

tute of moral sense and hence of the sentiment of pity even in its lowest terms.³⁷

There is an increasing amount of evidence that certain individuals are by nature anti-social. It seems probable that any measures taken with some of these for their education for social life are bound to fail. Therefore in the light of our present knowledge it would seem desirable that capital punishment should be reserved for those whose physical and mental characteristics and whose history point to their incorrigibility, and to those who by long experience in correctional institutions have shown themselves to be irreformable. It must be admitted that the methods of ascertaining with certainty their incorrigibility are still inadequate. Nevertheless, society would probably be less exposed to danger if it eliminated the worst of the offenders than if it risked their escape or pardon by life imprisonment. This proposal, however, would limit capital punishment to a very few and these should be selected by the best means known to psychiatry and sociology. With the necessity of having these findings approved by a jury or a court it is not likely that reformable offenders would be destroyed. In the meantime every effort should be made to devise means for the correction of offenders and the improvement of our criminal procedure and our pardoning power.

In this connection it must not be forgotten that present tendencies among penologists are toward discovering and placing in institutions for their care the feeble-minded, psychopaths, paranoiacs and other individuals dangerous by reason of their mental abnormality. These would be shut off from society. In many cases, if this were done early, they would not be a menace to society. This method would not only wipe out that stock but would also prevent some of them from developing criminal habits. Such a procedure effectually applied would leave only the confirmed criminal of sound mind, but dangerous to society, and who cannot be kept in prison, to be exterminated by capital punishment.

APPENDIX TO CHAPTER XVI

The Loeb-Leopold Case. The Loeb-Leopold murder case in Chicago has raised acutely and concretely the problem of capital punishment once more. Two young men, Loeb and Leopold, nineteen years of age, students in the University, kidnapped and killed the little Frank boy, aged about twelve. They planned to use the boy for the purpose of extorting money from his father. All these families were ac-

³⁷ Garofalo, *op. cit.*, pp. 372, 373.

quainted with each other. The two criminals confessed after they were captured and said they did it in order to show that they were able to plan a first-class crime, escape detection and get the thrill out of the experience. Both of them were high-class students but, on examination by an alienist, both were found to be emotionally undeveloped.

After a long trial, in which the defense urged emotional abnormality and the tender age of the two boys, refusing to urge the defense of insanity, which in Illinois would have required a jury, the judge decided to send them to state prison for life, not on the basis of emotional disturbance, which the Illinois law does not take into account except on the basis of insanity, but on the basis of their ages.

This decision has excited a great deal of discussion by lawyers and penologists. Dean John H. Wigmore, of the Northwestern Law School, attacked the decision, both on the basis of law and of the social policy. He attacked the statement of the judge that life imprisonment "may well be the severer form of retribution and expiation". Dean Wigmore points out that retribution and expiation are terms discarded by the very progress of the criminal law to which the judge referred in his opinion. He points out that the reformation theory could not be invoked as a basis for mitigating the penalty which the law allowed the court to inflict upon these murderers, because there was no evidence introduced to show the probability of their reformation. In fact, all the evidence was to the contrary. Their philosophy of life, intellectual keenness and education, and their cynical callous unscrupulousness, says Dean Wigmore, show them to be irreclaimable. What then is the bearing of the deterrence theory upon the court's treatment of these offenders? This theory has been entirely ignored, says Dean Wigmore, in the decision of the court. He is of the opinion that the deterrence theory is the "king pin of the criminal law". This decision in the Loeb-Leopold case, he believes, lessens the restraints on the outside class of potential homicides. In support of that opinion he cites the fact that on September 1st, after the argument of the defense had been published, two eighteen-year-old girls were arrested in Chicago for assisting two youths of sixteen and nineteen cruelly to kill an old woman whose money they coveted. On their arrest one of the girls said, "A cop told me they would hang Tony, but they can't; there has never been a minor hanging in Cook County. Loeb and Leopold probably won't hang; they are our age. Why should we?" It should be noted that the judge later cited in his decision the fact that there had never been a minor hanging in Cook County. Dean Wigmore is of the opinion, therefore, that capital

punishment has a deterrent effect upon potential criminals of normal mentality. There can be no question that criminals prefer state imprisonment to hanging. We need more evidence, however, to make certain that capital punishment is more effective as a deterrent than life imprisonment.

On the other hand, this case is one which illustrates the contention set forth above that capital punishment should be invoked for incorrigible criminals of good mentality. There seems very little reason why the state should keep two such men alive in the face of the social resentment which their deed excited. No matter how well they work or how well they behave themselves in prison, they can never repay society for the damage they have done not only to the family of the victim, but to the humanitarian sentiments which lie at the basis of our society.