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AN EXAMINATION OF SOME DISPOSITIONS RELATING TO MOTIVES AND CHARACTER IN MODERN EUROPEAN PENAL CODES

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An almost universal characteristic in the penal codification of the present time is the increasing consideration of the subjective elements in criminality. More and more the emphasis is laid upon what sort of individual committed the infraction rather than upon the gravity of the crime with which he is charged. "The individualization of the penalty" and "not the infraction but rather the individual shall be punished"; such are the slogans indicating the tendencies of present codification.

But it is one thing to create slogans as indicative of a desired tendency and quite another to realize successfully the conceptions involved in this tendency in the criminal codes. Once the criminal law is freed from its preoccupation with the objective materiality of infractions and is on the road to subjectivism, to a consideration of individuals, it is confronted with difficulties of great magnitude and importance. When the task of the criminal judge becomes something more than a crude proportioning of penalty to fault based upon a more or less doubtful free will, then many difficulties present themselves. An increasing subjectivism in the criminal law and the judge means an increasing preoccupation with individual life which in turn involves a consideration and evaluation of all the complex elements entering into the relation of such individual life to society.

Our justification for entering upon such a road is that we wish to realize by so doing a more efficacious protection of society against the commission of the injurious acts we call crimes.

It means that we must be more preoccupied than we have been with the causes that brought the individual to commit his infraction and this in turn involves an adoption of a particular form of penal treatment depending upon which of a particular series of causes was the predominant one. In every action, however, we will find a large part of the explanation as to why the deed was committed in the personality of the individual who did the act. Given an outer incitation, why this individual reacted as he did is most frequently only explain-

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able in terms of his personality. And our problem in the individualization of the penalty is generally one of the adaptation of the penalty to the personality of the particular individuality so that as far as possible to remove the impulsion latent within him to commit criminal acts.

But we are immediately confronted with the question, what criteria can we give the judge to enable him properly to understand and evaluate a particular criminal personality? Assuming that an individual has committed an infraction what guides can we give the judge so that he can best realize an individualization of the penalty, so that this person shall be less likely in the future to commit other infractions and thus secure an adequate protection of society against him?

To attempt to answer these questions is to try and settle some of the most disputed problems of modern penal law. All that will be attempted in this article is simply an examination of some of the dispositions relating to two of the criteria that have been suggested as an aid in the individualization of the penalty, namely, the motives to the infraction and the character of the individual. And we shall also see how much of a place has been made for these elements in the penal codification of the present time.

I.

The reasons why motives demand for themselves a place in the modern penal law are not far to seek. Though an act may be the external expression of a human will, the will itself is very often determined as the result of the struggle of motives in favor of acting and against acting within the individual. And it is said that it is not the fact of a particular act being committed, which holds its author up to popular esteem or condemnation. It is the motives impelling the commission of the act which are the bases of the popular judgment. Thus public opinion makes a difference between the individual who committed an infraction with robbery as a motive and the individual who kills to avenge his sullied honor. If the motives followed by an individual appear honorable he is treated with leniency irrespective of the technical definition of his particular infraction. Moreover, such popular judgments finding their lodgement in the jury, express themselves often by an acquittal where the motives appear honorable and a conviction in the contrary case.

If such is the popular tendency, should it not then find its way into the criminal law and thus bring the latter into harmony with the

facts of social life? The concept of crime itself is a social judgment of the injuriousness and thus the undesirability of particular actions sanctioned by a penalty. If popularly the judgment as to the social worth of particular infractions depends upon the motives followed in the production of the act, then ought not the law take account of such motives and determine their evaluation and classification and provide for a division of offenses and offenders based upon such an evaluation and classification.

But popular judgments of approval or disapproval may also be based upon the more permanent elements of personality as revealed in the act, that is, the individual committing this action did so because of the baseness or dishonorableness of his character, whereas another individual who has committed an infraction has not shown himself thereby base and dishonorable. And the criminal law in order properly to fulfill its function as an organ of social control will employ its most severe measures against the first class in order to modify their characters as revealed in the act and thus give them the modicum at least of social virtues necessary for life in society. However, against the second class measures of protection will be taken which will express society's disapproval of the particular act and will thus function as a means of deterring the commission of such actions in the future.

In truth what may be said is that perhaps social judgments of approval or disapproval are sought to be based upon the apparently dominating impulsions which produced the infraction. These may be the motives in the sense of the aim or purpose followed in the act, it may be a particular character quality revealed in the act such as cupidity, or it may lie in the sum total of personality elements, the character. Each one of these matters ought therefore properly to have a place in the modern penal codification in order to bring the latter into touch with popular opinion.

Perhaps the attempt to make a place in the criminal law for the apparently dominating impulsions productive of the act, explains the confusion that one finds relative to the definition of the term motives itself, in criminological literature. Thus motives may mean any one of the three things above mentioned according to different authors. If by motives is understood that which induces the individual to act, it is not enough for some authors to constitute a motive that the legatee who murdered his testator wished to get the money from his legacy. Many legatees have wished their legacies much sooner and not all have murdered. This particular legatee, however, lacked the minimum of the character element of pity necessary for life in so-

ciety, which is why he committed the act. Yet other writers respond, many cruel persons do not murder and the explanation for the act lies deeper. It lies only in a consideration of the whole being of the delinquent and if we understand by motives that which induced the individual to act, the latter must be sought for in his entire personality.

But it seems that to envisage motives in the sense of a particular character quality or as constituting the whole psychic personality of the delinquent is to confuse things that ought to be kept separate. It is quite true that individuals do not re-act in the same way to the same incitations and the reason why this particular person re-acted as he did lies in his whole being. Our understanding of the action, however, will be aided if we isolate the ends and aims pursued therein. Once we have done so we can then try and determine what were the particular character qualities or personality elements that caused this particular individual to pursue such aims and purposes and to employ the means he did to realize them. Still we do not find a neat separation of these factors in the criminal codes and it is sometimes difficult to know just what is meant by the term motives. With this in mind we will examine some of the dispositions relating to motives.

II.

When one examines the 19th century criminal codes one is struck by the small part played by motives. In some of these codes, they are not even mentioned. In others there is simple mention of the fact that the personal conviction of the legality or of the honorableness of the motive does not exclude the unlawfulness of the infraction or the intention with which it was committed.¹ Such is also the attitude of the Anglo-American law. Carl Stoops, to whom is due much of the credit for the larger place of motives in modern penal codification could well write "while the penal law of the middle ages distinguished between honorable and dishonorable acts and thus distinguished them according to motives, the latter is not sufficiently considered in the modern penal law."²

However, motives were not completely ignored. There is an interesting provision in the Bavarian Code of 1813 which also found its way into many of the Codes of the German states and into some of the Codes of the Swiss Cantons. Article 90 of the Bavarian Code reads "In the measure of the penalty the judge considers the great-

¹Art. 29 (4) Portugese Code, Art. 9 Mexican 1871 Code Art. 55 of Wurtemberg Code 1855.

²Exposé de Motifs, Avant-Projet Code, Penal Suisse, p. 67.

ness of the illegality of the Will." Article 92 defines the latter notion by providing an increase of the penalty:

"(1) The more numerous and the more weighty the motives were present for the consideration of the law

"(2) The lesser were the outer occasions which called forth the deed and the more the delinquent from his own inner impulsions sought the occasion for the crime.

"(3) The more wicked and the more dangerous were the passions and the desires from which the delinquent acted."

We find in these provisions the germ at least of all three of the conceptions of the term motives as outlined above. The ideas embodied in these dispositions have moreover a modern ring. Positivistic ideas tell us that the penal measure ought to be determined by the dangerousness of the individual to society. The elucidation of Ferri's Italian project for a criminal code says also that the motives determining an offense are a fundamental criterion of the greater or less dangerousness of the authors of similar infractions.³ In the dispositions of the above Bavarian Code we find an attempt to measure the dangerousness of the will to the legal order and the basing of the penalty upon such determination. And as an aid thereto, the forces impelling the individual to act and among such forces the motives to the act are important symptoms.

These dispositions provide in a rudimentary way for the individualization of the penalty on the basis of the criminal will exhibited. If the later 19th century Codes could have developed and perfected these dispositions, if judicial and penitentiary practice could have kept pace with such development, our present day positivists might have found many of their ideas in practical application. But such was not the case since most of the 19th century Codes had little place for the motives impelling the individual to act.

Turning to the modern projects and modern criminal Codes—

Almost universally we find in them in the provisions regulating the measure of the penalty a disposition saying that the judge must take into account the motives followed by the delinquent.⁴ This means even where it is not expressly stated, an attenuation of the penalty in case the delinquent ceded to honorable motives.⁵ The chief value

³Exposé of Motifs to Ferri Code, p. 400.

⁴Art. 36—1st Swiss Project for Criminal Code Art. 54 Polish project, Art. 67, German 1925 Project and 60 of the 1927 Project, Art. 134 (3) of Italian 1927 project.

⁵These two dispositions provided for by article 37 and 39 of the 1st Swiss project were the only dispositions relating to motives which remained in all the succeeding projects.

of such a provision is to express what probably every intelligent judge does wherever he can move between minimum and maximum limits in the fixation of the penalty. The disposition in and of itself has not however a great value. No definition or criteria are given whereby a judge may recognize a motive. Moreover there is no classification of motives as honorable or dishonorable and the latter judgment will be made perhaps more according to the individuality of the judge than the individuality of the offender. Honorableness and dishonorableness are subjective judgments varying with individuals, varying with the milieu from which a person comes, with his experience, education and so forth.

Moreover these provisions assume that it is not a thing of great difficulty to establish the motive to an infraction, but often the contrary is true. An individual may not himself be sure as to what motives were decisive for him in the commission of the action. Even if he were to make his judgment on the basis of the conscious representations which influenced his action, we cannot know how much of a part subconscious representations and subconscious feelings were determinative therein. Moreover even if it were possible to construct a motive for the infraction we cannot know whether it is a correct one for the offender has an interest in suppressing the dishonorable circumstances in order to give himself a motive which may act as a ground of attenuation. Even where an individual confesses his crime the latter frequently contains an attempt to excuse the action. The rake who has abused a little girl maintains that she seduced him. Thus the provision above runs into great difficulties in its application in the determination of just what was the motive to the infraction.

Still it is not without its value. It is sometimes not so difficult to establish a motive and to judge of its dangerousness or its non-dangerousness or of its honorableness or dishonorableness. So when a bank robber holds up a bank at the point of a gun there can be little doubt that the prime motive is robbery and that such a motive is a socially dangerous one. Wherever then a motive may be established and may be classified we have a symptom whereby we can measure the dangerousness or non-dangerousness of the nature of the delinquent to the legal order. And such a symptom may properly play a part in the attenuation or aggravation of the penalty.

III.

An example of how a particular character quality revealed in the act is singled out for special penal treatment is the disposition com-

mon to many of the new penal codes and projects relating to infractions committed from cupidity. In such infractions a fine may be added to the penalty privative of liberty which may exceed the maximum limit for a fine provided by the code, or if the infraction is punished exclusively by a fine, the latter may also exceed the maximum.⁶ In certain cases this disposition may be a very salutary weapon in the prevention of crime. A wealthy usurer may not be impressed very much with the threat of a three months or six months imprisonment, but the prospect of having to suffer a heavy fine in addition may have a much weightier influence. Such a disposition may exercise a salutary influence also as an aid in keeping modern business competition within legal limits.

Much of the value of this provision as a weapon against certain types of offenders may be lost if it is employed too widely. Most infractions having for their object the acquisition of someone else's property may be said to rest upon cupidity. The same is also true of such infractions having nothing to do with the violation of property interests as that of being a *souteneur* or keeping a house of debauch. But if this provision is extended to all the infractions where greed may possibly be involved it will run into all the difficulties that beset money penalties. Despite all the improvements in the means of assessing money penalties and the manner of collection, their employment is still necessarily limited through the physical impossibility of squeezing money out of a person who has none. However, if this disposition is limited as it ought to be, to persons committing infractions from cupidity and who have independent resources that may be struck by heavy money penalties, it may do valuable work in the prevention of the commission of criminal acts by such individuals.

IV.

A different consideration of individuals according to whether the impulses followed were more or less honorable involves not only a difference in the amount of the penalty, but also in its kind. We have seen in the dispositions relating to motives that they are directed towards an attenuation or aggravation of the punishment and thus they take effect on the amount of the penalty. The provisions relating to cupidity show how a particular type of penal measure that is a heavy fine, is employed where the impelling force is one of greed, such a measure being perhaps the most effective to reduce the strength of

⁶Art. 69 German 1925 Project, Article 42 Polish Project, Art. 37, Swiss 1903 Project.

this force. But the general problem is: since some individuals follow impulses which are less anti-social than others should they not be separated from the more dangerous elements in the execution of their penalty by the creation of a special form of penal treatment for them?

The answer to this general problem is found in the European codes, first of all, in the provisions relating to parallel penalties.⁷ By the latter term is understood employing a different type of penal treatment where the impulse to the crime was more or less honorable. In the reformation of the French Code in 1832, it appeared in the form of provisions for the separate treatment of delinquents committing political infractions, that is the death penalty was abolished for such crimes and two new penalties banissement and détention were provided to cope with them instead of the ordinary penalties of Réclusion and travaux forcés.

Similar ideas providing for parallel penalties are to be found in many other 19th century penal codes and are not simply confined to political infractions. In the present German Code (1870) Art. 20 states that where the law gives the judge the choice between Zuchthaus (Prison at hard labor) and Festinghaft (Detention in a fortress), the former is to be chosen only when the infraction proceeds from a dishonorable character (ehrlösen Gesinnung). This provision was applicable to only a small number of infractions and in practise was almost exclusively confined to duels. Thus the idea of parallel penalties in the present German Code has been too restricted to be of much practical value.

During the labors on the Italian Code of 1899, Mancini proposed two kinds of penalties, a severe regimen intended to repress offenses committed from evil abject and dishonorable impulses and a more simple one intended for offenses committed from impulses not evil or blameable in themselves. Power was to be given to the judge to choose one form of punishment or the other depending upon the impulse followed in the commission of the crime. The same idea in a somewhat different form had already been realized in the 1867 Austrian project for a Penal Code. Article 90 of this project gave the judge the power to change Zuchthaus (Prison at hard labor) to Gefängnis (Prison) and the latter to Arrest, when he finds in the individual case that the infraction was not committed from a contemptible nature (verachtloser Gesinnung). A similar power is not however to be found in the present Italian code, but one does find the penalty of de-

⁷See Article by Garçon 1896 *Revue Penitentiare*, p. 829.

tention alongside the ordinary penalties being applied to political infractions, infractions of the press and also certain infractions where attenuating circumstances are present.

Two methods may be employed and have been employed to realize the ideas back of parallel penalties. In line with the objectivism of the classic school, certain infractions such as political crimes are given a more or less honorable character through the creation of a special prison regime for delinquents committing them. The idea here is that the impelling forces to such infractions are of a different more honorable nature and worthy of different treatment. On the other hand there is the method suggested by the German Code and employed by the Austrian projects of not classifying in advance infractions as honorable or dishonorable, but making this decision rest upon the judgment as to the honorableness of the impulsion in the individual case. This is perhaps the better method of realizing the fundamental ideas inspiring parallel penalties. Their justification is that individuals committing infractions from more or less laudable impulses should not be confounded with cut throats and common thieves in the expiation of their penalties. But if certain infractions are declared in advance honorable, many persons acting from more or less dishonorable motives and impulses will be included in the category of those serving an honorable penalty. How much more honorable is an individual committing a grave political infraction because of egoism and desire to obtain something for himself than the pickpocket who adopts his trade because he wants to live without working. Or, Garçon advocates⁸ that the so-called "crimes passionels" be included in the category of those subject to an honorable penalty. But can we say that a man has acted honorably though he sets up a plea of "crime passionel," when he has first destroyed the love of his mistress by his brutality and egoism and then has killed her because she left him?

There is also another consideration against the idea of ranging certain infractions in the category of honorable and worthy of a special treatment. Many infractions committed from impulses just as worthy and just as deserving of special treatment, will be left out of such a group. Thus a provision general in scope allowing the judge in the individual case to separate the infractions proceeding from honorable impulses from those not proceeding from such impulses, is the only logical method that can be adopted to attain the ideas back of the principle of parallel penalties.

⁸See Article cited below.

The question also arises how are "honorable and dishonorable impulses" to be understood in the general provision. Shall the criterion be one of whether the motives to the particular deed were honorable or dishonorable, or shall the criterion be something much wider and more inclusive, the nature or character of the individual doing the action? That a difference may be had depending upon the method followed can be seen where a depraved individual does an act from motives not dishonorable—such as stealing to prevent starvation. It will be seen from an examination of the newer codes and projects below, that there is considerable uncertainty as to which is the better criterion.

Thus in the present Norwegian Code 1903, we find a general disposition relating to our subject having as its base a consideration of character. This code has two ordinary penalties *Foengsel* and *Heft*. The latter penalty is pronounced for crimes which do not constitute proof of a complete demoralization. By Art. 24 where *Foengsel* is the only penalty, *Heft* may be substituted where the special circumstances show that the action did not proceed from a dishonorable nature. However this distinction is considerably blurred in this Code by the power given to the prisoner by Art. 23 to change a penalty of *Heft* to one of *Foengsel* on the ratio of 2-1.

The German codifiers have also attempted to find a formula which will distinguish individuals in the penal treatment depending upon the impulses followed. They were aware that Art. 20 of the present Code was conceived too narrowly and have attempted to generalize it. To replace the *Festungshaft* they adopted *Einschliessung* (Detention). Art. 107 of the 1919 project stated that where the law gives the judge the choice between *Zuchthaus* and another penalty privative of liberty, the judge is to choose *Zuchthaus* only when the deed proceeds from a dishonorable nature or character (*ehrlosen Gesinnung*). Also where the choice is between *Einschliessung* and another penalty privative of liberty, the former is to be chosen where the deed does not proceed from a dishonorable nature. This formula was however changed in the succeeding 1925 project. There the choice between detention and the other penalties privative of liberty is made to rest upon "when the determinative motive of the delinquent is that he held himself compelled to act on the ground of his religious, moral or political convictions."⁹ The motives to this project state that it was attempting to treat infractions differently that were inspired by ideal motives and thus generalize the provision of Art. 20 of the present Code. Still

⁹Art. 71, German, 1925 project.

it is somewhat dubious if the formula chosen to realize this object is a happy one. Much that occurs under the influence of moral religious or political convictions can hardly be called inspired by ideal motives. Thus the formula was again changed to the 1927 project and the choice of detention is now made to rest upon "where the delinquent has acted from honorable motives and where the results of the deed are not particularly reproachable to him."¹⁰

Thus we can see from the above how the German codifier wishing to adopt a general provision separating individuals who have acted from dishonorable impulses from those who have not so acted has wavered in his adoption of a criterion between motives and character. Perhaps the completest realization of the latter criterion as a means of such separation is to be found in the Czecho-Slovak project in 1927 which rejected the criterion of "low and dishonorable motives" proposed by the earlier project of 1921. In the 1927 project Art. 14 declares that infractions punishable by the penalty of réclusion are crimes and infractions punishable by another penalty are délits (where not specially qualified contraventions). The infractions to which réclusion or another penalty is applicable is punishable by the former, when the infraction has been committed through baseness of character (*bassesse de caractère*), notably when it shows a vulgar love of gain, laziness, malice, impudence, brutality or if it ought to serve the delinquent as the means of committing or facilitating another crime or to assure the profit of another crime, or escape the penalty undergone for another crime.

The *Exposé de Motifs*¹¹ tells us that "although criminal acts have an homogeneous character from the point of view of the protection of the goods of the law, nevertheless one can distinguish here two species of delinquents. In one group the act proceeds from a baseness of character which shows us the unsocial nature of the delinquent while others are led to commit infractions by different impulses which evidence greater social value or which at least do not evidence this baseness of character. In the first place it is necessary to use against the delinquent the most energetic means possible in order to modify his character as revealed by his act, so that the danger he carries for society shall be removed and if it is not possible to attain this purpose, to place him in the impossibility of committing an injury. For the delinquent of the second category nothing else is needed than to weaken his penchant to the infraction and to re-

¹⁰Art. 72,, German, 1927 project.

¹¹Exposé de Motifs Avant Projet Tchecoslovak de Code Pénal, 1927, p. 20.

affirm the ideas which will prevent him from committing such acts in the future.”

The special part of this project provides that most infractions are punishable alternatively with *réclusion* and prison. Only a few are punishable solely with prison or a money penalty (for the most part negligent infractions) and some such as that of being a *souteneur* (Art. 266) or the engaging in the white slave trade (Art. 265) or the keeping of a house of prostitution (Art. 264) are punishable exclusively with *réclusion*.

What is sought to be obtained by the employ of this notion of baseness of character, is perhaps a bit wider than that sought under the older ideas on parallel penalties. There the effort was to separate individuals acting from more or less honorable impulsions from those not so acting. Here the idea is the employ of the concept of baseness of character as a fundamental means of obtaining an individualization of the penalty through a proper separation of criminals and thus an execution of punishment according to the personality of the condemned. But our question is whether this conception is a realizable one for this purpose capable of practical application, which may lead to valuable results in the fight against crime?

The German legislator in his use of a similar term has not attempted to define this notion. A comparison of the Czech conception with the same concept found in the first two Swiss projects¹² shows that the latter codifier conceived it somewhat differently. The notion seems to be sought for but it does not seem to be easily grasped.

The germ of the idea seems however to be ancient enough that is, the idea of employing special measures against individuals with anti-social characters. We read in Prof. Mackarewicz's book "*Einführung in der Philosophie des Strafrechts*,"¹³ that in primitive societies, homicide was left to private vengeance since human life has no role for the society as a whole, the loss being felt by his relations and not by the whole group. It is only when an individual becomes dangerous or disagreeable to a large number of persons that the society takes steps to eliminate him. And the commission of a grave

¹²In the 1893 project (Art. 39) *bassesse de caractère* is present where the delinquent acted from, wickedness, brutality, ruse, vengeance, cupidity, joy of injury, or simple criminal pleasure.

In the second project, 1896, where *bassesse de caractère* appears solely as an appendage to the particular infraction of injury to property (Art. 79) and not as a general provision providing for an aggravation of the penalty as in the first project, baseness of character becomes where the delinquent acted from vengeance, envy, hatred, joy of injury.

¹³Page 148.

crime was not necessary to bring about the elimination. The anti-social character as revealed by a number of small evil deeds was sufficient to bring about this measure.

But we are concerned with the use of this criterion in modern penal law as a means of the individualization of the penalty.

By individualization of the penalty we understand the adaptation of the penalty to the personality of the delinquent committing the offense. There is at the bottom of the ideas of individualization an unreal simplicity. Human personalities are so different, so varied. It is true perhaps that they may be classified from a criminological standpoint into certain groups. This has been done often enough yet even though so classified and a penitentiary regime arranged for each of such groups we still cannot say that we have a true adaptation of penalty to personality, a true means of re-adapting an individual if possible to social life. The truth of the matter is that we have only a limited number of measures at our disposal. The prison is at the basis of our criminal code and with all the possible variations of regime it is a limited medium of social re-adaptation and re-classification. In so far as the causes of crime lie outside the individual's personality, in the social milieu the prison can do very little apart from building up the individual resistance to crime through fear of punishment, or through the acquisition of a means of livelihood in the prison, and as to the causes of crime lying within the personality it is somewhat dubious as to just how much the prison can do to remove them.

Thus true individualization is something of a dream. However this is not to say that the efforts in this direction are fruitless. Any measure which separates habitual offenders from offenders for whom we have as yet some hope of saving from a life of crime is to be lauded. Also an experimentation with different prison regimes for different types of individuals is a worthy enterprise. This is attempting to go as far in the direction of individualization as possible with the medium that is available.

The question then is, is the conception of baseness of character one which will enable us to obtain as much individualization as possible under the circumstances. Reduced to its simplest elements this means that the judge will order a harsher prison regime, réclusion for an individual whom he thinks acted from a base nature instead of a lighter one. And through so doing proper individualization of the penalty is hoped for. This separates delinquents into two classes; those who have acted from a base nature or character, and those who have not so acted. But is it possible to divide delinquents into two such cate-

gories? And if this were possible is the index of a personality so clearly given by the infraction he commits, so as to enable a judge to determine to which category he belongs? It seems that both questions must be answered in the negative. What if a person shows a "vulgar love of gain" through his infraction? Is he any more base or low than so many business men actuated by the same motives? What if the delinquent acts through laziness? There are many people who do not believe in the gospel of the desirableness of work who could hardly be called base characters. And perhaps the only distinction between them and the individual committing an infraction is their possession of money and thus the means of leisure. A person committing a brutal act may be said to do so from a depraved character. On the other hand the brutality may have a direct connection with an abnormality in his sexual life and thus give us little upon which to base an ethical judgment as to his real nature. Or, the brutality may have been the result of his losing control of himself in the commission of the act because of the influence of passion and thus going to excess foreign to his real character.

This touches upon the second question: is what an individual is, revealed by what he does. The answer is generally yes. But is this particular act done by this person a true picture of what he is? We cannot say yes here with the same assurance. We often do acts that are foreign to our real natures.

But an individualization worthy of the name measures the strength and form of the penal reaction by the danger of the entire character and personality of the individual to the legal order. If by baseness of character is meant simply whether or not this particular act was committed through such baseness, then it is a defective criterion of individualization since the entire character and personality of the delinquent may not be revealed by this particular act. If it is sought on the other hand to pass a judgment upon the entire personality of the individual and not simply upon the personality revealed in this act, then it is extremely dubious whether this can be done by simply dividing individuals into two categories and calling one group inspired by a base character and the other as not so inspired. Even if the criterion were a good one, how can the judge in a few hours or days tell us what the entire psychic personality of the individual is and pass an ethical judgment thereon. It takes Dostoevsky many hundred pages to delineate the story and character of Raskolnikoff in "Crime and Punishment." Criminal Courts cannot possibly make psychological investigations as complete and masterful as this one. Even if they could in cases such as that of Raskolnikoff,

how can we possibly say whether we acted from baseness of character or not and that the most severe penal measures must be employed against him "in order to modify his character as revealed by the act."

The question of whether a dishonorable nature or character, *ehrlosen Gesinnung*, are practical realizable concepts in the penal law is made more acute by the fact that other penal measures also depend upon the judge's decision as to whether or not the individual acted from such an impulsion. So this notion is applied in some codes as a criterion to determine whether or not the condemned should be deprived of his civic rights, on the theory that civic rights should only be exercised by persons worthy of exercising them and an individual recognized as dishonorable by the judge is not so worthy. Or, the concept has an important bearing on the decision of whether the particular infraction has or has not been prescribed. A different period of prescription exists for a crime and for a *délit* in the penal codes and if the difference between these two depends upon whether the delinquent acted from baseness of character or not, the particular period for the infraction in the individual case cannot be known until this decision is made.

V.

In the pages that have preceded we have exposed two of the criteria in some of their phases that are employed in modern criminal codification to realize a subjective criminal law. Perhaps a conclusion that can be drawn from such an examination is that the way of subjectivism is a hard one. Aim or purpose pursued in the infraction, a particular character quality revealed in the act such as cupidity, the honorableness or dishonorableness of the character of the person acting (when it can be determined): all this tells us something about the person who commits a criminal act. It enables us to be a little more intelligent in our penal treatment. But at best it reveals to us the inadequacy of the attempt made by man to judge man. However there is this comforting factor. It is something of an advance over what was known before when it was attempted to make the punishment fit the crime and not as we attempt today make the penal measure fit the delinquent. The latter is an infinitely greater task than the previous one and modern penal codification in attempting to meet these new demands is enacting another stage in the long history and evolution of the criminal law. All that can be said is that the eternal verities have not yet been written. Criteria shown to be imperfect by the tests of experience will be discarded. And perhaps what succeeds will be a yet more perfect medium to realize the function of the penal law as a means of social control.