the teacher for the student, and the employer for the employee, including dozens of particular rules about collective liability in different cases such as a car accident or a defective product. Non-individual liability is not a strategy of primitive societies to decentralize policing; it is at the heart of any retributive system.

The other component of penal history is the history of rational exclusion systems organized to incapacitate, chastise and/or exclude those who represent a potential threat to themselves or to others. In history, all systems of exclusion are rational, whether they are set up to manage political dissent (ancient Greek and Roman exile), diseases (leper colonies), vice (monasteries), or deviance (asylums). All these systems have the same use of individual liability and a global aim of management. All these systems are rational because their goal is a streamlined management of social risk.

When criminal justice became a system of exclusion in the late eighteenth century with the birth of the prison, it also became a rational system in which punishment corresponds to a perceived danger. But this rationality is not new (it is bound to social exclusion) and it should not be associated with changing mores. What is new is that criminal law has become the main system of exclusion to the detriment of almost all other competing systems. While when Charlemagne established a truly rational policy of social exclusion to anyone who was deemed a social danger for the first time in the middle-ages (by recommending systematic death for sodomites, blasphemer and the like) these laws were still competing with the social exclusion of the Church. Nowadays, even psychiatric hospitalization as lost its prerogatives (Harcourt, 2007) and prison is the only lawful system of exclusion that as a quantitative impact on postmodern societies.

How should modern law be seen?

Barely a century after the advent of modern criminal law, there appeared a new form of complexity, a proliferation of exceptions and specific cases, a new typology of sanctions, and apparent attacks from all sides on its principles. Apart from the somewhat anachronistic abolition of capital punishment in Europe, which should have logically followed the reform supposedly inspired by Beccaria, the second half of the twentieth century is primarily characterized by its increased severity: Authoritarian libertarianism, widespread belief in the effectiveness of prison, and mass incarceration. New trends in criminal policy translate into an increasing rate of incarceration in the Western world and, since the 1970s, a rise in prison suicide, as can be seen in France. Gone is the modern criminal law; gone is the classical, rational, and monolithic structure. Everything from now on will be seen as a form of regression.

This historical centrality of modern criminal law leads to be somewhat suspicious. Is this golden age of rational and monist law that significant, or is it a mere parenthesis in the history of the "law in the books?" What if, in reality, modern criminal law had been an attempt at reform, like that of Cyrus, Lycurgus, and Solon, an attempt which was not successful in the long run? The revolutionary discourse that put it in place, helped by the first

theoretical developments in the philosophy of law, fashioned a dual optical illusion: The break that modern criminal law truly represents, and the inability of the law that follows to perpetuate its ideals.

Yet, at least one element of modern criminal law is unique, the generalization of incarceration. Although it had actually started somewhat before the various revolutions of the eighteenth century, it is the strongest and most undeniable aspect of the contemporary legal system, the aspect that is found so hard to fully understand. The carceral penal system was perceived as softer than the sentencing immediately preceding or coexisting with it in Europe, because at the time it appeared in England it was in competition with the lex talionis (Blackstone, 1769). However, one can hardly say that westerners today live in the softest penal system in History. For Durkheim, if prison is, the end ("purpose" and "final stage") of the "progressive softening of sentencing," he also notes the "rough manners" of Antiquity when "murder and larceny were only weakly repressed": these are manners softer than modern penal law. Death sentences corporal sentences, banishment sentences all become prison sentences: the glass of punishment is either half-full or half-empty, but one surely cannot say that all aspects of modern punishment are uniformly softer than ancient law.

The generalization of incarceration is undoubtedly an important event, but unlike other features of modern criminal law, this movement is not questioned today, but instead is growing, and that is what one can expect from any path-dependent institution (Roe, 1996). Also, past history does not progressively lead to the birth of Prison. Incarceration was a stable practice on the fringe of the penal system until the seventeenth century, when it began to emerge. Perhaps the reason why the evolution of prison is so different from the evolution of other features of penal law is that prison is an objective practice, a real and material mutation. It cannot be compared to the changes in official intent that have doubtful influence on the daily practice of lawyers and law enforcement agencies. Unlike the abstract concepts of criminal law, one cannot find a predecessor to an objective practice by merely extrapolating analogies with earlier systems. The generalization of incarceration is in many ways the most significant aspect of modern criminal law, and the only one that reveals to us the very existence of the break.

PENAL HISTORY IS A DISPOSSESSION (Part 3)

Once free from the main evolutionary paradigm, expressing the "direction" of criminal law in the same terms used by Hegel, Durkheim, Von Jhering, or Posner becomes an entirely new endeavor. Quoting the poet and lightly changing his words, one may say that the history of criminal law is the process through which societies lose their ownership of it ? Against the main paradigm, there appears to be a triple loss of control: over the meaning of the penal system, over its direction, and over its physical consequences.

Modern societies saturated the meaning of punishment

A new type of punishment has its meaning when it appears. The significance that gave birth to the system is, therefore, its only true meaning, role, and purpose. There are two different ways to define this meaning, and using one of those two ways; reveals more about those who define it than about the system it supposedly defines. The first way is ideology, in the Hegelian tradition; the purpose is defined as the official (or unofficial) intent of the one in power: humanization, rehabilitation, good economy of power, or discipline. The other way is inspired from the Marxist opposition to the young Hegelian. The significance of a system by the material conditions of its birth can be characterized, that is to say, the living conditions of the group that has been established and that it is supposed to serve, the priests, the warriors, the capital owners, and the high middle class. At this moment, it can be said that this meaning of sentencing belongs to politician, to the monarch, to the tribe, and to the philosopher. It can still be identified because it has a direct link with the material creators of the system.

However, as soon as the blueprint of the new sentence becomes practice, all the actors of the system become progressively aware of the ambiguities and multiple effects that each punishment can have. They offer to this new punishment multiple and competing ambitions that saturate it with contradictory meanings (to punish and prevent, to rehabilitate and isolate, to purify and consolidate) meanings that constantly ask the ones in power to make contradictory choices. "Only that which has no history is definable." The loss of meaning is an inevitable phenomenon which arises from the contrast between the meanings affixed to official penal practices and those that reflect the reality of day to day life. Eventually, as an institution survives through different times with different ideologies and infrastructures, new meanings become attached to each penal practice (the act of sentencing, confinement, or the judicial ritual) by each actor of the criminal justice system. Also, after an institution has reached a certain degree of maturity, it loses the logical and monolithic structure that characterized its birth, and it can no longer be analyzed by a structuralize thought. This loss of control could explain the fascination of Poststructuralism for crime and punishment (Harcourt, 2007).

One can easily see how this loss of meaning poisons any contemporary debate on sentencing. Judges and politicians do not live in an ideologically homogeneous era; it is impossible to agree on what the primary purpose of the modern penal systems should be. For instance, if one believes prison actually deters and save lives, then worrying about prison conditions is an unnecessary cost, which may only lead to further costs, but if one believes that it should be rehabilitate, then poor prison conditions can only lead to more crime. The same kind of reasoning can be applied to all purposes that a prison serves, discipline, incapacitation, purification.

If a word has a dozen different contradictory meanings, it should not be used in an argument, as the argument will certainly be confusing. In a way, it is the same with our mode of punishment. The jail sentence is very confusing, and no one understands what modern states are trying to do with it. Whereas the aims of fines, physical punishment, exile, or death penalty are all easy to grasp, the one punishment invented during the so-called rational era is the most mysterious one.

All societies are prisoners of their past choices

If the saturation of meaning is a nietzschean discovery, path-dependency is a phenomenon that has been highlighted in academic journals since the 1990s. Path-dependency represents a well-known form of a loss of control, namely that of direction. What it describes is that the more important past institutional investments are, the more costly they are to reverse. An average American town has more adapted urban plan than an average French town, because the French town is older and the streets were not conceived to be adapted to contemporary life. The older an institution get, the more costly it is for it to adapt to new situations (Roe, 1996).

Again, the mechanism is progressive. The more a society grows, develops, and organizes, and the more it is able to implement these types of investments, the more it is able to constrain itself and ultimately limit its future ability. But this linear approach offers, in the end, an account that is no longer linear in terms of increasing nations' freedom to legislate. The power of a state increases gradually until it is free enough to limit its future freedom.

We have many examples of this phenomenon in penal history; the advent of the prison is undoubtedly the most important. The generalization of incarceration has changed penal procedure by allowing it to be longer and more costly, in Europe in particular, where the use of pre-trial detention is very widespread (Kensey and Tournier, 1999). These changes have, in turn, enabled new types of evidence, or rather a greater zeal in the search for evidence that was previously restricted to sworn testimony, when the question was not simply abandoned with an immediate appeal to the ruling of God. There is now a link between the impossible conviction on evidence as small as that used in ancient law and the diminishing freedom of the suspect before his conviction. By making

invisible the consequences of physical punishment, widespread incarceration has also contributed to making corporal punishment even more intolerable, although somehow it still indirectly exists. Added to this is the fact that the birth of the prison has led to the creation of infrastructure, jobs, and a metric scale of rational and internally consistent punishments, not to mention that conditional release which rewards redemption and prison medicine which strengthens our sense of control of danger. We now see that the cost of a decision to generally switch from prison sentences to another type of sentence would be prohibitive: a vast and solid network between the prison sentence and most other modern features of contemporary criminal law has been irremediably locked in. The path of the prison is ours, and we can only accept its existence.

Judges convict to the unknown

The last thing modern criminal law seems to have lost is its control over the physical consequences of punishment. Long ago, around the conversion of Constantine, western societies had integrated some authorizations of revenge in their penal system. But in the following centuries, victims progressively lost control over the consequences of the crime and of the obligation the criminal holds to them: previously, this power was in their hands, and they were responsible for the failure or success of the administration of justice.

Instead of each authorization for revenge, governments, States, and Kings tried to impose a new mode of repression that was supposed to collective consequences as well as individual consequence. This marks the beginning of the official assignment of an overall objective to criminal law, which lasted until the birth of the prison. At the turn of the nineteenth century, as Foucault remarks, modern societies grew aware of the fact that they did not properly control the collective consequences of punishment. The justice of the Ancien régime was seen as a waste, bad economics, and bad management. It is unpredictable and does not allow power to be exercised properly (1975). Therefore, according to Foucault, the age of enlightened rationalized criminal law has made it apparently softer. Government invented the prison, or borrowed it from other traditions of exclusion.

What was the result of the birth of the prison? Of course, contemporary societies do not have better control over the collective consequences of punishment, the mere assertion that one could know how to univocally and optimally reduce crime without worsening the social fabric, is ludicrous to the postmodern mind. But in the meantime, western penal systems have lost all control overs the individual consequences of punishment: In jail, some criminals suffer indirect corporal punishments from guards and other inmates, while others reign as gang leaders. With the most conservative estimate, prison suicide kills at least four times more than the death penalty does in the United States (Thigpen et al., 1995); the undesired physical consequences of the penal system are at least as important as the desired ones. This is even more prevalent in Europe, where there is no capital punishment, and where prison suicide can be ten times higher (Chesnais, 1976). It was a naive and utopian Zeitgeist that believed that a political will could ever manage the collective consequences of punishment or the individual effects of prison on the individual.

To be more precise, unlike 300 years ago, when a judge or a jury convicts a criminal in the year 2000s, he has absolutely no idea of the consequences that conviction will have over the life, body, and material possessions of the convict. While, of course, sentences such as fines, corporal punishment, or the death penalty can all be experienced subjectively, only by throwing someone in jail does a judge truly convict him to the unknown. In most western countries, the judge or jury also has no adequate idea of the length of the sentence that will be experienced because of mechanics such as parole. The unconscious awareness of this phenomenon may explain what David Garland sees as the new culture of control (2001), which is a growing intent to understand the consequences of punishment.

CONCLUSION

Three main aspects of the penal system are beyond contemporary societies reach. Now, saying that modern penal systems lost ownership of penal history implies that there was a time where humankind had that ownership. Without getting into a misplaced nostalgia, one can say that the question of dispossession is only central in the modern era. Beyond the fact that, in terms of social institutions, only blueprints can be owned, something in criminal law changed, making the issue of control more important: when law was sacred, reflecting the will of the gods, possession of it was not an issue and we should be cautious about parallels with those eras.

Modern societies gradually lose more and more control of the penal system as they ask too much of it. Criminal law is, for most of its history, a sacred and unquestionable body of principles (an eye for an eye, you shall not bare false witness, etc.) that is not meant to be logical but is of divine origins. These principles are not expected to accomplish much, and certainly not to be logically criticized or deconstructed. This distinguishes criminal law from other norms like commercial law, which was most likely invented by salespeople to consecrate their customs, and whose efficiencies can be discussed. Efficiency of criminal law cannot be discussed effectively. Sure, modern scholars can lay down an official objective like Blackstone's ratio (“Better ten free criminals than one innocent in jail”, 1769) and say that they want a criminal procedure that achieves this. Even for this very small portion of the criminal system (which is insignificant), and even if they could measure that kind of effectiveness (which they surely cannot), nothing justifies Blackstone's ratio in the first place. While commercial law is only accepted by salespeople because of its expected efficiency, penal law used to be accepted because of its sacred origin. As soon as judges tried to use the penal system to actually do something, whether it is to deter, to rehabilitate, or to make changes in society, they were deprived of it.

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