

Measures of Social Defense

Nathaniel Cantor

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Nathaniel Cantor, *Measures of Social Defense*, 22 Cornell L. Rev. 17 (1936)
Available at: <http://scholarship.law.cornell.edu/clr/vol22/iss1/2>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

MEASURES OF SOCIAL DEFENSE†

NATHANIEL CANTOR

I

"The end of punishment", wrote Beccaria in 1766, "is no other than to prevent others from committing the like offense. Such punishments, therefore, and such a mode of inflicting them ought to be chosen as will make strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal."¹

Following this classic statement of Beccaria and the conviction of Montesquieu that "every punishment which does not arise from absolute necessity is tyrannical", the 1789 French Declaration of the Rights of Man and the French decree of January 21, 1790, definitely incorporated this new principle. The French Code of September 25, 1791, did away with all forms of torture. The Revolutionary Assembly of 1791 declared that "penalties should be proportionate to the crime for which they are inflicted, and that *they are intended not merely to punish but to reform the culprit.*"²

For the first time in the history of European criminal law, at the close of the eighteenth century, the *principle* that penalties are applied to reform the offender and not merely to punish him was systematically incorporated into legislative enactment.³

The history of the growth of this reformatory idea remains to be written. The contributions of Jeremy Bentham, John Howard, Mirabeau and the French encyclopaedists, are fairly well known. Little, however, is known of the late eighteenth and early nineteenth century German contributors.⁴

†This essay should be viewed in light of what it is intended to be, viz., an attempt *merely to acquaint* the American reader with the development of an idea which is markedly influencing European criminal legislation.

The research has been made possible by the Social-Science Research Council, of which the writer was a fellow 1932-33.

¹AN ESSAY ON CRIME AND PUNISHMENTS (1872) p. 47. So startling in that day were such reflections that Muyart de Vouglans, the outstanding French criminologist of his day (1767), regarded Beccaria as a lunatic.

²BRISSAUD, HISTORY OF FRENCH PUBLIC LAW (Cont. Leg. Hist. Ser., 1915) p. 565.

³This idea had been germinating years before. Already in 1593, the Workhouse for Women at Amsterdam had been established with the reformatory idea in mind. Pope Clement XI built the prison (Hospital of St. Michael) at Rome in 1704, and Villain XIV built the Ghent prison (1775), being inspired by similar ideas.

Pufendorf (1632-1693) opposed the inquisitorial methods, as did Wolff (1679-1754) and Thomasius (1655-1728). Frederick the Great, in 1740, three days after he assumed power, prohibited torture, except in several instances, and in 1756 proscribed it completely. In 1787, under the Austrian Emperor, Joseph II, a new code embodying the ideas of the Enlightenment displaced the *Constitutio Criminalis Theresiana* of 1768.

⁴In the writings of Hirzel, Zeller, Wachter, Julius, and Feuerbach in the first third of the 19th century, many of the modern progressive reform ideas are to be

The development of prisons in the United States followed the general reformatory tendency. The early colonies had established detention jails and work houses for drunkards and vagrants. Capital punishment was imposed for the graver felonies and generally corporal punishment for the less serious crimes. The physical conditions in the jails were shocking.

Under the influence of the Quakers (who were in turn influenced by the English reformers), a movement in opposition to the death penalty arose. Imprisonment at hard labor was the substitute and corporal punishment was formally abolished. Fines and imprisonment became the general penalties for crime. During the early nineteenth century, about ten states erected penitentiaries, i. e., institutions of penance. The road to reform, it was believed, was reached through silence, solitude, hard labor, and prayer.

In brief, the legislative enactments of the late eighteenth and early nineteenth centuries, the prison regimes, the writings and pamphleteering of the European humanitarians and early American colonists, represented developments of the classical idea in the criminal law and in prison treatment. The individual was to be reformed. Part of the reform technique consisted in punishing him no more than was necessary to deter him and, by example, others. The criminal codes assumed their present form. Specific offenses carry specific punishments. The more heinous the crime, the more severe the punishment provided. The disposition of the offender was primarily determined by the character of the offense.

New points of view, however, emerged in the last quarter of the nineteenth century and the first decades of the twentieth. (1) The disposition of the offender was primarily to be determined by his character rather than his crime. (2) The reformation of the individual, while important, became secondary to the chief function of the criminal and penal law, viz., to defend *society* against future crime. Such defense might be guaranteed by reforming the individual, by segregating him or by preventing criminal careers. But the reform of the individual offender is not enough. The defense of society requires the introduction of preventive and hygienic measures which will destroy the germs of crime.

Since society must be defended from criminals, the treatment process of such individuals will obviously be of great importance. General prevention of crime is bound up with the special prevention or eradication of criminal careers. The two goals cannot be separated. But the form and content of the individual's treatment must be determined by the underlying purpose of

found. Especially significant are the two volumes of H. B. Wagnitz, the German John Howard, who maintained that prisons should be made educational institutions, and that all offenders should be classified. See WAGNITZ, *HISTORISCHE NACHRICHTEN UND BEMERKUNGEN UBER DIE MERKWURDIGSTEN ZUCHTHAUSER IN DEUTSCHLAND*, vols. I and II (1791-1794), vol. I pp. 36, 82 *et seq.* Also FUEBACH, *REVISION DER GRUNDSATZE UND GRUNDBEGRIFFE DES POSITIVEN RECHTS*, vols. I and II (1799-1800).

the administration of criminal justice, the defense of society—not the punishment of criminals.

How did these changes or shifts come about?

II

From the middle of the nineteenth century until today, spheres of knowledge, especially in the biological and social sciences, have widened. The influence of Darwin, Comte, and Spencer were felt in the fields of criminological inquiry. Physiology, biology, neurology, psychology, psychiatry, economics, anthropology, anthropometry, and social statistics—all the sciences having to do with human behavior—developed rapidly.

Césaire Lombroso, a surgeon by training, became deeply interested in certain types of *criminals*. He applied the facts at his disposal to an analysis of the *personality* of the offender. He attempted to differentiate classes of criminals. The starting-point of criminology was, for him, the criminal and not the crime. Ferri, on the sociological side, and Garofalo, from the jurisprudential angle, developed Lombroso's central thesis. Associations were formed, congresses assembled, and the "newer" penology crystallized. Its central doctrine was that reformation of the offender depended upon analysis of the causes of his offense. Penology became a *method of treatment* based upon knowledge of the etiology of crime. Its goal was the defense of society.

Society, it was believed, would be protected through "individualizing" treatment. Thus we read in the Report of the London International Penal Congress of 1872, "Recognizing as the fundamental fact that the protection of society is the object for which penal codes exist and the treatment of criminals is devised, the committee believes that this protection is not only consistent with, but absolutely demands the enunciation of the principle that the moral regeneration of the prisoner should be the primary aim of prison discipline." That is to say, society is to be protected by reforming the individual offender through a method of *prison discipline*.

But the early congressists failed to recognize or to develop the implications of the work of the Italian Positivists. According to Ferri and Lombroso, the causal factors of criminality lie within the individual's biological inheritance and the physical and social environments. Their attempts in classifying offenders into various types carried with it the corollary concept of "social dangerousness". If certain individuals were recognizable as "born"—insane, habitual, or professional offenders or "criminals by tendency"—it followed that *punishment was ineffective*; that such socially dangerous members of society should be segregated indeterminately or definitely isolated.

The beginnings of the *modern* content of measures of social defense are seen. The reformation of the individual is only the means to the more gen-

eral and important goal of the modern positivist school, viz., the *protection of society*. *Preventive* measures against the commission of *future* crimes becomes the dominant interest. Furthermore, this interest is to be safeguarded by the criminal *law*. The important problem which presents itself is how to organize the criminal law in accordance with this purpose.

A series of perplexing dilemmas present themselves. The classical criminal codes are based upon the objective act which carries with it a specific punishment as reparation for the offense committed by a free, responsible, moral agent. Crime is a legal entity with a fixed punishment. For the positivist, the causes of the offense do not lie in a free will or in ethical considerations, but in a determined series of biological and sociological events. Not the crime, but the criminal, should be the unit of the criminal law. Legal or social responsibility, not moral responsibility, determines one's liability for an act. Not fixed *punishments* for specific crimes but individualized treatment in the light of the personality of the offender and his social dangerousness is the object of criminal legislation and penal administration. Through such revised criminal law, preventive and defensive social measures are to be introduced.

The conflict in the criminal law between the classical doctrine of fixed punishments for specific crimes and the positivists' idea of preventive measures because of social dangerousness on the one hand, and between punishment for deterrence and preventive detention for social security on the other, has characterized both criminal and penal theory and practice for the past half-century. This conflict has found expression in the discussions and reports of the various congresses, the professional journals and draft projects, as well as in the actual laws of several European and South American countries.

It is desirable before we proceed briefly to describe the underlying theory of measures of social defense. The idea behind the measures of security is simple. They are to be imposed in those cases where deterrence has failed and punishment in itself is insufficient to protect society against crime. These means of security are intended to protect the state against the dangers of recidivism and the activities of the mentally abnormal, and to prevent juvenile delinquents from developing into adult offenders by re-adapting them socially. The measures of social defense aim to prevent the commission of crime in the future.

The penal law recognizes special groups of offenders to whom the measures of social defense may be applied—those declared to be professional or habitual criminals, those whose punishment has been mitigated because they suffer from some grave psychic infirmity or because they are deaf and dumb, victims of chronic alcoholism or drugs, and juvenile delinquents.

Special measures of security are imposed upon the various sub-classes depending upon the type of "social dangerousness". The term of sentence

is indeterminate except that a minimum period is provided for in certain cases. Discharge from the institution of prevention depends upon whether the "social dangerousness" has ceased to exist.

The measures of security are divided into two categories, personal and proprietary. The personal measures restrict the liberty of the individual through detention or through supervision without detention. The forms of detention are assignment to an agricultural colony or industrial workhouse or infirmary or institution for the physically and mentally unwell, or to a reformatory. The forms of non-detention are supervision by the public authorities, the restriction of place of residence and the interdiction of certain localities, and the deportation of aliens. The proprietary measures consist of the confiscation of goods or objects which have occasioned or may lead to a criminal act, prohibiting the practice of certain professions, and the deposit of a sum of money or its equivalent to guarantee good behavior.⁵

A brief summary of the several congresses held during the earlier years will indicate the development as well as the various shades of the reform movement.⁶

III

The first International Congress of Criminal Anthropology met in Rome, November 23, 1885.⁷ Ferri wisely recognized that the foundation for a theory of measures of social defense rested upon a scientific study of the individual offender and his environment. Hence, the first question raised at the congress was, into what categories may criminals be classified, and what essential characteristics distinguish the types? The second question dealt with the natural genesis of crime. Was it possible to assimilate a theory of criminal anthropology to a penal code? Garofalo argued in favor of it. Already the need for a trained personnel in prison to study criminal science was recognized. The Congress took the position that professors and students

⁵Among the leaders in the movement for reform may be mentioned Tarde, de Vabres, Fouillee, Saleilles, Garraud, in France; Prins in Belgium; Stoos in Switzerland; Van Hammel in Holland; Liszt, Liepmann, Aschaffenburg, Gentz, Kohlrausch and Exner in Germany; Eucker and Kadecka in Austria; Krylenko and Issajew in the Soviet Union; Saldana in Spain; Rappaport in Poland; Ferri, Altavilla, Santora, Carrara, Palopoli, Saporita in Italy; Ortiz in Cuba; Almaraz in Mexico; Leon y Leon in Peru; and Makino in Japan.

⁶The use made of various expressions to characterize the modern tendencies may be confusing. The Germans employ the term *Sicherungsmittel*; the Italians refer to *misura di sicurreza*; and the French employ the terms *mesures de surete*, *defense sociale*, and *l'hygiene preventive*. The writer believes the phrase "measures of social defense" will express the content of the movement common to the several countries.

⁷Holtzendorff, a classical criminologist and one of the German leaders, spoke at this congress "of the bankruptcy of the existing [classical] penal system".

of criminology should have training in psychiatry and legal medicine. Ferri read a paper "On the Relative Value of the Individual, Physical and Social Conditions Which Determine Crime".

The second Congress was held in Paris in 1889. The French delegates combatted and even ridiculed the idea of the "born" criminal as well as the concept of criminal types. The third Congress at Brussels in 1892 (in which the Italian delegates refused to participate because of the cavalier treatment their ideas received at the Paris Congress) spoke of the "death of the Italian School". Outward peace prevailed at the fourth Congress in Geneva, 1896. Delegates were present from England, Russia, Austria, Belgium, Hungary, Denmark, Holland, Portugal, Rumania, Brazil, Argentina and Japan. Ferri thus restated the position of the positivists. "By the born criminal the Italian school has always meant any man in whom the *determining* influence to crime is chiefly assignable to a pathological condition." There was present a *predisposition* to crime *but a favorable environment would prevent its commission*.⁸

The fifth Congress at Amsterdam (1901) discussed among other matters the means of social preservation of certain criminal classes, (abnormals and juvenile delinquents). The Congress voted for the necessity to permit the judge to include in the legal elements of a trial the bio-physical facts of the defendant's personality. The need for a preliminary medical examination in the case of juvenile delinquents was also supported.

One gathers even from these scattered remarks that the scientific approach to crime prevention had taken root during the last fifteen years of the nineteenth century. The title, International Congress of Criminal Anthropology, indicates the chief interest of this group, viz., the character of the offender.

Another organization, the International Union of Penal Law, was founded in 1889 by leaders in Germany (Von Liszt), Holland (Van Hamel), and Belgium (Prins). This association, stimulated by the positivists, was interested in assimilating the newer ideas to the criminal and penal law. One of its chief principles was that "criminality and the means of repression must be examined from the social and juridical point of view."⁹ Von Liszt, however, approached the analysis of the personality of the defendant from the *moral* point of view. The criminal act remained central and essential for fixing responsibility.¹⁰ This difference accounts for the refusal of the

⁸See FERRI, *STUDI SULLA CRIMINALITA* (1926) pp. 753, 768.

⁹See QUIROS, *MODERN THEORIES OF CRIMINALITY*, pp. 131-2 for the statement of principles of this organization. The Law Faculty of the University of Brussels has just published a large memorial volume, an anthology, *L'OEUVRE D'ADOLPHI PRINS* (1934).

¹⁰This was the essential attack made by the classical criminologist, Francesco Carrara, in 1878, who, in commenting upon FERRI'S *TEORICA DELL' IMPUTABILITA*, declared, "No penal science is possible without the admission of free will." The positivists, however, were primarily interested in the social dangerousness of the offender.

Italians to join the International Union of Penal Law. The association represented a compromise between the classical and positivist groups. They advocated repression, in the classical sense, punishment for some offenders and preventive measures of social defense for others. They believed that punishment alongside of measures of social defense was essential in any scheme of criminal law.

A similar and fundamental conflict appears in the resolutions of the various meetings of the International Prison Congress (1872-1930).¹¹ Space forbids a detailed account of the conclusions of the several congresses. The idea of reformation as the end of penal treatment dominates the discussions. The Congress in St. Petersburg declared that "from the point of view of punishment and rehabilitation there are no absolutely intractable offenders". The progressive or grade system was thought to be the best mode of treatment in reforming the inmate. Yet fifteen years later at the Budapest Congress the grade system was thought desirable only for juvenile offenders. The problem of the indeterminate sentence and treatment of professional criminals was discussed at the Brussels, Washington, and London meetings. The 1925 London meeting dealt with the "individualization of treatment", declaring that the sentencing judge should have at his disposal the circumstances throwing light on the character and previous history and all facts necessary to determine a proper disposition of the offender. The judiciary must receive specialized training in criminology, psychology, sociology, legal medicine, psychiatry and penology.

The 1930 Congress in Prague is of special interest in the present discussion of measures of social defense. The first question raised was what are the most suitable measures of security and how may they be systematically incorporated? The conclusion was that the system of punish-

¹¹Dr. F. H. Wines, one of the leaders of the American practical reform movement, was appointed by the President of the United States, following a joint resolution of both Houses of Congress, to organize the first International Prison Congress in London in 1872.

The place and year of the eleven congresses are :

London, 1872

Stockholm, 1878

Rome, 1885

St. Petersburg (Leningrad), 1890

Paris, 1895

Brussels, 1900

Budapest, 1905

Washington, 1910

London, 1925

Prague, 1930

Berlin, 1935

RUGGLES-BRISE, *PRISON REFORM AT HOME AND ABROAD* (1924) describes this international movement since the London Congress of 1872.

ments must be completed by a system of measures of security for the protection of society when punishment is neither applicable nor adequate. The measures of security aim at improving the offender, segregating him, or removing the possibility of his committing new offenses. They are to be imposed by the court. Yet at the London Congress in 1925, Lord Cave, Lord Chancellor of England, in discussing the indeterminate sentence, said: "Our people still regard the criminal, not as an unfortunate invalid who should be subjected to curative methods, but as an offender against the public good; and the idea of punishment as an element of the penal law is not obsolete in this country."¹²

This contradictory view appears once again in the deliberations of the recently organized International Congress of Penal Law. At the first Congress held at Brussels (1926), the theory that punishment, retribution, and intimidation should be the immediate object of the criminal law was upheld by prominent scholars.¹³ Others maintained that in the present state of public opinion punishment must be retained if the people are not to take the law into their own hands.¹⁴ But another delegate observed: "We believe that the complete triumph of the thought of the positive school is incontrovertible in the developing law; and it already partly exists in the legislation of all the countries which have adopted conditional liberty, conditional sentence, measures of security for habitual recidivists, or responsible minors."¹⁵

Yet the general attitude was expressed that punishment was not a sufficient means for social defense against the more dangerous criminal, the mentally abnormal, the habitual and juvenile offenders. After heated discussions, the resolution passed took the following form: Punishment is not sufficient for social defense. Punishment should be completed and made more efficacious by measures of safety.¹⁶

The second conference at Rome (1928) continued in the same spirit of compromise. The Congress recognized the need for the specialization of judges of the criminal courts if the measures of security were to be successfully applied. The delegates felt that the Italian government had constructed a model penal code. By 1928, the existing criminal code which went into effect in 1931 had already been drafted. This code (discussed below) incorporates measures of security alongside of measures of punishment.

The Third International Congress of Penal Law at Palermo (April,

¹²PROCEEDINGS OF THE NINTH INTERNATIONAL PENITENTIARY CONGRESS, p. 265.

¹³Thus, Prof. Thomas Givanovitch, of the University of Belgrade, *PREMIER CONGRESS INTERNATIONAL DE DROIT PENAL, ACTES DU CONGRES (1927)* p. 541.

¹⁴Prof. M. Mercier, of the University of Lausanne, in *ACTES DU CONGRES*, pp. 551-3.

¹⁵Coll, in *ACTES DU CONGRES*, p. 537.

¹⁶Ferri himself subscribed to this compromise resolution, feeling that tradition and public sentiment must be taken into account; that half a loaf was better than none.

1933), which the author was privileged to attend, considered six questions. The third, of interest in the present context, raised the problem, "Is it desirable to have a code of penal *execution* alongside of a penal code and a code of criminal procedure?" The history of the administration of punishment is essentially expressed in the gradual restriction of arbitrary administrative discretion. Through the criminal law the substantive rights of the condemned have been established. *Yet there is also need for the individualization of inmate treatment.* Several of the delegates declared that the rights of the prisoners could be incorporated in the criminal law. Others felt that the execution of the sentence, i. e., the principles of individualized treatment should be especially and autonomously codified so as to guarantee the inmate certain forms of treatment as a matter of right. The *sentence* of imprisonment which constitutes the punishment does not determine the *conditions* under which it is served.

The fourth meeting of the International Congress of Penal Law will be held in 1936. One of the important questions to be discussed is whether it is desirable that the court be granted the power to impose sentence for an act not expressly defined as criminal before its commission. The historic maxim, *nullum crimen, nullum poena sine lege*, is being questioned since the defense of society is thought by some to be more important than the fetish of guaranteeing the legal rights of individuals.¹⁷

IV

The theoretical development of the reform movement on the part of the various associations was paralleled by its growth on the legislative side.¹⁸ This legislative evolution passed through three stages. (1) In all of the classical codes, special provisions were made with reference to the insane (e.g., the Lunatics Asylum Act of England). In many of them, differentiated treatment was provided for the abnormal and adolescent criminals.¹⁹ The measures of security, it must be noted, were as yet applied only to the irresponsible offenders, those who were morally incompetent, who for one reason or another were not held strictly accountable for alleged criminal acts. The classicists and positivists are in accord up to this point. (2) *When*

¹⁷See Escobedo, *Ancora sull' Analogia Nel Diritto Penale Sostanziale*, GIUSTIZIA PENALE (1934), Fasc. VI. Also Dr. J. J. Anossov's discussion of the "Analogy Principle", *Über die Analogie im Strafrecht* (June, 1933) MONTSSCHRIFT FÜR KRIMINAL-PSYCHOLOGIE UND STRAFRECHTSREFORM; *ibid.*, July-August, 1934.

¹⁸It should be noted that the discussions and resolutions of the various continental associations exerted a direct influence on the European and South American draft projects since the leaders in the congresses were also, in many instances, the writers of the respective draft-projects. Thus, e.g., Ferri, Almaraz, Saldana, Prins, de Vabres, Novelli, Rocco, Gentz, Radbruch, Kadecha, Rappaport.

¹⁹See, e. g., GERMAN 'St. G. B., § 51.

one seeks to apply the measures of social defense to the responsible as well as to the irresponsible the conflict arises. Such measures are not intended as punishment but are applied for purposes of social defense, i. e., they aim at segregation, elimination, or social re-education. This is the view of Prof. Stoos who in 1893 drafted a criminal code project for Switzerland. For the first time in Western Europe, there was introduced a scheme (but not a system) of measures of security as a means to supplement punishment as a more efficacious social defense against crime. They were now applied not only to the irresponsible or "quasi-responsible" criminals, but also to the category of the more dangerous delinquents, particularly the alcoholics, the dissolute (vagrants), the habitual and professional offenders. The Swiss project was characterized by (a) the imposition of measures of security by the judge; (b) in the form of an indeterminate sentence; (c) based always upon the social dangerousness of the criminal; and (d) frequently substituted for punishment. The Swiss system was transitory, representing a compromise between the classical and positive view of the end of the criminal law and penal treatment.²⁰ Historically its value lay in serving as the stimulus for subsequent legislation on the Continent and in the South American countries.²¹ (3) At the present time it is being more clearly recognized that measures of security and not punishments are (a) the best means of social defense. Social defense is best obtained through (b) a study of the personality of the delinquent which permits (c) his classification and treatment under (d) an indeterminate sentence. These four chief ideas of the positivists were pronounced by Enrico Ferri over fifty years ago.

²⁰Cf. Rabinowicz, *II Problema delle Misure di Sicurezza e L'evoluzione Moderna del Diritto Penale*, SCRITTI IN ONORE DI ENRICO FERRI (1929) (hereafter referred to as SCRITTI). Also, Mittermaier, *Uber die Entwicklung der Strafgesetzgebung seit dem Entwurf Stoos von 1893*, 43 SCHWEIZ ZEITSCHRIFT FUR STRAFRECHT (1929) p. 73.

The Stoos Project has gone through many revisions, 1894, 1896, 1903, 1908, 1916 (for first time special treatment for juvenile delinquents). Each revision resulted in greater clarity and refinement of purpose.

²¹The more important criminal legislative movements have taken place in the following countries during the twentieth century:

Norway	Albania	Czechoslovakia	Cuba
Egypt	Germany	Poland	Brazil
Japan	Switzerland	Jugoslavia	Colombia
China	Sweden	France	Finland
Argentina	Denmark	Austria	Belgium
Peru	Roumania	Greece	Mexico
U. S. S. R.	Serbia-Croät-Slovene		Italy

Only the U S S R and Cuba have altogether accepted the Positivist principles. All other codes are a compromise between the classical and positivist points of view. The projects of Austria, Germany, Switzerland, Denmark, Norway, permit the judge to substitute in each case measures of security for punishment.

See Enrico de Nicola in SCRITTI, pp. 133 *et seq.*

They were first systematically and logically elaborated in the Ferri Project of 1921, the first unequivocal, uncompromising Positivist penal code.²²

Because of its historical importance, representing the first *definite* absolute break with the classical doctrines, and because of its practical influence upon subsequent legislation throughout many lands (especially upon the present Italian Code), a more detailed account of its content is given.

The Ferri Project

It has been stated that Ferri's project is "a penal code without responsibility and without punishment". This definition is true, but the terms require explanation. Responsibility and punishment are not to be used with their traditional implications. The Project denies *moral* responsibility and does not employ punishment in the sense of retaliation for moral culpability. For the first time—and upon this thesis the code pivots—the offender and not the offense is the point of departure in criminal legislation. The aim of the criminal law is to defend society against the dangerousness of the offender. It is the first modern criminal draft project to have "humanized" penal law.²³

Many critics have asserted that such a criminal code is no longer criminal law. The much-used argument²⁴ has been presented that individualization makes classification impossible. But this criticism is unsound. Penal sanctions may rest on a classification of offenders as well as of offenses.²⁵

Criminal intent in the Ferri Project did not have the role of separating the responsible from the non-responsible. Its significance lay in determining the type of sanction. It was one of the elements determining one's social dangerousness. All offenders for Ferri, the determinist, were to be held legally accountable for socially dangerous behavior. The concept of their dangerousness (*pericolosità*) thus becomes central in determining treatment.

The entire project contained 131 articles. It is divided simply and clearly

²²Ferri, *Progetto Preliminare di Codice Penale per i Delitti*, in *PRINCIPII DI DIRITTO CRIMINALE* (1928) pp. 756 *et seq.*

²³Ferri, speaking of Lombroso's contribution to criminology, quotes Van Hamel: "Before, man knew penal justice, but penal justice did not know man." Ferri states that "Lombroso's greatest merit was to draw the attention of the world to the personality of the criminal." *PROCEEDINGS OF THE NINTH INTERNATIONAL PENITENTIARY CONGRESS* (1927) p. 236. From the legislative point of view, Ferri's tribute to Lombroso may be more aptly applied to himself. No writer has been more influential than Ferri, in his project, in breaking down the legalistic approach of the criminal law. For a brief but critical account of Ferri's project, see CASSINELLI, *L'AVVENIRE DEL DIRITTO PENALE* (1930) c. 9.

²⁴DEANGELIS, *LA REFORMA DEL CODICE PENALE ITALIANO* (1923) p. 19; BATTAGLINI, *PRINCIPII DI DIRITTO PENALE IN RAPPORTO ALLA NUOVA LEGISLAZIONE* (1929).

²⁵Because of Ferri's uncompromising stand on the matter of moral responsibility, two members of the commission drafting the Ferri Project, Carnevale and Stopato, resigned.

into three parts: The Crime, The Criminal, and The Sanctions. Article 1 proclaims the fundamental principle that there can be no crime or sanction without a law. Articles 20-22 of Part II deal with "dangerousness".²⁶

Article 20 declares: "The degree of dangerousness is determined according to the gravity and modality of the criminal act, the determining motives and the personality of the offender."

Article 21 cites the circumstances which indicate grave dangerousness to society, such as the offender's organic or psychical conditions previous to the act which show criminal tendencies, having acted through ignoble motives, whether there was premeditation of the crime, whether others were complicated, whether there was an abuse of public or private confidence or the fraudulent violation of a special trust, etc.

Article 22 describes the circumstances indicating *minor* dangerousness. The following factors are to be weighed: the integrity (*l'onesta*) of previous personal, family and social life, having acted for excusable motives or in public interest, having acted in a state of excusable passion or intense emotion aroused by the unjust provocation by others, having acted through suggestion of a tumultuous crowd, having attempted to make spontaneous and immediate restitution through sacrifice of economic status, and having confessed the crime before discovered or before being interrogated before the judge.

The project (Part II, chs. IV,V,VI) deals with habitual, professional, mentally abnormal, and juvenile offenders, and those who reveal a persistent tendency toward crime ("*persistente tendenza al delitto*"). Special sanctions are provided for political offenders.

Part III, "The Sanctions", removes all distinction between punishments and measures of security. *The project eliminates the concept of punishment and all notions of retribution for moral culpability. Indeed, the criminal law itself becomes a branch of administrative law.*²⁷ Several varieties of measures of security are provided for the several classes of individual offenders. The Sanctions are divided into reparative, repressive and eliminative measures. The first are applied to non-dangerous offenders and consist of the publication of the sentence and the payment of damages to the victim. Repressive sanctions consist of a more or less rigid form of personal coercion, with the obligation of work during a relatively indeterminate period which aims toward the re-education of the offender. Elimination of the incorrigible offender consists in segregating him permanently or for an

²⁶Because of their importance in contemporary criminal legislation a more detailed description of Articles 20-22 is given.

²⁷The writer is of the opinion that as the "sciences" of criminology and penology develop, *criminal law* will disappear. Juvenile delinquency with its equity procedure is now only quasi-criminal in character. The development of family courts and the *administrative* agency of probation are further steps in this direction.

indeterminate period. The special sanctions for politico-social crimes committed by anyone over eighteen years of age (article 40) consist of detention or exile. For the mentally unwell, special work colonies or asylums are provided (article 42). Juvenile delinquents under eighteen years of age are to be placed under the supervision of their own or another private family or are to be sent to an institution.

Finally, attention should be called to the institution of the Councils of Patronage, (Part II, ch VII) set up by the project. The present Councils of Patronage set up by the Italian Government are a direct outcome of Ferri's suggestion in this code.²⁸

The Soviet Union

Many countries have accepted the positivist ideas in part (among them Peru, Argentina, Rumania, Czechoslovakia, France and Mexico), but the Soviet Union definitely builds and Cuba has constructed a draft project upon the foundations of Ferri.

The Soviet Code²⁹ has as its purposes (1) the prevention of new crimes by former offenders, (2) influencing other potential offenders, and (3) adapting criminals to the conditions of life in the proletarian state (article 9). These ends are intended to protect society. They are to be reached through measures of social defense of which there are three general classes. The medico-pedagogic and medical measures are applied to minors. They are placed under the supervision of their parents or guardians or placed in medico-educational reformatories. The Medical measures are applied to the mentally abnormal (article 2). The Judicial-correctional measures are applied to offenders over fourteen years of age (to those between fourteen-sixteen only when the Juvenile Delinquency Commission considers other measures inapplicable). The judicial-correctional measures consist of public reprimand, fine, warning, payment of damages, proclamation of the offender as an enemy of the proletariat, deprivation of citizenship, expulsion, imprisonment or hard labor without cellular confinement, loss of certain political and civil rights, temporary exile, restriction of residence, loss of employment or exercise of profession, total or partial confiscation of property.

Of outstanding importance both from the point of view of the development of the criminal law and the defense of society is the surrender of the Western European maxim *nullum crimen sine lege*. Article 16 of the code declares that "when an act constituting a danger to society is not expressly mentioned in the code, the measure of importance and the foundations of

²⁸See Cantor, *Councils of Patronage* (November-December, 1933) J. CRIM. L. AND CRIM. p. 768.

²⁹The discussion refers to the Russian Republic's Code (in effect Jan. 1, 1927), upon which the other Soviet Republic codes are based.

responsibility for such act shall be determined regard being had to the provision of the code relating to those offenses which are most nearly analogous." Article 7 declares "that all persons who have committed actions socially dangerous or who present a danger because of their associations with a criminal milieu or on account of their past record, may be placed under measures of social defense, judicial, correctional, medical, or medico-pedagogical in character."

The Soviet Penal Code therefore does not consider moral responsibility, but legal responsibility because of social danger. It does not punish, but adopts measures of social defense ("sanctions", in Ferri's terms).³⁰

In 1926, due to the efforts of Prof. Fernando Ortiz, Cuba projected a draft-code incorporating Ferrian principles.³¹ The Cuban project substitutes the title "criminal" code instead of "penal" code, and speaks of "criminal sanctions" instead of punishments. In content as well as terminology, it follows the Italian positivist school.³² The Cuban project adopts the concept of legal responsibility (article 49, part II, ch. I) which is aggravated or diminished according to the major or minor dangerousness (article 53). The classification of offenders (articles 16-59) follows that found in Ferri's project. Individualization of disposition is provided for by article 54, which declares: "The criminal dangerousness of an offender will be 'individualized' by the judge, consideration being given to the motives and nature of the offense and the attending circumstances". A series of administrative measures are applied also to those who show "dangerousness" even before an offense has been committed.³³ The criminal sanctions decreed by the judge are for a relatively or absolutely undetermined period or for a life-long period. Prison sentences carry the obligation of labor, the wages of which are in part turned over to the family of the offender, the state, the victim, the offender, and to the treasurer of the Council of Patrons.

Another Cuban draft code had been drawn up.³⁴ Its cardinal points are similar to the 1926 draft code, viz: (1) Society is not to punish but to defend itself; (2) The basis of criminal justice is the dangerousness of the offender; (3) The most rational method of individualizing criminal sanctions is granting discretion to the court in the imposition of sanctions; (4)

³⁰See CASSINELLI, *op. cit. supra* note 23, c. 4, for a clear discussion of the Russian and Cuban codes.

³¹The text is published in Italian in *SCUOLA POSITIVA* (1926) Part I, p. 397; in French, *PROJET DE CODE CRIMINAL CUBAIN* (1927).

³²Heymark, *L'Idée Ferri Dans Le Projet de Code Criminel Cubain*, SCRITTI, p. 303.

³³Ferri wanted the socially dangerous (i. e. those who have yet not committed a criminal offense) under the jurisdiction of the law of public security (public administrative measures). See BATTAGLINI, *op. cit. supra* note 24.

³⁴By a commission headed by Dr. A. Vicites. See *SCUOLA POSITIVA* (1929) Part I, p. 239.

Preventive measures may be applied to "dangerous" individuals who have as yet not committed criminal offenses.

Peru in 1924 introduced a new penal code supplanting the code of 1863.³⁵ The Swiss project of 1915 and the Ferri Code of 1921 were the basis of the new Peruvian Code. The idea of "social dangerousness" was introduced for the first time in the criminal legislation of Peru. Other positivist ideas accepted were the relatively indeterminate sentence, conditional liberation after two-thirds of the sentence has been served, provision for those under eighteen years of age to be placed under correctional and educative measures, and judicial discretion in imposing the various sanctions. Article 136 of the Penal Code creates the office of Inspector General of Prisons (Dr. Leon y Leon) who centralizes the service. In 1925, the Council of Patrons was set up. A school for juvenile delinquents was established. In March, 1929, an institute of criminology was organized as well as a penitentiary school for guards.

A correctional school for women at Lima and a men's penal colony at "El Norton" were established in May, 1926.³⁶

The New Italian Penal Code

The fundamental difference between the codes of the various European countries and that of the present Italian (Rocco) Code of July 1, 1931, is one of form. In all other codes, the various measures of security are fitted into or scattered throughout a classical framework, whereas the Italian code is divided into two parallel parts, one devoted to the application and execution of punishments and the other to the application and execution of measures of safety. In other words, the Italian Code represents the first actualized project combining both the classical and positivist functions of the criminal law. How successful such systematization is will be seen as we proceed.

The 1921 Project of Enrico Ferri was not accepted for the simple reason that it was far too radical for Fascist-Catholic Italy. Therefore, the government authorized another commission to draft another project. The present code is the result of two preliminary projects (1925-1931) under the direction of Ex-Minister of Justice Rocco.³⁷

³⁵See Leon y Leon, *Sviluppo Delle Istituzione Penitenziarie Del Peru* (1931) RIVISTA pp. 365 *et seq.*

³⁶The Spanish students of criminology and penology who have influenced South American legislation may be listed. Ruiz, Funes, Saldana, Calon Jose de las Heras, Rafael Satillas, di Fernando Caldalso, Fererico Custejon, and Anton Oncea. For the Italian influences in Uruguay and Brazil, see Thot, *Sul Diritto Penale Latino-Americano*, SCRITTI, pp. 487, *et seq.*

³⁷The work of the commission is published in over a score of volumes. LAVORI PREPARATORI DEL CODICE E DEL CODICE DI PROCEDURA PENALE (1930). Only Volumes V and VII are of special interest in the present discussion.

The new code introduces penal political legislation, new institutions, and more perfect technique, "which, however important, do not modify the basic historical tradition of our law and the scientific principles through which it is inspired. Thus the idea of criminal legal responsibility, based upon the individual mental capacity to intend and to will and upon the consciousness and will of human acts will continue to dominate today, as it has dominated for centuries, the system of our national penal legislation."³⁸

On the other hand, Italy, along with all other countries, has recognized that the struggle against the professional, habitual abnormal, and juvenile delinquent cannot be met by repressive measures alone. Hence measures of security in nature preventive and not punitive have been introduced.³⁹

The system of measures of safety is negatively a protest against the abstract and mechanical application of punishments in terms of the offense. On its positive side, it is intended to individualize treatment, to take account primarily of the personality of the offender. The endeavor to combine within the same criminal code individualization of treatment and punishment for offense was bound to lead to inevitable conflict in legislation and administration. A brief discussion of several of the major contradictions follows.

The classification of offenders is basic to any individualization of treatment. The Lombroso-Ferri classification of offenders, i. e., habitual, professional, abnormal, "born" criminal (*tendenza a delinquere*) receives recognition. In certain cases, habitual criminality (commission of third felony not necessarily of same character) is *inferred by the judge* (article 103) after taking into account the nature of the crime, the conduct and character of the offender, and all of the elements provided by article 133.⁴⁰ On the

³⁸LAVORI, vol VII, p. 9.

³⁹The official interpretation of the principles guiding the construction of the measures of security is found in vol. V of the LAVORI, pp. 224 *et seq.*

⁴⁰Article 133 declares: "In the exercise of the discretionary powers specified in the preceding article, the judge must take into account the gravity of the offense, as inferred from—

(1) The nature, character, means, object, time, place and any other circumstances of the act.

(2) The gravity of the injury or of the danger caused to the person injured by the offense.

(3) The intensity of criminal intent or the degree of culpable negligence.

The judge must likewise take into account the guilty party's capacity to delinquency, as inferred from—

(1) The motives to commit delinquency and the character of the offender.

(2) The criminal and judicial antecedents and, in general, the conduct and life of the offender prior to the offense.

(3) The conduct contemporary with or subsequent to the offense.

(4) The individual, domestic and social conditions of life of the offender.

An English translation, THE PENAL CODE OF THE KINGDOM OF ITALY, is published by H. R. M. Stationery Office, London, 1931.

other hand, in other cases the habitual condition is *presumed by law* (article 102), being automatically based upon the fourth felony (of same character) having been committed within ten years subsequent to the third felony. In the latter instance, no account is taken of the personality of the offender. That four felonies have been committed within a certain period is sufficient in law to label one an habitual criminal. When four contraventions (misdemeanors), however, have been committed, a return to positive concepts is made and article 133 controls the declaration of habitual criminality. Again, if the fourth offense, being either a felony or misdemeanor, is of a *different* character than the previous offenses, the court, having regard for the circumstances specified in the second paragraph of article 133, must pronounce the offender a *professional* criminal.

If a person commits a crime and is neither an habitual nor a professional criminal, but in the light of the circumstances in the second paragraph of article 133 "discloses a special inclination to crime, the cause of which is the particularly wicked nature of the guilty party, (he) shall be declared a delinquent by tendency" (article 108). (Here the born criminal of Lombroso receives recognition.)

Article 89 declares that "a person who at the moment when he committed an act, was, by reason of infirmity, in a state of mind such as *largely to diminish without excluding* his capacity of intention or volition, shall be responsible for the offense committed; but the punishment shall be *reduced.*" The writer considers this article unintelligible. But assuming it does make sense what is significant from the point of view of social protection is the form of treatment rather than the time sentence. This holds true for all the types of measures of security. The law seeks to recognize along with the positivists the personality of the offender, but, at the same time insists upon maintaining the classical doctrine of free will. Generally the *detention* under a form of social security measure *follows* the sentence of *imprisonment* for the offense. In effect, the offender receives a double sentence.

Drunkenness or drug addiction does not exclude responsibility. In fact, habitual drunkenness or drug addiction increases the ordinary punishment for the act (articles 94 and 95). It is obvious to the positivist that these conditions have deeper pathogenetic roots which cannot be eliminated by police or punitive measures alone. In determining the sentence, the data of medical diagnosis should be considered *if* social defense were the aim of the criminal law.⁴¹

⁴¹Carrara, *Der Entwurf des italienischen Strafgesetzbuches von Gerichtsartzlichen und anthropologischen Standpunkt aus betrachtet*, 12 DTSCH. ZEIT. GERICHTL. MED. no. 1, p. 12; Cantor, *The New Prison Program of Italy*, PROCEEDINGS OF THE AMERICAN PRISON CONGRESS (1933) p. 133.

German Reform

The present code is substantially the same as the *Strafgesetzbuch* of the North German Bund. It was signed by Emperor Wilhelm on May 31, 1870, and went into effect, Jan. 1, 1871, when it was binding on the German Reich. Other states, such as Baden, Wurttemberg, Bavaria, Helgoland, gradually took it over. Many modifications have been made in the Code of 1871. Nevertheless, it is essentially the same. One may readily appreciate that a code of 1871 cannot quite meet the needs of a country in 1936. In those sixty-odd years, many changes have taken place both in the industrial and social life of the people as well as in our knowledge of human beings and their behavior. Such discrepancy between the prescriptions of the code and the needs of the time have not gone by unnoticed or unchallenged. For many years, both in the German Parliament as well as in academic circles, efforts have been made to introduce necessary reforms. Such efforts, however, had been met by counter-attacks at the hands of the "classical school". The so-called modern school attacked the penal code on two grounds which were and are related to each other, viz., the "responsibility" of the offender and the goal of punishment. The classical school maintained that the individual was completely responsible for his acts and that therefore such acts served as the basis for inflicting punishment as requital. They fought all measures which would place discretionary power in the hands of the court and any means which would work toward the improvement of the offender's personality. The modern school opposed this reasoning at every point. They denied the fundamental view of "freedom of the will" and the presence of individual guilt; they insisted that revenge or requital was not the goal of punishment. Whatever punishment was imposed had to serve as a protection for the state. Through punishment, the offender was to be *taught* that crime did not pay. An indeterminate sentence was to be imposed and the offender to remain in custody only until this lesson had been learned.

In 1902 the ideas of the modern penologists in Germany began to crystallize and took form in the famous encyclopaedic work, *A Comparative Study of German and Foreign Penal Law*.⁴² Even before this study was completed Dr. Lucas, of the Prussian Ministry of Justice, with five other members, were constituted a commission on May 1, 1906, to draft a revised code. This was published in 1909. This draft, however, was fundamentally classical in character although some of the newer ideas were incorporated. While holding to the basic idea of punishment as requital they recognized that imprisonment might serve other purposes also.⁴³ On April 4, 1911, another

⁴²VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLANDISCHEN STRAFRECHTS (Verlag von Otto Liebrann, Berlin, 1905-1908).

⁴³Members of the modern school did not lose the opportunity of attacking this

commission of sixteen members was appointed, again under the chairmanship of Dr. Lucas, and again a new draft was published in 1913. The Reichstag was to have passed upon this proposed draft. The war, however, prevented action on this measure. The work of reform was again resumed in 1918 and a year later another draft together with the revised 1913 draft was published. Again both the German and Austrian Ministry of Justice worked together on a new draft which after much reworking was published in the summer of 1925 as "The Official Draft for a Common German Penal Code". Finally, on May 14, 1927, the official draft, which had again been gone over, was presented to the Reichstag which turned it over to one of its committees. The Reichstag, due to political exigencies, was dissolved before it had a chance to pass upon the draft of 1927. A new Reichstag was elected July 31, 1932 and again dissolved. The political changes in Germany finally led to the appointment of Adolph Hitler as Chancellor, Jan. 30, 1933. With the coming into power of the National Socialists, the criminal law and penal theory and practice underwent changes in conformity with the National Socialist philosophy.⁴⁴

England and the United States

Whatever the explanation, the fact remains that England and the United States have not clearly developed either a philosophy of criminal law or a penal theory. Nevertheless, both countries have developed administrative agencies which function as measures of social defense, although they are not called "measures of safety". In both countries, the movement has proceeded without any definite theoretical basis, from practical prison or correctional reform to legislative enactment and codification.⁴⁵

As early as 1847, an English Parliamentary Committee was interested in introducing elements of reform into the treatment of juveniles.⁴⁶ But the prevailing point of view was expressed by Lord Chief Justice Cockburn in the 1863 report of a Royal Commission. "The experience of mankind has shown that, though crime will always exist to a certain extent, it may be kept within given bounds by the example of punishment. This result it is

draft. Professors Kahl, Lilienthal, Von Liszt and Goldschmidt presented a work COUNTERDRAFT GEGENENTWURF (Verlag von J. Guttentag, Berlin, 1911).

⁴⁴For the major changes, see Cantor, *Prison Reform in Germany-1933* (May-June 1934) J. CRIM. L. AND CRIM. p. 84.

⁴⁵The notorious fact that one discovers within the fifty jurisdictions in the United States, some of the most "progressive" penal institutions in the world, along side of the most barbaric chain gangs (not to mention the detention jails) and a severity of prosecution probably unmatched anywhere in the world, is sufficient evidence that the reform movement is neither integrated nor general.

⁴⁶RUGGLES-BRISE, *op. cit. supra* note 11, p. 89.

the business of the lawgiver to complete by annexing to each offence the degree of punishment calculated to express it."⁴⁷

In 1897 Sir Evelyn Ruggles-Brise came to the United States to study the juvenile reformatory movement. He was favorably impressed, and upon his return to England a small experiment with juvenile offenders between the ages of sixteen and twenty-one was begun in the London prisons. A small society, the London Prison Visitors' Association, was formed. The youngsters were moved to the old convict prison at Borstal, and out of the London Association the Borstal Association was formed. After a few years of informal experimentation, the work was supported officially by the Prevention of Crime Act (1908). This act permitted the judge, in his discretion, to impose a sentence of detention in a Borstal institution from one to three years in lieu of a sentence of penal servitude, in hopes that the offender might be reformed. The Home Secretary was also authorized to establish other Borstal institutions. The Borstal idea was a measure of social defense aiming at preventing the growth of criminal careers.

The Probation of First Offenders' Act (1887) provided for the conditional release (probation) of first offenders convicted of an offense punishable with not more than two years' imprisonment. Discretion was given to the court to consider the character, age, and background of the offender. That serious offenders were not considered shows that the classical doctrine still prevailed.

The Probation of Offenders' Act (1907), the first legislative approval of probation in England, and the Criminal Justice Administration Act (1914), which enumerated the conditions of probation, developed the idea of probation, extending the discretion of the court to further cases and conditions. The Criminal Justice Act of 1925 provided for probation areas each in charge of a probation officer. Although probation in England is not widely employed, the principle of individual treatment for crime prevention is firmly established.

Probation in the United States had its feeble beginnings in the kindly efforts of private volunteers. Upon their request, the court might place a defendant under their keeping with the sentence suspended pending good behavior. The first official recognition of probation was a statute of Massachusetts in 1878 which authorized the mayor of Boston to appoint a county probation officer. In 1891, the law was extended and made compulsory for the entire state. At first probation was applied to juveniles, but later it was extended to adults. There are still thirteen states which have no adult probation.

The indeterminate sentence, first applied to the juvenile inmates of the

⁴⁷*Id.* at 61.

Elmira Reformatory in 1877, is based upon the belief that the offender can be reformed, but that the period required cannot be predetermined but depends upon the opportunities offered to correct or reform the habits of the individual offender and his own willingness to participate in the process. Implicit in the concept is the idea that once released such offender becomes a social asset instead of a liability.

Of significance in the present context of measures of social defense is the anomalous legislative status of the indeterminate sentence. In some states, it is mandatory upon the court to affix the penalty provided by the legislature for the specific offense (e.g., capital punishment for murder or first degree robbery while armed, or rape). Again, the legislature provides for increased or decreased severity of punishment depending upon the aggravating or mitigating circumstances surrounding the offense (e.g., having a weapon during the commission of the offense, or the habitual offenders' acts). Shall the legislature or the courts or an administrative board determine whether an indeterminate sentence shall be imposed or when the inmate shall be released? Because this particular measure of social defense has developed without an integrated penal philosophy, it probably defeats its very purpose in many cases.⁴⁸

The system of parole (or conditional release, as it is known in England) may be considered a measure of safety insofar as the state is interested in supervising the paroled inmate until he is rehabilitated, i. e., prepared to maintain orderly behavior in civil society. The transition from prison life to the outside world is difficult. The parole officer, so runs the theory, assists the inmate through friendly guidance and help in readjusting himself.

Juvenile delinquency provisions rest upon the belief that it is better to prevent the youthful offender from becoming an adult criminal than to punish the child for the offense. Hence the entire procedure is based upon the type of individual offender. The State Industrial and Agricultural "schools", the foster homes, reformatories, or institutions to which juvenile delinquents are sent are interested in correcting the habits of the individual child. Prevention and not punishment is their goal of treatment.

The juvenile delinquency courts, the devices of probation, the indeterminate sentence, parole, the psychiatric and psychologic auxiliary clinics, all testify to the growth of the idea of reformation and crime prevention through individualization as the better means of protecting society. *Yet a detailed analysis of the machinery for administering these devices reveals conflicts and cross-purposes which in large measure defeat the goal of social defense.* The problems of personnel and of insufficient knowledge inevitably raise difficulties which at present cannot be resolved. But the confusion and

⁴⁸See Cantor, *Conflicts in Penal Theory and Practice*, PROCEEDINGS OF THE AMERICAN PRISON CONGRESS (1934) p. 57.

inefficiency resulting from lack of clarity as to the *end* of the criminal law and the purpose of *treatment* can be remedied, in part. Instead of a thorough overhauling of our criminal codes, the best we have accomplished is a "restatement" of the existing confusions by the American Law Institute.

The European students have not altogether succeeded in integrating the positivist and classical systems but *they do feel the imperative need for understanding the basic assumptions of their criminal and penal law*. If contradictions appear in the legislation or proposed drafts, there exists a large group of students informed of a vast literature who are competent to indicate the difficulties and point the way to development. On the other hand, most of the European countries, in practice, are behind the United States. The Anglo-Saxon countries, while more or less eager, especially in recent years, to appoint all kinds of crime commissions, to experiment, to conduct research, are, nevertheless, content to muddle along unmindful of the need for direction.⁴⁹

The United States with its relatively greater amounts of research funds, legislative appropriations, and greater number of research workers, and its willingness to experiment, is in a position, *once a more integrated criminal law and penal theory are developed*, to contribute to the solution of the problem of crime and criminals and hence to the defense of society.

⁴⁹The "Declaration of Principles" of the National Congress on Penitentiary and Reformatory Discipline (now the American Prison Association), drawn up in 1870 at Cincinnati, Ohio, remains to this day one of the best general statements of our "modern" penal ideas.

During the 20th century, the rise of the mental hygiene movement, and the technique of social work and aptitude testing in the United States, have made and give promise of making important contributions to the understanding of the criminal. Little has been accomplished, however, in *utilizing* the data or their implications for the criminal law, and penal theory. Cf. Glueck, *Significant Transformations in the Administration of Criminal Justice* (April, 1930) 14 MENTAL HYGIENE 280.