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# CONFLICTS IN PENAL THEORY AND PRACTICE<sup>1</sup>

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## *Introduction*

In a formal sense no conflict in penal theory exists in this country since none has been explicitly developed. In this respect the United States lags far behind the European countries and several of the South American Republics.<sup>3</sup>

Our lack of interest in penal theory is in part accounted for by the relative youth of this country. Theories of criminal law had been developed in Europe by the eleventh century. Beccaria had written his classic before the American Revolution. The relatively recent growth of America, however, does not altogether explain our inability to have developed the implications of the principles enumerated in 1870 by the American Prison Society.

One of the important factors accounting for the failure is that of personnel. The lawyers and jurists in this country have been occupied with developing the civil law to meet the needs of our extended frontiers and expanding industrial communities. But very few have been interested in the problems of crime and penal treatment. It is literally true that we have not one single text on the philosophy of criminal law nor a comprehensive work on penal theory. The confusion of the several criminal codes both in substance and form reflects the lack of clarity in our thinking as well as our lack of interest in criminal law.

The outstanding accomplishment in recent years was a restatement of the criminal procedure of the several states by the American Law Institute. A real examination of its fundamental structure and an analysis of its basic guiding principles was not in question. The model Code of Criminal Procedure of the Institute perpetuates the underlying inconsistencies of criminal procedure.

<sup>1</sup>The writer wishes to express his indebtedness to the Social Science Research Council which made possible much of the research upon which this article is based.

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<sup>3</sup>It was my privilege to attend the Third International Congress of Penal Law held at Palermo, Sicily, in April, 1933. Of the six hundred delegates present from all civilized lands, the one official delegate from the United States was the American Consul from Palermo. Even the names of the major half-dozen or more international criminological and penological societies are unknown to many American students of crime and prison problems.

The development of the criminal law and penal philosophy for the most part has been left to or accepted by the sociologists, psychologists, psychiatrists and physicians. Just as the lawyers as a class are untrained in the social disciplines, so the social scientists have received no formal discipline in the law. It is difficult to explain to a European criminologist that the American students of criminology and penology are not jurists. When the name of an American criminologist or penologist is mentioned almost invariably the question is asked, "With what law faculty is he associated?" Apart from one or two exceptions I do not know of a single outstanding European criminologist or penologist who is not or has not been a member of the law faculty of his university or at least who has not had legal training.

Penal theory is inextricably bound up with the criminal law which determines its general scope and practice. Without an understanding of the history and development of the criminal law one should expect inevitable confusion and cross-purposes in the criminal law in legislation and practice, which is precisely what one discovers in an analysis of American criminal legislation, criminal procedure and penal treatment.

To such analysis we now turn. An attempt will be made to illustrate only several of the major defects arising from the theories characterizing American criminal jurisprudence.

## I

### *The Theoretical Foundations of American Criminal Law*

For the moment the question we must ask ourselves is what is the purpose of the prevailing criminal law in the United States? What are the most significant characteristics of the existing criminal law? Of primary importance is the division of criminal acts into violation of city ordinances, misdemeanors and felonies. That is, certain classes of crimes are considered more reprehensible than other classes. Corresponding to the kind of offense is the degree and type of punishment. Generally, violations of city ordinances which are morally less serious than other types of crime are dealt with through a money fine. Some misdemeanors carry the alternative of a fine or a term in the penitentiary. The morally more reprehensible felonies carry a prison sentence. Implied in such classification is the idea that the gravity of the offense must be met by a corresponding severity of the punishment. This holds true also for the distinction between more or less serious degrees of the same offense.

The classification of crime according to this scheme (found also in European codes) can be justified only upon the theory of retribution. A criminal law which had as its object the protection of society could not require and would not need a gradation of offenses based upon their gravity. In brief the traditional classical doctrine of the punishment fitting the type and degree of the morally reprehensible offense is rooted in American criminal law.

Another symptom of the retaliatory spirit of contemporary criminal law is the central concept of individual responsibility for crime. Why does the criminal law distinguish between responsible and irresponsible individuals? This distinction can have no meaning other than that only a "free" moral agent can be punished. A crime must be an act of free will for only the morally free are responsible and have to be punished. This idea is legally expressed through the concept of "mens rea," specific criminal or wilful intent. It would take us too far afield to trace the development of the moral element in the criminal law. Here we need but state the fact that its subjective element did not exist in the early criminal law as it developed in Italy. It was later introduced when ecclesiastical or Canonical law which had independently developed, exerted influence over secular legislation emphasizing the moral state of the offender. Crime, henceforth, was an offense against God, as well as against man.

But if the end of the criminal law is the protection of society, acts must be judged in terms of their effect upon society and not in reference to the free will of the moral agent. As a matter of fact, and its inconsistent theory is again shown, the criminal law does not permit the discharge of the criminally insane, the feeble-minded or the immature youth because of the lack of or the failure of development of free will but attempts so to *treat* them that they will no longer or for the time being prove to be a social menace.

What would happen if an expert endocrinologist testified that the defendant who committed the alleged rape was suffering from an extreme case of hyperthyroidism? Probably the evidence would not be permitted in the record. The issue is not that a glandular condition or a neurosis should be a legitimate defense for a crime but that the law in insisting upon free will as a basis for criminal responsibility is driven to an embarrassing position and would, if it followed its logic and recognized elementary physiological and biological facts, be reduced to a *reductio ad absurdum*.

Why, it may be asked, are money fines imposed in the majority of violations of ordinances and misdemeanors and not in most fel-

onies? Whatever the purpose of the fine be, it could apply in one case as well as in the other if its aim were social protection. It seems that as the law operates, more serious *punishment* is reserved for felonies. Contrariwise, the authorization in all but two states for parole for felonies indicates that society is protected through supervision. Why, then, do only nine states provide for the parole of misdemeanants who constitute the largest group of offenders? Evidently because a misdemeanor is considered to be a *morally* less reprehensible offense which ought not be penalized by continued state supervision.

In brief, the present classification of crimes, the retention of specific criminal intent, the matching of gravity of offense with severity of punishment are understandable only in light of the fact that the *responsible* offender must *be punished* for his moral defection. The criminal law retaliates. It seeks retribution. You have sinned? You will be punished. You have sinned much? You will be punished mightily.

Yet the classical system of punishments had to assimilate the knowledge which has accumulated in the past fifty years. The advances in chemistry, physiology, neurology, biology, psychology and psychiatry have made possible a clearer understanding of human behavior. Instead of throwing overboard a philosophy of criminal law which had been all but invalidated by this advance in knowledge we have been forced haltingly to accept the facts. This knowledge accelerated the non-legislative development of such germinal institutions as the juvenile delinquency courts, probation, parole and the indeterminate sentence. It is not often enough recognized that these agencies are premised upon a theory opposed to the classical doctrine of punishment. The youthful, immature offender must not be punished. He must be kept from a criminal career. Hence the development of the juvenile court which is equitable and not criminal in its proceedings. What is best for the child? How can the social worker, the physician, psychiatrist and psychologist help us understand the child? What treatment is most propitious?

Juvenile probation was developed. The growth of adult probation, which half-heartedly existed here and there, was stimulated. But it led (and in many places still leads) a surreptitious life. The judges of the criminal courts had to become accustomed to this strange institution. They were not and now are not required to accept the findings of the probation worker. The trial record speaks for itself. Was the alleged crime committed? Did the defendant

commit the crime? *Basta!* One, five or fifteen years in the state's prison. Newer attitudes had to be created, newer points of view generated. Not the class of crime but the type of offender became the central issue—theoretically. And so we witness the strange spectacle of a defendant being indicted and tried for a specific criminal *offense*, the only issue being whether or not the crime was committed, for which the legislature prescribes a definite punishment, and a history of the background of the offender furnished by the probation department which is generally irrelevant and may not be introduced at the trial. The stark inconsistency in spirit between the criminal law seeking to punish for guilt and the administrative device of probation seeking the rehabilitation of the offender is blurred by slipping the probation report to the judge before sentence is imposed.

Under the indeterminate sentence an offender should be given an opportunity again to take his orderly place in society. How long a time he needs cannot be determined in advance. That will depend upon him. Apparently we are interested in returning to society an offender who promises to conduct himself as a law-abiding member of the group. The possibility of his *reformation* underlies the indeterminate sentence. Why, then, do most criminal codes provide as the lower limit of the indeterminate sentence a definite minimum sentence for the crime in question? The answer may be given that in the present liquid state of social science a minimum time period should be provided by the law to guarantee social security against the insecurity of knowledge. Such a reply, I believe, is largely a rationalization for the inability to surrender the doctrine of punishment. An indeterminate sentence from five to fifteen or ten to twenty years is not uncommon. As a matter of fact, the more *serious* the offense, the longer is the minimum time provided by the law in the indeterminate sentence. The ghost of retribution for moral delinquency hovers about indeterminately. The indeterminate sentence is another device for eating the pie whose ingredients are mixed according to the best scientific recipe and retaining the hard crust of tradition.

The habitual offender's acts fortify this view. Recidivism, it is supposed, marks the recalcitrance of the offender rather than the failure of the prison and other social institutions. Hence such willfulness of spirit is met by a definite life long imprisonment or what amounts to life-long isolation. By the simple arithmetic computation of adding one plus one plus one the conclusion is reached that a third or fourth felony conviction marks one's will as incorrigible. The real reason, of course, is that such incorrigibility must

be *punished* as severely as public opinion will permit—and that is saying a great deal.

Juvenile Court procedure, probation and the indeterminate sentence are procedural devices resting upon the belief that society can best be protected by individualizing the administration of justice. But the criminal codes, notwithstanding what is said and written about the protection of society through intimidation or deterrence, are based upon and generally administered in the spirit of vindictiveness and retaliation.

Rules and laws do not enforce themselves. They operate through human direction. One need but thumb through the reports of sentences by the courts to note the biases of the judges, their interpretation of the spirit of our criminal law. Or better consider public attitudes toward the defendant in serious felony charges reported by the press. Is there any doubt, all theory notwithstanding, that public opinion calls for vengeance? The private blood feud of the earlier centuries has been transformed into an orderly public feud. Now it has become the People of the State of X versus John Doe. To be sure, the more revolting cruelties have been done away with, the individual is guaranteed a more or less fair hearing. But despite the recent innovations of the juvenile court and probation our criminal law, clothed with the sovereignty of the people, continues its cry, "Vengeance is mine."<sup>4</sup>

## II

### *The Theoretical Foundations of American Penology*

The criminal code determines the mode of treatment by specifying the type of punishment for different kinds of crime. Penal practice is bound by the limits set up by the criminal law. If contradictory principles underlie the criminal codes it is to be expected that similar contradictions will appear in penal treatment. That this is the fact will become apparent as we proceed.

The current and conflicting modes of treatment may be classified under punishment as such, incapacitation, deterrence and reformation.

Punishment as such is the only logical mode of treatment which follows a retributive theory of the criminal law. Yet few students

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<sup>4</sup>Dean Pound has remarked, "American prosecutions today are coming to be conducted with a ferocity without parallel in common law trials since the Stuarts."

Professor John Barker Waite has ably demonstrated that "the primary purpose of the criminal law is the imposition of punishment." *Criminal Law in Action*, 1934.

make any serious effort to justify punishment as such. In spirit, however, the atmosphere of "treat 'em rough" permeates the penal administration of many of our penal institutions. Anyone who believes this to be an over-statement need but spend a few weeks or months in any one of the larger prisons in America or on the Continent to become convinced of its basic truth.

No one will deny, I think, that most of the present physical plants, the jails, penitentiaries and prisons are patterned after the older type of prison which was an institution for evildoers. It is a very far cry from hotel accommodations to providing clean sanitary and dignified habitable quarters for those who despite being branded as criminals retain the attributes of human beings. So far as I know no one has seriously questioned Joseph Fishman's trenchant attack on the jails of America.

If jails intended for the accused are so horrible it can hardly be expected that the county penitentiaries or prisons intended for the convicted would generally be any better. Up until twenty years ago exercise in open daylight was not permitted! Why did prison wardens have to wait until 1914 when Thomas Osborne had the courage to throw open the yard to prison inmates? What is the reason, one asks, for the interminable petty prison rules, the privilege of limited correspondence and limited reading? The answer will be given that the administration of a prison will not permit extended privileges. There is some truth in the reply. But a similar answer would have been given to the privilege of the use of the prison yard before 1914. It was given as the reason for not introducing radio sets, moving pictures and sports and music. The real reason, I believe, was (and is) the feeling that prison inmates must be made to suffer; they must be castigated and atone for their evil. In fact, this is the precise official explanation given by German and Italian Ministries of Justice for the deprivation of such privileges. (Even smoking is now generally prohibited in German prisons as are athletics and music.) In no prison in Italy is there a musical instrument, or any sports. The only entertainment permitted is compulsory chapel attendance.

It is a notorious fact that expenditures for prison programs are most grudgingly voted by the state legislatures. The prison inmates are considered only after important appropriations are provided. They are prisoners and little regard is due them.

In the newer prisons anywhere from \$100,000 to \$1,000,000 or more is spent for a concrete and steel wall one-half or a mile long,



but the legislatures will not grant a wage decent enough to attract capable men to join the prison staff.

The general run of prison guard reflects the attitude of the layman toward the inmate. The affectionate term employed by the inmate for the guard reflects, in turn, the high regard in which he is held by the inmate.

The spirit of "you've-got-what's-coming-to-you" is the dominant tone of most of our penal institutions.

The results of incapacitation as a mode of treatment are unknown (except, of course, in the case of life imprisonment or execution). No one knows what degree of deterrence this method effects. In any case, from the point of view of the protection of society, only the incorrigible individual should be incapacitated. A "recidivist" is not necessarily incorrigible. An habitual criminal may be an indication of a miserable and unintelligent prison program. We do not know.

The high degree of recidivism in this country as well as in the European countries is certainly an indication of the fact that deterrence has no effect upon this group. The retort is often made that it is not the reformation of the actual but the deterrence of the potential criminal that is sought. What effect deterrence has upon the civil population is unknown. Punishment might be justified for its deterrent effects upon others if we had the information. What little we do know about psychology in general and the laws of learning in particular indicates that punishment as such especially toward adults cannot lead to desirable social habits. Deterrence at best works negatively. It restrains people from acting through fear. An intelligent program of reform works positively. Its aim is to build desirable social and emotional traits.

Reformation as a mode of treatment seems to be accepted, in theory, by the majority of present day criminologists; the proposed reforms of many of the American states as well as foreign countries emphasize reformation as against other modes of treatment. It cannot be too strongly emphasized that any method of reformation which proposes to prevent or diminish crime cannot be based upon types and grades of offenses. *Modes of treatment must be determined in terms of their efficacy to prevent or diminish crime and not in terms of the offense committed.* Yet the hard fact remains that the criminal law classifies criminals in terms of offense, imposing sentences accordingly. Later, *i. e.*, after sentence has been imposed the prison classification clinic attempts to make an analysis of the offender in order

to determine the best method of treatment. But the court has already sentenced him to the State's prison or reformatory or penitentiary. The criminal law has already determined the length of time he must be removed from society.

The most recent legislation in this matter is that of Illinois in 1933. Responsibility for the institution to which an inmate is sent and the manner of incarceration has been transferred from the province of the sentencing judge to the Department of Public Welfare which in turn delegates this function to the division of the Criminologist. Prisoners are to be examined on admission at the two diagnostic depots or clinics and a recommendation as to their placement or transfer on the basis of psychiatric, psychological and social data is to be made. In brief the detailed regulations concerning prisoners have been placed under the administration of behavior specialists but—and here the contradiction arrives—the judge still retains the power of determining the original sentence.<sup>5</sup>

The classical doctrine of fitting the punishment to the crime conflicts with the modern theory of reforming the offender. An illustration or two will make this clear. Forgery, first degree, in the state of Washington, is punishable by a minimum of six months, while in Missouri it carries a minimum sentence of ten years.

Suppose a prison classification clinic in Washington determines that the forger still remains unadjusted at the expiration of the minimum six months sentence. Or suppose that the members of the clinic in the Missouri prison unanimously agree that their forger may be safely released at the expiration of six months. In neither case may the prison administration act upon their findings since the minimum terms provided by the law for the offense control the disposition of the offender. In one case a forger is returned to society and in the other a long term of useless suffering is imposed upon a supposedly reformed individual who might become a social asset but who instead will probably leave prison an embittered inmate seeking to collect a debt he feels society owes to him. A similar dilemma may arise in New York, where burglary first degree carries a minimum of fifteen years as the statutory punishment, in Texas two years, and in Illinois one year. Rape, first degree, is punishable in New York with a minimum of one year. In Texas the same offense

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<sup>5</sup>The seven bills relating to the penal and delinquent system of Illinois are Senate Bills Nos. 149, 560-564 and 582 of the fifty-eighth General Assembly of Illinois (1933). For a discussion see Goldberg, Abraham W., "Illinois Penitentiary and Related Laws," *Journal of Criminal Law and Criminology*, May-June, 1934, pp. 103.

carries a minimum of fifteen years and in Alabama the death penalty.

The major purpose of a classification clinic is to diagnose the individual and prescribe a method of treatment most likely to readjust him. It seems elementary, then, that the findings of the clinic should control the character of the sentence. The classification after sentence spells confusion in theory and, what is worse, tragedy in practice.

A detailed analysis of an inmate's daily activity in the shop and school, an examination of his social and educational opportunities would reveal similar inconsistencies in penal theory. Prison administration fluctuates between disregard for what happens to the individual in certain respects, a positive attempt born of meanness of spirit to frustrate him in other respects and an enlightened attitude of helpfulness in still other respects. All degrees of these attitudes may be found in the same prison official or in different members of the prison personnel.

The lack of cooperation between the various units of a prison administration and often a deliberate attempt to discredit the work of the psychiatric and psychological staffs is found in some institutions. Recently in a large eastern prison a parole worker of the psychiatric clinic seated at his desk requested a guard to bring him a certain inmate. A few moments later the guard "brought" him in by a shove which sent the inmate from the office door across the room to the office desk.

At the same institution the chief psychiatrist was to leave to accept an appointment elsewhere. One of the guards turned to him and smirkingly remarked, "Understand you're leaving us, Doc. When do we cry?" Isolated instances, to be sure. But I possess a volume of notes on comparable instances which I have witnessed in scores of prisons.

Theories operate through men and women and not pen and paper, and the fact that we have little knowledge as to the effects of various methods of treatment and the modes of their application and the fact that prison officials are confronted with a series of confusing perplexities and dilemmas which are as trying if not more trying than those arising in any sizable group activity does not justify or excuse the lack of a solid and well-integrated point of view. The peculiar difficulties of prison environment makes its need imperative. Furthermore, the efficiency of various methods of treatment cannot be determined until a criterion is established by which their value is to be judged.

The absurdity of our contrasting penal theories is best observed, perhaps, in the attempt to apply modern ideas through the traditional mode of treatment. We seek to reform the inmate, to re-socialize him by severing him from social ties, by placing him between prison walls in a highly artificial and primarily abnormal setting. We de-humanize him by removing initiative, by providing rules, and conniving at the violation of many of them thus undermining his social responsibility and destroying his self-responsibility. He is placed in a world as remote from that to which he is to return as the civics taught in schools is from the practices of Tammany Hall. But we are not unmindful of the difficulties of the transition. When the inmate receives his absolute release the Warden presses the \$10 bill into his hand and as likely as not thinks "Good riddance of bad rubbish" and says, "Good luck and be good," and thinks again, "I'll be seeing you soon"—and in the majority of cases he does.

The inmate definitely sentenced because he does not for one reason or another merit the indeterminate term is absolutely discharged without guidance or supervision. The indeterminately sentenced inmate who wins his release because of his record is placed under supervision.

Strictly speaking the issue now is not a plea in behalf of the inmate. We are interested in making clear what it is we are after.

Let us glance, for a moment, at the penalty of a fine. About 75% of all sentences imposed by the courts of this country are fines of a few dollars. About half of the population committed to penal institutions are committed for non-payment of fines. But approximately half of this group or 25% of the prison population is released within a few days of the beginning of the sentence. No discrimination in commitment to prison for non-payment of fines is made between first offenders and repeaters.

Jurisdictions differ widely in the use of the fine penalty. In one jurisdiction (Mass.) 1990 were imprisoned for non-payment of fines in one year (1923), while in another state (N. Y.) in that time 4090 were thus committed.

In the first half of 1920 no convicted prostitute was fined in New York City, while 62% were fined in Chicago during the same period.

In the same state (Mass.) in 1927 in one jurisdiction 76.5% of sentences were for unpaid fines while 9% were placed on probation and in another jurisdiction 10% of the sentences were for unpaid fines and 78% of those sentenced were placed on probation. Upon

what type of offender and for which offenses shall fines be imposed? For drunkards, prostitutes, drug addicts, traffic violators, gamblers, stock swindlers, the young, the old? Why should those unable to pay a fine be sent to prison? Or should they be imprisoned? But various alternative substitutes for payment of fine are employed, suspension of the fine with or without probation, remission of the fine, orders to leave town. Apart from its effectiveness, what theory is behind the methods used?

Fines are the general penalty for misdemeanors and imprisonment the general penalty for felonies. Why? Whatever the reply, the practice denies the reason for the distinction since in at least half the cases of fines, imprisonment follows their non-payment.

Do we wish to punish the criminal or do we want to protect society? Is it the reformation of the actual offender or deterrence of the potential criminal we seek? Or are we attempting to reach several of these ends? Are they logically mutually exclusive or is it impossible or undesirable practically to carry through any one point of view? The answers to these questions, I believe, will be found in the attempt to construct a rational penal theory.

### III

#### *A Rational Penal Theory*

A rational penal theory rests upon the answer to the question what *should* the ultimate end of treatment be. But the ultimate end of treatment, in turn, rests upon the answer to the question what *should* the ultimate end of the criminal law be. Whatever end or ends the criminal law should serve will determine also the character of the treatment process. As historically developed the answers to the question what *should* the ultimate end of the criminal law be may be classified under two heads; (a) the criminal law should serve the purpose of punishing those who violate the law; (b) the purpose of the criminal law is to preserve the welfare of the state. Retribution for the crime or protection of the social good are the two major points of view.

These two answers are obviously inconsistent. The criminal law cannot serve to protect society and, *at the same time*, aim to punish those who violate the law. Punishment may be employed and its use justified as a *method* to protect society but in this case punishment ceases to be the end of the criminal law and becomes one of the *methods* employed in preserving social order. Is it possible to show that one or the other of these answers is sound and the other false?

Law, civil or criminal, as an end in itself, a "Recht an sich," has no intelligible meaning. Justice as an end in itself, an ultimate aim sought for its *own* sake, is without content. Similarly, retribution, as an end of the criminal law was considered to be absolute and just (Kant and Hegel). It is a *fundamental* fact which cannot be argued but which can only be accepted, pointed to and demonstrated that wherever and whenever men and women live in groups social relations arise and some attempt to regulate these relations is made. Such efforts to make social relations orderly become crystallized either in the form of settled habits of activity, oral traditions or codified rules. Primitive peoples rarely have written law. They are governed chiefly by traditional forms of activity. When the traditions are fixed and a special group of individuals takes or is given the power to enforce such rules law is born. Either one believes that Moses ascended Mount Sinai and brought the commandments down from heaven or one must recognize that law arises out of the need to regulate social activity and protect the common good. There is no issue about which to argue. There is merely a fact of experience which must be accepted. Men, being what they are, live together and try to live peacefully. In order to live peacefully, since individuals differ in interests, they must agree to follow certain rules or regulations. These rules become the law of a group. Law, therefore, is set up to aid in the preservation of the social good. The end of the criminal law is, therefore, not set up by definition but follows from the character of human association. We do not need philosophers nor textbooks to determine the end of the criminal law. Its goal is determined by the fact that man has the capacity to develop and transmit culture or civilization.

Those who maintain that the end of the criminal law should be defined in terms of retribution or punishment and that punishment is just as retribution (Stammler, Kohler, Kant, and Hegel) rest their position upon some *a priori* grounds, some preconceived notion, moral or philosophical (Kant, Hegel), religious (Stahl), or aesthetic (Herbart). The various explanations offered for two thousand years in the attempt to justify a Vergeltungstheorie are themselves evidence that the initial premises are false.

Despite the tremendous literature that has developed in Germany concerning the problem of the end of the criminal law and notwithstanding the scholarship represented by the various schools I am naive or bold enough to state that the *fundamental* problem is much simpler than the literature indicates, that, in fact, the issues about

which the schools have fought are largely verbal. The problem of the end of the criminal law is not the only question concerning which men have spent much time, energy and labor only to discover that no genuine problem has been in issue.<sup>6</sup>

The end of the criminal law should be determined by the end it serves in reality. This position is neither morally, politically, religiously or philosophically determined. It is a neutral description of what occurs in fact.

Let us return to the question what is the purpose of the prevailing criminal law. (This is a question of fact and not of theory.) As it now exists the criminal law serves inconsistent ends, that is, it is both retributive and protective. I maintain that both ends cannot exist without leading to ineradicable confusion both with respect to the contents of the criminal code and, hence, with regard to the treatment of criminals.

It has been shown above how inconsistently both the criminal law and penal treatment operate. The inconsistency in practice is unfortunately fortified and perpetuated by a corresponding inconsistency in the prevailing theory of the criminal law and penal treatment. A brief review of the development of criminal law and penal theory during the past fifty years will support this contention.

The Italian Positivists, especially Lombroso, Ferri, and Garofalo, introduced a new point of view into the realm of penology. They were the first students *systematically* to apply the fact of the social sciences to a knowledge of criminal jurisprudence and penology. The need for *dispassionate* inquiry into the nature of crime and the character of criminals was clearly recognized by them. The Positivism of the Italian school lay in its *method* of approaching the problems. Inquiry not accusation was its keynote.

Apart from this newer attitude of research into the causes of criminal behavior an accompanying development of the criminal law was initiated. The ultimate aim of the criminal was no longer mere reform of the criminal but the defense of society. However, in recent years the concept of the "protection of society" has been given new content. Around the 1870's the protection of society rested on the retributive view of the criminal law. This is the view already expressed by Beccaria in the 18th century. Through prison discipline,

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<sup>6</sup>I do not mean to imply that the growth of the criminal law does not involve many complicated problems or that its present functions do not require much study. I am here concerned only with what the end of the criminal law should be.

through reparation and intimidation, the criminal would be deterred and society thereby defended.

The *défense sociale* of the modern school is a much broader concept. The French term *l'hygiène préventiv* implies the modern point of view. Through the use of all available scientific instrumentalities the roots of delinquency are to be prevented from thriving on the social organism. In brief, society, is to be protected through *preventing* crime altogether or by making further criminal behavior unlikely. Measures of social defense aim to *prevent* the commission of crime in the future rather than *punish* for crimes committed in the past.

While most progressive penologists accept this newer point of view, that the aim of the criminal law should be the defense of society, they insist upon retaining punishment as an essential factor in penal treatment. On the one hand there is a belief in intimidation through the efficacy of punishment and on the other support of measures of social defense in which punishment plays no rôle.

Switzerland as early as 1893 had drafted a projected code (the Stoops project), which represented the first systematic and developed form of measures of security. It was recognized that punishment was useless or harmful in the case of juvenile delinquents, the feeble-minded, the insane, vagrants, drunkards, the habitual and professional offenders. Special institutional set-ups and treatment were to be provided. Educational programs for some, medical treatment or hospitalization for others and indefinite preventive detention for others were the means of protecting society from the dangerousness of the socially irresponsible or from the likelihood of others developing criminal careers.

Such measures of social defense were incorporated, however, as a means to supplement punishment. The Swiss project was distinguished by four factors. (1) Measures of security could frequently be substituted for punishments; (2) they were almost always based upon the dangerousness of the offender; (3) they were always pronounced in the form of an indeterminate sentence; and (4) they were imposed in the discretion of the court. It is important to reiterate that the Swiss system of measures of security was incorporated along the side of the classical system of punishments.

This Swiss project never became law. But it served as the model or inspiration of changes in the criminal codes or adoptions of new codes in close to thirty European, Scandinavian, and South American countries since the turn of the century. Only the USSR, however,



has accepted the positivist principles in toto. All other codes represent a compromise between the classical doctrine of punishment and the positivist point of view of prevention.

Space limits a description of the meetings of the International Congresses of Criminal Anthropology from 1885 on, or of the International Union of Criminal law founded in 1889 or of the International Congress for the Unification of Criminal Law or of the meetings of the International Prison Congress. One of the underlying issues at all of these meetings was how to combine the traditional classical point of view with the modern positivist point of view. On several occasions the feeling was so intense that the Italian delegates refused to attend the meetings.

One need but turn to the first resolution of the section on legislation of the last (1930) International Prison Congress to recognize the hopeless logic involved in the attempted compromise between the two points of view. The resolution reads, "It is essential to round out the system of penalties by a system of measures of security to guarantee the safety of the public in cases where a punitive sentence is inapplicable or insufficient." The resolution implies that there are cases where punishments are applicable and sufficient. Hence the system of penalties is supported. But it is also essential to set up a system of measures of security to guarantee the safety of the public. Here the protection of society is the desideratum.

I submit that the *attitudes* of punishment and prevention are, however, so diametrically opposed both in criminal procedure and penal practice that either one or the other point of view must be subscribed to before an integrated penal administration is possible. To develop penal reform by maintaining both points of view can lead only to confusion—as is the case.

The conflict is basically not one of ideas, though it should be, but rests upon emotional attitudes. Briefly and simply stated the problem is *in what spirit shall we approach the entire fields of criminology and penology?* Shall we be narrowly moralistic or objective? The charge of being slobberingly sentimental must be levelled at those hard-boiled but soft-headed workers and public laymen who insist that they know with whom they have to deal. The answer is of course, that they do not know. Their opinions are based upon their observations of the prison population. Their experience is limited to the desperate behavior of men trapped in a wall. But the conduct of inmates is the end-product. The administrators too often lack the *appreciation* of the almost baffling complexities which enter into

character formation and growth. They fail to place the criminal in the setting which science demands. The criminal, it has been said before but cannot too often be reiterated, is what he is because of his chromosomes and environment, not because of the Grace of God or the temptation of the devil. Fundamentally chance not choice makes men what they are. Historically determined events not capricious freedom of will determines behavior.

This is the crux of the conflict in penal theory and practice. If our aim is to prevent the incidence of crime and reduce the rate of recidivism in order to secure society we must above all else seek *to understand* the causes of crime careers. This calls for the cultivation of the scientific outlook. Praise and blame are irrelevant in diagnosis and prognosis. The criminal law is built upon the concept of free moral responsibility and penal treatment is founded upon the belief that the will is not free, that *institutional* treatment will alter habits. Unfortunately institutional treatment carries with it the moral attitudes of the public, the legislators, courts and penal administrators.

Mental disease, not so many years ago, was thought to be a visitation from God sent to punish the morally diseased.<sup>7</sup> The eyes of the chained insane were gauged out with red hot irons to drive out the evil spirits. We learned something about physiology, neurology and psychiatry and now we institutionalize the insane or remove the causes of the functional disturbances.

We still literally in some prisons and in the police stations of a majority of jurisdictions lash the evil will of some criminals.<sup>8</sup>

It may be asserted that a rationally constructed criminal law will no longer be a criminal law. The assertion is sound. A penal code which surrenders the basic concept of moral responsibility for a legal or social responsibility and which determines the disposition of the offender in light of his social dangerousness rather than in terms of legal categories will no longer retain a classical character. That the construction of such correctional code is not beset with difficulties and even danger is not denied. Such code was in fact developed by Enrico Ferri in 1921 but was not accepted by Fascist-Catholic Italy because of its radical character. The various republics of the Soviet

<sup>7</sup>At the beginning of the nineteenth century Dr. Heinroth wrote, "No one becomes insane unless he forsakes the straight path of virtue and the fear of the Lord." Quoted in Ferri, *Sociologia Criminale*, Vol. II, p. 140.

<sup>8</sup>After Beccaria wrote his little pamphlet he was called a protector of robbers and murderers since he wished to abolish torture. Abbe Jachinei published four volumes against Beccaria "the destroyer of justice."

Union, speaking generally, have adopted a code which incorporates the basic principles of the positivist school.<sup>9</sup>

The logical development of such legislation will result in criminal jurisprudence becoming a branch of social welfare legislation. This tendency is, in fact, observable at the present time. Juvenile proceedings are equitable and not criminal in character. In New York State the Department of Social Welfare and not the Department of Correction has jurisdiction over juvenile delinquents under sixteen years of age. Recently family and domestic relations courts exercise jurisdiction over mothers previously left to the criminal courts.

While the Continental countries have struggled with the theoretical problems involved in combining the classical and positivist schools, England and the United States have built up practical agencies incorporating the newer ideas. Germany, Belgium, France, Switzerland and Austria to mention but several of the countries, have attempted for the most part unsuccessfully, to accomplish through legislative action what this country and England have accomplished practically. We have worked from the bottom up. Juvenile delinquency, juvenile and adult probation, parole, the Borstal Institutions, the women's reformatories, and the indeterminate sentence were first haltingly and sporadically experimented with, before definitely being accepted by the legislatures.

But these institutions are a foreign growth upon our traditional administration of criminal justice. The criminal law deals with specific crimes and accompanying punishments.

At the same time we vaguely feel the needs for the individualization of treatment. Juvenile delinquency proceeding and practice, probation, the indeterminate sentence and parole represent the compromise.

One may well doubt whether England and America are more successful with a willingness to experiment in the absence of a clear penal theory than the European countries with their double entry penal theories. There can be no concealing the fact that European students have reached an impasse in their theoretical formulations. This is best typified by the irreconcilable contradictions of the new Italian penal code of 1932. The Italian Code represents the first in continental Europe to systematize the measures of security for social defense. Yet this system is incorporated alongside of the classical system of punishments. Generally the result is that *after* a socially

<sup>9</sup>In fact, the Soviet Union has a correctional instead of a penal code. The word is unimportant except that it indicates the new spirit of the Soviet legislators and administrators.

dangerous criminal, *e. g.*, a recidivist, has been *punished* ("castigated" is the official expression of the Italian Ministry of Justice) for a term of five, ten or fifteen years he is placed in a preventive institution under the administration of the measures of security for a further indeterminate sentence. The classical system of punishments and the modern concept of social defense cannot dwell alongside each other without leading to fantastic results. First the offender is given the punishment he deserves and then treated in order to protect society. (A similar practice is provided for in other European codes.)

Contemporary penal theory is as muddled as current practice. They both suffer from the common defect of attempting to mix oil with water. Do we wish to *punish crimes* or do we wish to *protect society* by *preventing the development of crime careers*? These aims are contradictory in principle and in practice. They rest upon radically different assumptions as to the nature of criminals, the character of crime, and as to the means of dealing with them.

A rational penal theory will aim at the protection of society. It will not traffic with punishment as such. It will interest itself in reforming those offenders who are reformable and will indefinitely or permanently segregate those who are not whenever they commit offenses dangerous to the orderly existence of social life. Such penal theory must necessarily be integrated within a system of jurisprudence whose central aim is also social welfare. From the moment of arrest of an offender to the time of complete surrender of state supervision of the inmate the entire administration of justice must be so shaped that all cooperating agencies function in terms of the protection of society.

I am not unmindful of the legislative, judicial and administrative problems involved. Nor am I unaware of the incomplete knowledge at our disposal. Penal theory to be significant and operative must enter the daily thinking habits of a majority of the people. Penal theories which are more than formal reflect the social, economic and religious values of the culture.

This fact also accounts for the present conflict in treatment processes. We maintain views of criminals and their disposition which arose decades before the development of the social sciences. The revision of our social institutions which some of us may believe is necessitated by what is known both in physical and social science has as yet not infiltrated and cross-fertilized the traditional attitudes which are still dominant. Hence the lack of far-reaching progress in the treatment of offenders.

We shall probably continue placing our faith now in one method of treatment which appears promising and conforms with the newer insights and then choosing another method to conform with the wishes of the more conservative majority. The resulting inconsistencies represent the inevitable price paid to divided opinion and insecure knowledge. The confidence of the public must be gained but it can be won only after the inefficiency of traditional methods of treatment are demonstrated as measured by the results of modern methods of treatment. All the more important is it, however, that the goal be defined so that direction be given to our thinking and experimentation.

Influential groups of laymen must be educated in these newer attitudes. State legislators must be made aware of changed conceptions. A new judiciary in part made possible through modified law school curricula and perhaps civil service selection of the judges must arise. State Judicial Committees and commissions on law revision (New York State, in 1934, is the first to have established a commission on law revision) will be enabled to revise both the substantive criminal law and the codes of procedure.

Training schools for penal administrators will prepare a professionalized personnel. I believe that the traditional method of incarceration for most prisoners will gradually give way to the more enlightened help of the corrective forces of community life where natural relationships with society may be maintained. Working camps, cottage colonies, farms, employment under state supervised industries are various forms of supervision which can be developed.

In a recent address before the New York Academy of Medicine, former Chief Justice Benjamin Cardozo of the New York State Court of Appeals stated:

"I do not say that either psychology or medicine or penology has yet arrived at such a stage as to make a revolution in our system of punishment advisable or possible. Here, as in so many fields, we shall have to feel our way. It may be by slow advances, by almost insensible approaches. I have faith none the less, that a century or less from now, our descendants will look back upon our penal system of today, with the same surprise and horror that fill our minds when we are told that only about a century ago 160 crimes were visited under English Law with the punishment of death and that in 1801 a child of thirteen was hanged at Tyburn for the larceny of a spoon."

Blue-prints are a bit more difficult to interpret than finger-prints. I am the first one to appreciate the trying complexities of prison ad-

ministration, the discouraging problems of inmate classification, the lack of trained personnel and facilities, the rooted loyalty of the inmates toward each other as against their cooperation with the administration, the thousand and one tensions and frictions which operate against an integrated treatment program.

I sympathize with the administrator who demands a practical program in light of the prison situation and populations as they *exist*. But the most practical treatment is one that rests upon a program, *i. e.*, a theory. The theory need not and in all likelihood cannot be applied wholesale. It will have to be modified and will be limited by the situation peculiar to each institution.

But in order that the route be chartered the goal must be defined. We shall have to feel our way, but we must know where we are going. We must be practical but we also need a program.