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Treatment of Persistent Offenders Outside of the United States

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THE TREATMENT OF PERSISTENT OFFENDERS OUTSIDE OF THE UNITED STATES

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I.

That the treatment of criminals should be individualized is certainly one of the few propositions in practical criminology which are accepted by almost everyone. How can the program of individualization be carried out?

Within the general scope a number of concrete and practical problems arise. Science has to investigate and to describe the typical situations, especially the types of criminals necessitating special treatment.[2] Lawmakers have to provide for the measures adequate to the particular situations. Judges, with the help of experts and practical workers (for instance, of the probation officers) have to search for the correct diagnosis in every concrete case and to prescribe the most appropriate treatment. Administrative agencies, under the supervision of judges and with the help of persons mentioned, have to apply the prescribed treatment in a manner which would make it the most effective.

Practical problems of the described type are many. Among them, that of the treatment of persistent offenders will be studied in this paper.[3]

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[2] The objection is sometimes made that the treatment of offenders based on classification is no longer individualized. This is an objection similar to that against the use to predictive tables; the reply should be the same: to individualize the treatment does not mean to rely exclusively on the intuition and the common sense of the judge (cf. S. Glueck, "Individualization and the use of predictive devices," *Journal Law*, 23 (1932-1933), 76).

[3] Out of the extensive literature on the subject the following works should be mentioned. F. Exner, *Die Theorie der Sicherungsmittel*, Berlin, 1914; W. Valsecchi, "Pene e provvedimente di sicurezza," *Scuola positiva*, 30 (1920); E. M. Foltin, *Die chronish erheblich Gefährlichen mit besonderer Berücksichtigung ihrer Behandlung im englischen Recht*, Wien, 1927; E. Ferri, "Les mesures de sécurité et les peines," *Revue Internationale de Droit Pénal* (later on quoted: R. I.), 2 (1925); Q. Saldaña, "Peines et mesures de sécurité, *ibid.*, 4 (1927); F. Flandrak, *Die persönlichen Sicherungsmittel im Strafrecht und Strafverfahren*, Wien. 1932; B. V. A. Röling, *De wetgeving tegen de zogenaande beroeps-en gewoontemisdadigers*, Haag, 1933; B. A. V. Röling, "Grundsätzliches zur Bekämpfung des Gewohnheitsverbrechertums," *Monatsschrift für Kriminalpsychologie und Strafrechtsreform* (later on quoted: M.), 25 (1934); H. Henkel, "Das Sicherungsverfahren gegen Gemeingefährliche," *Zeitschrift für die gesammte Strafrechtswissenschaft* (later on quoted: Z.), 57 (1938).

The concept of persistent offenders is the creation of the sociological school in criminology. In the early 1880's this school formulated the following propositions: 1. Criminals are to be classified into acute and chronic, and the latter subdivided into beginners and incorrigibles; 2. Segregation is the only sensible end of punishment as regards incorrigible offenders.[4]

For the further development in Europe, the ideas of C. Stooss have been decisive.[5] In his opinion, there are cases in which *the* aim of punishment, reformation, cannot be attained; in such cases, to which persistent criminality belongs, punishment must be replaced by another treatment, for which Stooss coined the term of "measures of social security." These ideas were realized in the Draft Penal Code for Switzerland (1893) which he completed under commission of the Swiss federal government. This draft permitted the court to replace punishment by indeterminate preventive detention, if the judge was convinced that punishment would not be efficient and could not prevent recidivism.

Theoretically C. Stooss was wrong: reformation cannot be considered *the* end of punishment: it is only *one* of its possible ends. Therefore from the impossibility of reformation it cannot be deduced that punishment should be replaced by something else. But he was right in that *reformatory* punishment should be replaced by another treatment as regard people who cannot be reformed. Very soon preventive detention for persistent offenders became the major point at issue in the criminological discussion.[6] After long struggles a kind of compromise was realized and an agreement reached. The essence of the compromise was: if, in a concrete case, retribution

[4] F. Liszt, "Der Zweckgedanke im Strafrecht," Z. 3 (1882), 33-43. Theoretically the idea that there are incorrigible criminals might be contested. From the practical viewpoint it is unfortunately obvious that there are offenders who cannot be reformed by the existing means of treatment. The problem has been recently discussed by Rohden, "Gibt es unverbesserliche Verbrecher," M. 24 (1933) and L. Verwaeck, "Gibt es Anhaltspunkte für die Unverbesserlichkeit des Verbrechers," *ibid.* 25 (1934).

[5] Cf. C. Stooss, *Der Geist der modernen Strafgesetzgebung*, Wien, 1906; "Strafe und sichernde Massnahme," *Schweizer Zeitschrift für Strafrecht* (later on quoted: S. Z.), 19, 1905; "Zum schweizerischen Strafgesetzenwurf," *ibid.* 31 (1918); "Der Dualismus im Strafrecht, *ibid.* 40, 1927; "Zur Natur der sichernden Maassnahmen, *ibid.* 44 (1931); "Die kriminalpolitische Bedeutung der sichernden Maassnahmen, M. 19 (1928). The rôle of Stooss has been stressed by W. Mittermaier, "Über die Entwickelung der Strafgesetzgebung seit dem Entwurfe Stooss," S. Z. 43 (1930).

[6] The general problem of the persistent offenders has been discussed at the congresses of the International Criminological Association in Brussels in 1910 and in Kopenhagen, 1913; at the international congresses of Criminal Law in Brussels in 1926 and in Paris in 1937; at the international penitentiary congresses in Prague, 1930, and in Berlin, 1935.

is not needed, but protection of society against dangerous individuals is necessary, measures of social security are to replace punishment; if punishment based on retribution is needed, but is insufficient from the viewpoint of social security, then measures of social security are to be added to punishment. The latter is the case with persistent offenders.

C. Stooss's draft has been important in another aspect too: it gave a practical circumscription to the problem of persistent delinquency. It eliminated, from the specific treatment based on the idea of segregation, not only juveniles and juvenile adults, but also: 1) mentally defective individuals; 2) habitual drunkards and 3) social parasites whose revolt against society is not active (as that of persistent offenders) but rather passive, i. e., vagrants, beggars, prostitutes, "souteneurs," etc.[7] This delimitation of the category of persistent offenders proved practical and hence has been followed by positive law almost without exception. In this way the problem gradually became concrete enough to be solved in an almost uniform way.

II.

As regards the practical application of the idea of segregating persistent offenders France could claim the honor of having made the first step by her law on "rélégation" of May 27, 1885.[8] Norway followed with the famous clause 65 of her criminal code of 1902, which has been elaborated by Goetz, a fervent adept of the sociological school. These laws applied the earlier pattern, that of Liszt: persistent offenders should be punished in a manner securing their segregation from society.[9]

[7] Further development added another class of offenders to be treated in a particular way—that of "hypersexuals," or of people habitually committing sexual offenses. For them the special treatment of sterilization seems to become the rule.

[8] The United States could have claimed the same honor for having created the indeterminate sentence and adult reformatories. As yet, 1) the indeterminate sentence is not a treatment but merely a technique to be applied to the persistent but also to mentally deficient and to reformable offenders; 2) the end of the measure was reformation and not durable segregation. In Europe the essence of the American measures was misunderstood and many criminologists invoked the American example in order to reenforce their arguments in favor of the segregation of persistent offenders. Today European visitors to the United States express the opinion that in this country the idea of individualization has been checked by the humanitarian idea. So, for instance, criticizing M. A. Elliott's *Conflicting Penal Theories in Statutory Law* (Chicago, 1931) F. Exner, "Amerikanische Strafgesetzgebung gegen Gewohnheitsverbrechertum," M. 25 (1934), shows that Elliott identifies classic criminology with the severe treatment of criminals and positive criminology with mild treatment; this testifies to a very superficial understanding of the new ideas in criminology (440-1, footnote).

[9] This is somewhat questionable as regards France: for *rélégation* (transporta-

On September 20, 1905, New South Wales enacted a "habitual criminal act," thus actualizing a movement started by J. Evans, director of the prison administration of the state of Victoria. This was the earliest law of the compromise type; according to it, criminals having committed at least three or four serious offences (especially described in law, which points out in which cases three and in which four sentences are necessary) may be sentenced to the normal punishment and, in addition to it, to detention "during His Majesty's pleasure."[10]

The same system was adopted by the British Prevention of Crimes act of 1908, which introduced into English law preventive detention. This detention is added to the normal punishment; the term is fixed by the judge (within the limits of 5 and 10 years), whereas, according to the governmental draft, detention had to last "during His Majesty's pleasure."[11]

The British reform influenced continental legislators: hence every draft criminal code comprised an analogous section on persistent offenders. The German draft of 1909 followed the system applied in France and in Norway, and the Austrian draft of 1911 the compromise system of New South Wales and of Great Britain, whereas the Swiss drafts of 1903 and 1908 continued to express C. Stooss's original idea of replacing, for persistent offenders, punishment by preventive detention.[12] In 1913 a new German draft was published which shifted to the compromise system.

For a certain time progress was checked by the war. After the war the problem was again taken up. Switzerland (1918), Germany (1919) and Austria (1922) published new drafts maintaining their respective positions.[13] In 1921 Italy made an attempt to open a new way introducing the concept of "criminality by in-

tion from France to a colony and, commonly, hard labor there) is added to the normal punishment. But French science recognizes the punitive character of the measure. Cf. Garraud, *Traité théorique et pratique du droit pénal français*, 2-e. edition, Paris, 1898, vol. II, 88-9.

[10] Other Australian states followed: New Zealand on Oct. 29, 1906, Victoria on Dec. 3, 1907, Tasmania on Apr. 13, 1907, South Australia in 1910, Queensland on Dec. 3, 1914, West Australia on Dec. 24, 1918. Out of other parts of the British Empire South Africa created a "habitual criminal act" in 1917.

[11] The act was obviously an application of the program of individualization, for its other part created the extremely successful "Borstal system" for the treatment of juvenile adults.

[12] Concerning these drafts see F. Liszt, "Die sichernden Maassnahmen in den drei Vorenwürfen," *Oesterreichische Zeitschrift für Strafrecht*, 1 (1910).

[13] Concerning these and later drafts see F. Exner, "Die bessernden und sichernden Maassnahmen im deutschen Entwurf 1919," S. Z. 34 (1921) and C. Stooss, "Die sichernden Maassnahmen des deutschen Strafgesetzentwurfs," *ibid.* 38 (1925).

clination," a mitigation of the concept of born criminality coined by Lombroso.[14]

Later years brought rapid advance. On April 22, 1927, Sweden enacted a special law concerning measures of social security against dangerous offenders. She was followed by three dictatorships: the Hungarian (law X of the year 1928), the Spanish (criminal code of Sept. 8, 1928, repealed by the republican government on April 15, 1931) and the Yugoslavian (criminal code of Jan. 27, 1929). On Feb. 27, 1929, Norway replaced clause 65 of her criminal code by new statements. On June 25, 1929, Czechoslovakia and on April 9, 1930, Belgium enacted special laws on dangerous offenders. The Danish penal code of April 15, 1930, and the Polish penal code of July 11, 1932, comprise corresponding sections. Finland joined the movement with a special law of May 27, 1932. On Aug. 4, 1933, the Spanish republic gave to the new idea the most drastic expression in a law which sometimes is called "a law on punishment without crime."[15] On Nov. 24, 1933, the new born German dictatorship introduced into the old penal code of 1871 the provisions of the drafts concerning persistent offenders. On June 16, 1937, Sweden replaced her law of 1927 by a new one which enlarged the possibility of applying the new measure.[16]

On Dec. 21, 1937, after 44 years of deliberation, the new Swiss penal code was ratified by the federal assembly; the code comprises a section concerning persistent offenders. The confirmation by popular vote took place on July 3, 1938.[17]

Draft penal codes not yet enacted, especially those of Greece (1924) and France (1932), comprise sections concerning the treatment of persistent offenders.[18]

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[14] Concerning this draft see: A. Lenz, *Ein Strafgesetzbuch ohne Schuld und Strafe*, Graz, 1922; La réforme de la justice pénale en Italie," S. Z. 33 (1920); Sh. Glueck, "Principles of a Rational Penal Code," *Harvard Law Review*, 41 (1927-1928).

[15] L. J. Asua, M. 25 (1934), 86 ff.

[16] The majority of the laws mentioned above (until 1932) have been reprinted in their original language, sometimes with a translation into English, German, or French, in Röling's "The wetgeving" . . . etc. Concerning the German law of 1933 see F. Exner, "Das System der sichernden und bessernden Maassnahmen nach dem deutchen Gesetze," Z. 53 (1934) and K. Mannheim, "The German Prevention of Crime Act," *Journ. Crim. Law*, 26 (1935-1936). Concerning the Spanish law of 1933 see L. J. Asua, *loc. cit.* Concerning the new Swedish law see Z. 57 (1938), 539-40.

[17] Without awaiting the enactment of the federal penal code, the cantons of St. Gallen o, Vaud, Thurgan, Glarus, and Hargan, had introduced the segregation of persistent offenders.

[18] For the Greek drafts see *Revue Pénitentiaire*, 50 (1926), 1 and 153, and R. I. 13 (1936), 13; for the French draft—R. I. 9 (1932).

In the meanwhile the movement has made progress outside Europe too. The Mexican penal code of June 29, 1928, the Chines penal code of Jan. 1, 1935, and the Cuban code of social protection of Feb. 10, 1936, introduced the segregation of persistent offenders. Draft penal codes of Argentina (1932) and Brazil (1933 and 1935) proceed in the same way.[19]

Summing up, it may be said: the special treatment of persistent offenders which, some 15 years ago, was a rare exception, has become a general rule; a modern penal code cannot be conceived without corresponding stipulations.[20]

III.

The recent laws and draft laws concerning persistent offenders are so similar to one another that their separate study would lead to tiring repetitiousness. A comparative study might be more suggestive, comprising the following problems: 1) Who is eligible for the new treatment? 2) What is the essence of the treatment? 3) Who is responsible for the application of the new treatment? 4) What is the type of sentence and, in addition to this, what are the terms to be served? 5) What are the conditions under which the persistent offender can be released? 6) Who is responsible for the release? Finally, 7) What is the juridical status of the released?

1. *Who is eligible?* The end of the treatment studied in this paper is to eliminate criminals who proved to be incorrigible. The first condition of eligibility is therefore the existence, in the life-history of the criminal, of many reformatory treatments which did not prevent him from committing new offences.[21] Many laws and drafts give precision to this point, and mention the number of

[19] For the Mexican code see M. 20, 21 and 22 (1929-1931) and R. I. 8 (1931); it was repealed on Aug. 13, 1931; cf. M. 22 (1931), 750; for the Chinese code—M. 22 (1931) and R. I. 12 (1935); for the Argentine draft—*Rivista di Criminologia* (edited in Buenos Ayres), 2 (1933); for the Brazilian drafts—S. Z. 51 (1937), 391 ff.

[20] The development in Russia cannot be followed in this paper, for in that country the treatment of offenders was, during many years, based on completely different principles which do not permit any comparison as regards special problems. During the last few years the country is rapidly returning to almost "classic" forms of punitive treatment. Cf. my "Letter to the editor," *Amer. Journ. Sociol.*, July, 1937, and my paper "Juvenile Delinquency in Soviet Russia" in Prof. W. A. Lunden's *Systematic Source Book on Juvenile Delinquency*, Pittsburgh, 1938.

[21] Spain (1933) forms an exception: people who display criminal tendency by constant association with criminals can be submitted to the treatment foreseen for incorrigible offenders. In Victoria and in Western Australia, in some cases, criminals can be submitted to the special treatment for persistent offenders beginning with the first offense.

previous unsuccessful terms in penal institutions: at least two (Norway 1902, Austria 1911, Czechoslovakia, Denmark,[22] Germany 1933, Sweden 1937); at least three (England, Hungary, Yugoslavia, Poland, Finland),[23] at least four (Sweden 1927 and Cuba), at least five (Germany 1909 and 1919). In some cases the number of terms required depends on the atrocity of crimes committed: a smaller number of more serious offences is considered equivalent to a larger number of less serious ones (France 1885 and 1932, New South Wales and all the later Austrian laws, Spain 1928 and 1933, Belgium, Italy). A few legislations give a more elastic formula, using the term "many" (Switzerland, Norway 1929). Often a time-limit is fixed by the legislator after which previous imprisonments lose their symptomatic value: only terms served during the last five years (Sweden, Hungary, Yugoslavia, Finland) or during the last ten years (France, Italy) are to be taken into consideration; time spent in prison is, of course, to be excluded.

All Australian laws, beginning with that of New Zealand, as well as Austria 1911 and Germany, explicitly state that, for the application of special measures designed for habitual offenders, crimes committed outside the country are as relevant as crimes committed in it.

Only rarely does the existence of this first condition suffice in order to declare an individual eligible for segregation; it is so in France and Belgium. Ordinarily the judge is directed to apply segregation only if some additional symptoms are present. The idea is always that of the probable insufficience of the normal treatment; such is the simple formula applied by Switzerland, Austria, Sweden and Norway 1929; England modifies it saying that the special treatment should be expedient for the protection of the public. More frequently the idea is expressed in a somewhat more complex form; either the dangerousness of the criminal (i. e., the probability of new offenses) is explicitly mentioned (Norway 1902, Austria 1911, Denmark, Poland and Finland), or the fact that the criminal belongs to the category of professional or habitual offenders is stressed (Germany 1919 and 1933, Denmark, Hungary, Poland), or else the inclination or the persistent tendency to crime must be present (Switzerland, Spain, Italy). As can be seen from the enumeration, two symptoms are sometimes mentioned by the same law; generally

[22] One major sexual offense suffices.
[23] One previous crime suffices, if the offender served at least 12 years in prison.

it happens with dangerousness and the characterization of the criminal as professional or habitual. Some legislators try still more to help the judge in his difficult task and mention some additional symptoms; such is the case in Norway 1902, England, Spain, Czechoslovakia and Italy. The nature of the crime, its motive, the general conduct of the criminal ("criminal habits and mode of life," in England), his means of existence, etc., are on the list.

Commonly there is a third condition: the newly committed offence must be of a certain gravity. For instance, in England only those offenders are eligible who have been sentenced, for the last crime, to at least three years of penal servitude. Sweden and Finland follow the British example. In all Australian laws, the newly committed offence must belong to the number mentioned in a special schedule. According to Sweden 1937, it suffices that the newly committed offence could be punished with penal servitude. In this and similar ways persistent offenders are discriminated from social parasites.[24]

2. *The type of the treatment.* The treatment of persistent offenders is 1) either aggravated punishment, or 2) a measure of social security replacing punishment, or 3) a combination of punishment and of a measure of social security, the latter being applied after the former.

The first system is now of historical interest only. France applied it in 1885, but the draft of 1932 does not follow the law in force. Norway 1902 introduced the system in positive law, but practically did not apply it (*Cf.* below ch. IV); the law of 1929 belongs to another type. The first German draft (1909) acted in the same manner as Norway 1902, but, since 1913, Germany has shifted to the third system.

The second system is applied in some places, but presents rather an exception: merely Hungary, Denmark, Sweden, and Switzerland have accepted it. Dominance has been gained by the third or compromise system.[25]

Practically the difference between the systems is not very large. Special institutions for the detention of incorrigible offenders exist only in a few countries; in others preventive detention is effected

[24] Only France (1885) (no longer in 1932), Czechoslovakia and Switzerland seem to confuse both cases.

[25] Exceptionally law permits the judge to choose between adding preventive detention to punishment or replacing punishment by detention. This is the case in Victoria and in the German draft 1925. The later draft (1927) returned to the compromise system; the motives (p. 45) explicitly say that this was done because of the fear to undermine the idea of punishment.

in prisons. Where special institutions exist, there is no great difference between them and prisons.[26]

The measure is generally called "preventive detention." New South Wales and Southern Australia apply the term "confinement," other Australian states—the completely inappropriate term "reformatory prison."

3. *Who applies the treatment?* In the majority of cases the segregation of persistent offenders is ordered by the judge trying the case. There are a few exceptions or, more exactly, additions to this. According to the Australian draft 1911, the judge had to sentence the criminal to normal punishment and to declare his eligibility for segregation; after the criminal had served the term of punishment, the same judge had to decide whether or not segregation was still necessary.

A better way is shown by Sweden. In that country cases in which preventive detention is legally possible are to be submitted to a preliminary examination by a special committee of five, with the public prosecutor as chairman and at least one judge and one physician as members. Only if the advice of the committee is positive, is the judge allowed to sentence the criminal to preventive detention, but he is never forced to do so. The short lived Mexican code made the application of the measure dependent on the "supreme council of social defense."

4. *The form of the sentence and the term to be served.* To the idea of the segregation of persistent offenders the indeterminate sentence is appropriate: if one has been segregated because of his dangerousness he must remain outside society as long as his dangerousness lasts. A legal minimum (not maximum) is logically consistent with the idea, especially if preventive detention replaces punishment.[27]

Only some legislators have been logical enough to introduce the indeterminate sentence. In the application there is no minimum in New South Wales, all later Australian laws, Spain 1928, Denmark, Germany. There is a legal minimum of two years in Italy (three years if the criminal belongs to the number of professional or habitual offenders, and four years if he is a criminal by in-

[26] As regards Italy cf. F. Antolisei, "Pene e misure di sicurezza," *Rivista Italiana di Diritto Penale*, 5 (1933), 133-6 and N. Cantor, "The New Prison Program in Italy," *Journ. Crim. Law*, 26 (1935-1936), 224-6. Concerning Germany, cf. H. Mayr, "Drei Jahre Sicherungsverwahrung," M. 29 (1938), 22.

[27] Otherwise the offender could be released earlier as compared with the case where he would have got a normal sentence and would have been sent to prison for a definite term. If detention is added to imprisonment, this possibility does not exist.

clination), of three years in Hungary (the judge being allowed to increase the legal minimum in his sentence), Finland and in Switzerland, five years in France 1885, and Poland, and ten years in Austria 1911. In Sweden 1927 the prisoner was to be detained at least two years after the expiration of the term imposed by the judge; according to the recent law, the minimum is to be determined by the judge, but cannot be below five years.

Other legislators have deviated from the logical line. The indeterminate sentence with a legal maximum was law in Norway 1902.[28] Indeterminate sentences with legal maximum and minimum are applied in Czechoslovakia (1-5 years), Yugoslavia (5-10 years), and Spain 1933 (1-5 years).[29]

Finally, several legislators apply to preventive detention the system of determined sentence. These are England, where the judge has to fix a term between 5 and 10 years; Belgium (between 5 and 10 years for minor cases; for major cases 10 or 20 years are fixed by law), Norway 1929 (with the possibility of ulterior prolongation by the judge), France 1932 (5-15 years) and Vaud (1-10 years). The fixation is of course not absolutely definite, for conditional release can in any case curtail the duration of the measure.

5. *Conditions of release.* The logical inference from the essence of the measure, as regards the possibility of release, is the following: after the expiration of the legal minimum (if there is any) or of the minimum fixed by the judge the detained must be released if he no longer presents any (or any important) social danger. This does not necessarily mean reformation, for within the limits of the problem studied reformation can be merely a happy, but rather improbable event. Yet it is known that, with age, criminogenic tendencies decline.[30] If, furthermore, the prisoner could be reasonably expected to live a honest life (for instance, if there is some job for him, or if his relatives present sufficient guarantees of support), an experimental release can be made.

The idea that persistent offenders should be released if they ceased to be socially dangerous (and only in this case) is explicitly expressed in Switzerland, England, Germany (since the draft of 1925), Sweden, and Italy. Other legislators revert to the accustomed formula of reformation and order release for the criminal

[28] This was 15 years or the trebled term of the punishment primarily fixed by the judge.

[29] There is the possibility of later prolongation by the judge.

[30] This has been brilliantly shown by Sh. and E. Glueck, *Later Criminal Careers*, New York, 1937, 124 ff. The dangerousness does not decline as regards mentally deficient people; this is one reason more to separate both problems in theory and in practice.

if he has been socially readjusted (i. e., reformed). This is the case in France 1885 ("good conduct"), New South Wales and later Australian laws ("sufficiently reformed or other good reasons"), early German drafts, Austria 1911 (at least two years of good behavior in prison), France 1932 (if there are certain symptoms of social readjustment). It is well known that practically social readjustment is considered attained if the prisoner behaves well; in this way the release of a dangerous offender is made dependent on his institutional reformation, and this is of course unsatisfactory.

Several legislative enactments do not describe the conditions of release, relying on the common sense and the tact of the agencies responsible for release; this is the way of Norway, Denmark, Belgium and Poland.

Statements are comprised in the laws of some countries which impose on the agencies of release the duty to study periodically the question of release. In Finland this has to happen every year, in Spain 1928 and in Hungary every two years, in England, Belgium and Germany every three years.

6. *Who is responsible for release.* In the majority of cases it is the judge (of the trial or the judge of the area where the offender is detained) who has to decide whether the offender should or should not be released. This is the system applied in France, Italy (special "surveillance judge"), Spain 1933, Germany 1933, Finland (prison judge). In Hungary and in Belgium the judge is also competent, but is allowed to act only after having received an application from the detained and, in addition to this, the advice of a special board (Hungary) or the request of the public prosecutor (Belgium). Administrative agencies are competent in Norway (a special board, with one judge as member), New South Wales and other Australian states (the governor),[31] England (the home-secretary, who is helped by advisory committees), Denmark (a special board in which at least one judge, one psychiatrist and one social worker are acting), Sweden (the same board which preliminarily investigates the cases).

7. *The juridical status of the released.* In the majority of laws the release of persistent offenders is always conditional. In England and in Austria 1911 it may be conditional or definite; the released is placed under special supervision in Switzerland, Australian states, England, Hungary, Sweden, Belgium and Germany. In New Zealand and Germany probation officers are to carry on

[31] In New Zealand, Tasmania and Queensland the prisoner may apply for release to a judge; the judge is to make an inquiry and, if the sufficient reformation of the detained is proved, is to recommend the governor to release the prisoner.

the supervision. In England, Western Australia, and Switzerland special societies may be granted this function.

The period of probation lasts no longer than two years in New Zealand and Queensland, two years in other Australian states, three years in Hungary, five years in England and Finland, ten years in Sweden; it is indetermined in Germany. The question of the conditions to be carried out by the released is dealt with in many details by Australian legislation. The recommitment of a licensed prisoner to preventive detention may take place for the following reasons: 1) if he fails to report to the competent agencies his address and occupation; 2) if he leads a dishonest life; 3) if, being in trouble with justice, he gives a false name or a false address; 4) if he is found to be associated with criminals; 5) if he is convicted for an indictable offence or for any offence punishable by more than three months of imprisonment; in Western Australia, instead of the last regulation, actual conviction to imprisonment over one month is required.

Among European legislations, those of Finland, Sweden 1937 and Switzerland give precise indications. In all countries mentioned the released can be recommitted to the institution for preventive detention if he escapes supervision or counteracts the advices of the agency of supervision; in Finland and in Sweden he may be recommitted, in the case also if he would again become "dangerous." If he perpetrates a new offence, he may, and in certain cases must be, recommitted to detention; as an exception Sweden states that, in some cases, he should serve a term in prison (the regime in prison being more severe than in institutions for preventive detention).

A second release is not impossible. In Finland it can be tried only ten years after the day of the recommitment.

If, during the period of probation, the released behaves well, his release becomes final. Formulas vary: in the majority of Australian states "he ceases to be a habitual offender"; in Victoria "he shall be deemed to have suffered" the penalty; in Western Australia, on the contrary, the sentence "is deemed to be annulled."

IV.

On the basis of the knowledge gained by comparative study, a "standard law" on persistent offenders could be prepared. Yet is this worth while? Does the new measure work sufficiently well in order to be imitated and developed? The answer depends very much on the results of the application.

These results are to be estimated from a specific viewpoint. The relative number of persistent offenders who behaved well after release is not decisive (as it is concerning reformatory treatment): for the reformation of persistent offenders is not expected, and if cases of repeated criminal behavior of the released become frequent this testifies only that the praxis of release is too lax and should be strengthened.

Decisive are two points: 1) whether the new laws can be enforced; in other words, whether they are applied in a sufficient number of cases and in a sensible way? 2) whether the new laws are followed by a decrease in the number of offences committed by persistent offenders; in other words, whether the criminal profession is attained in its roots?

There are only a few data available, and this is natural, when taking into consideration that the large majority of laws are less than ten years old. As regards the first question, the early laws have been complete failures. The French law of 1885 has been applied rather frequently, but it is commonly recognized that the conditions of "rélégation" were circumscribed in a wrong way, so that the law has not reached the individuals to be segregated.[32] In Norway, until 1924, the famous clause of the penal code of 1902 was applied in two cases only;[33] this means that the law has encountered unanimous resistance. In England the preventive detention has been applied only in 967 cases during twenty years (1912-1932);[34] this figure is extremely small if one takes into consideration that, in 1929, English prisons comprised 2,325 offenders having served more than 20 terms, 2,622 11-20 terms and 3,382 6-10 terms; almost all were eligible for preventive detention.[35] It seems that judges have been reluctant to apply the new measure which was not sufficiently supported by public opinion.[36] The prisoners feel that their sentence to preventive detention is an unjust second sentence for the crime which brought them penal servitude.[37]

In New South Wales, until June 30, 1928, 178 individuals (in-

[32] Cf. Garraud, loc. cit., 124-6.

[33] Z. 56 (1937), 258.

[34] Later years have not produced any change in the situation: criminal statistics for 1934 and 1935 show respectively 22 and 31 cases of application.

[35] H. v. Hentig, Über den Einfluss der Sicherungsverwahrung auf die englische Kriminalität, Z. 49 (1929). S. Hobhouse and A. Brockway, *English Prisons To-day*, London, 1922, 443, stress "the legal difficulty in applying the definition of habitual criminals to the case of particular men."

[36] Report of the departmental committee on persistent offenders, May, 1932, published by His Majesty's Stationery Office, London, 1932.

[37] Quoted from F. Hauptvogel, "Die Sicherungsverwahrung der Gewohnheitsverbrecher in England und ihr Vollzug," Z. 51 (1931); the author refers to an unpublished report.

cluding one woman) were declared "habitual criminals." Out of them 28 still served the definite term and 57 were in the indeterminate stage.[38] In Victoria the number of detained, under the law of 1906, was a little larger. There were 133 such people in prisons on June 30, 1921, 183 in 1926, 303 in 1930.[39] The increase of the figure shows that gradually the law becomes more and more applied.

The Swedish law 1927 has been applied about 150 times; however, people expect that the new law will double that figure.[40] In Norway the law of 1929 has been applied in 32, 84, 35, 30, 8 and 9 cases respectively in the years beginning with 1930. The decrease is explained by the fact that the majority of persistent offenders are now segregated, and also by the fact that the absence of special institutions for the new treatment relegated it to the ordinary prison, and that this is considered unjust by the population and has decreased the popularity of the law.[41]

In Belgium, during the years 1931-1933, the law of 1930 has been applied in 171 cases; 47 of the sentenced had already served at least 10 terms in prisons; 24—at least 20 terms, 10—at least 30 terms.[42] In Germany, the law on persistent offenders has been vigorously applied. In 1934, 3935 individuals have been submitted to the new treatment, and 1318 in 1935.[43] The total number of persistent offenders in Germany was estimated (in 1927) about 8,500.[44] If the selection was correct, this would mean that about half of them were already segregated.

As regards the effect of the new laws on the evolution of professional criminality, it is reported that, in New South Wales, the habitual criminal acts had a deterrent influence on persistent offenders; they migrated to other parts of the Australian Commonwealth and forced the corresponding governments to enact similar laws.[45] On the contrary, in Great Britain the deterrent effect did not appear. This proposition can be corroborated in the following way: 57% of the offenders sentenced to preventive detention have been burglars. Yet the relative number of burglars has increased from 6.90 (pro 100000) in 1899-1903 to 11.10 in 1925.[46] Later on

[38] The official Year-Book for New South Wales, 1938-9, 551.
[39] Victoria Year-Book, 1924-5, 311 and 1929-30, 108.
[40] Z. 57 (1938), 540.
[41] Z. 56 (1937), 259.
[42] H. v. Hentig, Beharrungsverbrecher, S. Z. 49 (1935).
[43] H. Georgie, Zum Vollzug der Sicherungsverwahrung in Deutschland, Z. 55 (1936) 613 ff.; H. Mayr, Die Sicherungsverwahrung in Süddeutschland, M. 27 (1936); H. Mayr, Drei Jahre Sicherungsverwahrung, M. 29 (1938).
[44] R. Heindl, *Der Berufsverbrecher*, Berlin, 1929, 194.
[45] P. E. Aschrott and E. Kohlrausch, *Reform des Strafrechts*, Berlin, 1936, 162.
[46] H. v. Hentig, loc. cit., 64.

it has slightly decreased again—to 8.90 in 1935.[47] Of course, the extremely rare application of the law could not have had any effect on criminality, the number of eliminated individuals being too small.

The results of more recent laws cannot yet be estimated. But the fact must be stressed that no country abolished the special treatment of persistent offenders after having introduced it, that some have already expanded their earlier laws (Spain and Sweden) and that other countries are prepared to do so (Great Britain). This is a reason to assume that everywhere the measure as such is considered adequate to modern needs.

As regards the best forms of the application of the idea certain points have to be clarified. The chief is the necessity of a complete differentiation between prisons and institutions for the detention of persistent offenders: prisons should be reformatories, i. e., institutions where attempts would be made to socially readjust people treated, whereas institutions for preventive detention should be organized according to simpler and less expensive patterns, securing society from new evil deeds on the part of the inmates, submitting them to discipline in the extent necessary to keep order and procuring them as much work as desirable from the viewpoint of decreasing the cost of detention. The segregation of the "veterans of criminality" (an expression of C. Stooss) would largely facilitate the task of the prison administration and increase the chance of reforming those people who still can be reformed.

Indetermined sentence with legal minimum (say—three years) and with the direction to study the possibility of release every two or three years is certainly the best solution. The treatment should be applied by the judge, according to the advice of experts; this would eliminate the application of the measure to mentally defective people for whom special institutions are needed. The release should take place only if the social dangerousness of the offender could be considered extinguished. The licensed should be supervised during a certain number of years.

The end of such a law would be to *destroy* the class of persistent offenders. The future will show whether there is a kind of *horror vacui* (in this case the place of the segregated would be promptly occupied by other individuals), or whether (and this is more probable) the breach of the specific tradition of the criminal class would be of salutary effect.

[47] This computation has been carried out on the basis of the Criminal Statistics for England and Wales, 1935.