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Impressions of an American Voyage by a Polish Criminalist

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IMPRESSIONS OF AN AMERICAN VOYAGE BY A POLISH CRIMINALIST[1]

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I left Poland to come to the United States with the intention of verifying there certain general ideas of the project for a Polish Penal Code. We wish to introduce in our penitentiary system the measures of safety. The idea as such is not new especially after the introduction of the "Preventive Detention" in England since 1908 and after the publication of various projects for Penal Codes in Central and Southern Europe.

One hears much of measures of safety in Europe at the present time, but allow me to say that there is very much misunderstanding as the result of the confusion of measures of safety with indeterminate sentences. The reports and the discussion during the Penitentiary Congress at London in 1925 are the best proof of this. They were not understood and a resolution was finally voted which did not answer the question put (although it avoided the conflicts raised).

That is why in order to avoid misunderstanding I will define my terminology, that is, what I understand by measures of safety and by indeterminate sentences, two institutions which are wholly different.

The measure of safety is an institution which implies the negation of the penalty-punishment. It signifies that society undertakes an action in order to defend iteslf in another manner than that which consists in inflicting on him a suffering. The defensive action can consist in the privation of liberty as well as in other methods. The period of the privation of liberty can be either determinate (for example internment for 5 years or for life) or indeterminate.

Indeterminate sentences are nothing but a judgment privative of liberty of a special character, that is as a reformatory penalty whose essential purpose is the reform of the delinquent. In order to attain this result time is necessary. How much time? One does not know in advance. That is why the judge does not speak of this element in his judgment or at most he mentions it in fixing a minimum period or a maximum limit. However, indeterminate sentences are applicable

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also to measures of safety when one does not know in advance how much time a treatment or an isolation period ought to last.

The Polish project for a Penal Code recognizes both measures of safety as well as indeterminate sentences. We wish to introduce indeterminate sentences with minimum and maximum limits, for minors who have to undergo their penalty in establishments of correction. On the other hand we have measures of safety which are not always based on the indeterminate sentence. The project also recognizes several types of establishments of safety. They are those for insane, those for abnormals (that is delinquents whose faculties are either physically or morally impaired), those for alcoholics, establishments for those who commit infractions through horror of work and finally for habitual delinquents and delinquents of profession.

There are thus five different species of measures of safety in our project. In the two first cases the internment is not at all for a determinate period. In the three following cases the period is either determined by the law (for example, two years for alcoholics, or five years for criminals of profession) or by the judge. The latter determines the period of detention for those, having a horror of work, on the basis of law which provides a minimum of one year and a maximum of three years. The Polish project has then measures of safety, based as much on indeterminate sentences as on determinate ones.

But it is not alone the Polish project which furnishes the proof that one ought not to confuse things totally different. The English law furnishes us with another. According to the 1908 law on the prevention of crime, after the execution of the Penal Servitude, the condemned will be detained "for such period as the court may determine" (Art. 10 cf. art. 15 par. 5: "the term of the preventive detention"). It is then the court which determines exactly the period of the preventive detention. It is thus a measure of safety on the basis of a determinate sentence.

We shall see that in the United States indeterminate sentences are largely developed and measures of safety excepting sterilization are not known at all. The sterilization of a criminal introduced in several states, but applied only in few, is a measure of safety of a definitive character. In the United States there are then indeterminate sentences concerning the execution of the penalty and a measure of safety applied in virtue of a definite sentence. In conclusion *measures of safety* are a new form of the social reaction against the

author of a crime, their place is along side of the penalty in a manual of the criminal law.

Indeterminate sentences are a form of execution of both the penalty and of measure of safety, they concern the relation between the judge and the administration of the penitentiary establishment. They tend to enlarge the powers of the public organ of execution of the penalty. Their place is in the chapter "Execution of the Sentence" in a manual of criminal procedure.

On account of the difference separating these institutions, it is necessary also to state the different criticisms addressed to each. Against measures of safety, and even those of a determinate period, there is only one argument: can one dispose of the person of the delinquent in one manner or another after he has undergone his penalty? Is not this idea coutrary to the principle ne bis in idem?

Allow me to recall a personal remembrance. Twenty years ago I participated in the conference of experts called together by the Austrian Government at Vienna, in order to give my opinion concerning the Penal project of Dr. Lammasch. The project in question practically did not provide any measures of safety. When I spoke to defend the idea of measures of safety the audience was astonished and when in order to make my ideas more comprehensible I compared the necessity of the internment of delinquents of profession to the necessity of the internment of a sick person with a contagious disease, an influential member of the Austrian Diet found this idea ridiculous. I feel that public opinion has not changed very much on this question. And it is not alone the great public which shrugs its shoulders, jurists of distinction share these doubts.

Against indeterminate sentences as such, there is another argument: the fear of arbitrary exercise of power, the fear of abuses.

What ought then to be the role of the administrative authority, of the director of the establishment, where the indeterminate sentences are applied?

In order to answer these doubts the Polish project has provided the preponderant role of the judge: if it is a question of the indeterminate period of the penalty for minors, the judge decides the matter of conditional liberation before the minimum of the penalty has been undergone. The judge decides also the question of the liberation of a criminal insane person from his Asylum or of a defective from his establishment. Therefore the judicial authority orders the internment and surveys its exercise. In this manner we have wished to avoid the dangers and the abuses of arbitrary power. In Europe we have

not as much confidence in the administrative authorities, we prefer the tutelary intervention of the Tribunals. And since Poland is a European State, and since the remembrances of the abuses of the Russian and Prussian Administrative authorities are still alive among us, we have not wished to renounce the guarantees, perhaps exaggerated, of individual liberty. It was necessary opportunism, therefore, which led us also to provide for judicial supervision without which the idea of the introduction of measures of safety would have provoked among us an opposition of political character. For in Poland also we are passionately attached to the dogma of the rights of man and of the citizen.

But is this judicial control a sufficient guarantee that there will be no abuses?

You all remember without doubt the report of my eminent colleague, Professor Hugueney of Paris, a report destined for the Penitentiary Congress of London (Acts V. II p. 298) concerning the policy to be followed with reference to recidivists. The French professor had much scepticism concerning judicial control because the judge called to revise the indeterminate sentence after incarceration, will be reduced to determine the fate of the condemned on the report of his jailers.

That is why I have undertaken my voyage to America to the country of a flourishing democracy, whose historic origins are tied so closely to the defense of individual liberty. It is at the entry of the port of New York that one can admire the gigantic monument of Liberty (a magnificent gift of the French people to the American people) as the symbol of the ideas dominating the country. It is to the country of liberty, to the country of Washington and Lincoln that I went to search for the arguments against the doubts of my savant colleagues and of my compatriots.

We know that the United States is the country of indeterminate sentences. It was therefore interesting to see in what manner one can combine the principle of individual liberty with a penitentiary system whose basic idea is that the period of imprisonment depends on the conduct of the prisoner or, otherwise put, on the discretionary power of the persons to whom the appreciation of this conduct belongs.

I.

On entering America one ought to say in advance that one is exposed to surprises not alone from an economic point of view, but also and perhaps still more so, from the juridic and moral point of

view. One can say that in America methods are employed inversely from those used and consecrated in Europe.

In Europe we wish to maintain the distinction of the penalty and correction: the first ought to rest above all an infliction of pain and the other is destined essentially to the amendment of abandoned and vicious juveniles.

In America, however, the contrary is found. The idea of expiation being wholly confused with the idea of amendment. If one places a man in a penitentiary establishment for an indefinite time and if one causes his liberation to depend on his conduct in the prison. this cannot be said to be an act of pure expiation, but is another phenomenon. It must be considered as an act of moral treatment.

On the other hand there are in certain states, establishments for abnormals and for defectives with physiologic or psychologic tares. It can be supposed that these establishments are wholly different from prisons, that these are institutions designed for the exercise of measures of safety, however such is not the case. Prisoners are transferred there from other penitentiary establishments in order to undergo the rest of their penalty, or defective criminals are placed there in order to undergo the whole penalty. It is possible that they remain there, when the period of the penalty has expired, but this is not indispensable. In order that this prolongation of their sojourn at the establishment can take place, a special examination by experts is had and a new decision of the judge. Thus the imprisonment in such an establishment is first a penalty combined with a treatment, and afterwards at the expiration of the judicial or legal maximum of the penalty, it becomes simply a measure of safety. It cannot be pretended that this system is very clear from the point of view of methodology, but it is perhaps the most simple.

The characteristic trait of the history of the American penitentiary system is that the practice precedes the theory, this comes from the American mentality which prefers experimentation to theoretic studies.

The American penitentiary tradition, for 100 years has believed and still believes that the prison can be a means of moral amendment of the prisoner, and this conception plays a great rôle in the United States. One does not see the necessity of measures of safety, since it is believed that the present system can conduce to the same results. Whatever changes the penitentiary system may undergo, the prison always remains as its basis. Let us recall an interesting discussion concerning indeterminate sentences during the international Peniten-

tiary Congress of Washington in 1910. The American members of the Congress spoke very little, but they answered very precisely all sorts of European doubts. They wish to keep the prison but also to introduce everywhere the principle of reform based on the indefinite time of the imprisonment. Doctor Wines declared, from the American point of view, it is impossible for the judge to determine in advance if a defendant is or is not susceptible of amendment. The only way to decide this and do away with all uncertainties, is to submit the latter to a reformatory treatment. The Americans were all in favor of the application of indeterminate sentences for all the condemned without distinction, since all persons who commit crimes are more or less defective. (Acts of the Penitentiary Congress of Washington, vol. I. p. 88.)

We are witnesses of a different evolution. In Europe we wish to make clearer distinctions: after the infraction we expect an act of expiation: malum passionis propter malum actionis. The measure of safety, if it is necessary, comes separately. In the United States measures of safety have not been introduced, but American penologues are immensely attached to indeterminate sentences and it is this which provokes the astonishment of European jurists.

Indeterminate sentences are in full development in the United States, their introduction is sought everywhere, their employment is not limited as it was fifty years ago at the time of the beginning of the reformatory. They become more and more an essential part of every American penitentiary system but these same Americans who have so many occasions to apply indeterminate sentences were stupefied when one put to them at the Congress of London the following question: "Would it be possible and in what limits to apply the principle of the indeterminate sentence to the struggle against recidivism?" They answered: "Indeterminate sentences apply only with a reformatory purpose and you wish to apply them to recidivists, to hardened criminals, to desperate cases?" The Americans reproached us the inconsequence, the lack of logic, the confusion, for this question put at the congress, speaks of indeterminate sentences as a means of reform and on the other hand of the application of this reformatory system above all to habitual criminals, and to desperate cases. (Cf. Hastings Hart Acts of the International Penitentiary Congress of London V. I. A., p. 464.)

The Americans have another mentality and speak a different juridic language than we Europeans. The form of the question put to the Congress of London was not illogical from the European point

of view, since we demand of the penalty that it respond above all to absolute justice, that it may be completely determined and we wish to introduce measures of safety of an elastic character alongside of the penalty and it is in connection with measures of safety that we think of reformation. It is necessary to confess that the establishments for habitual criminals are perhaps the least propitious terrain to the idea of reformation. Are the Americans not right from their point of view? The Americans believe in their reformation of delinquents but they know that there are cases where one has to renounce all hope. The Americans thus recognize also the desperate cases. Nevertheless Mr. Bates, official delegate of the United States declared at London that in his country there are no measures against the recidivists in the sense of English preventive detention. And why? It is clear if one does not forget the American optimism which believes that practically every criminal can be reformed, that practically every delinquent is amendable. Let us recall the words of Mr. Lewis E. Lawes, Director the famous prison at Sing-Sing: "It is understood that it is possible to reform most criminals." (Acts of the Penitentiary Congress of London, V. 2, p. 305.) No measures of safety, nothing but the system of reformation at the base of indeterminate sentences, such is the American taste. And the desperate cases? We shall see that they are beginning to think of them, but apart from indeterminate sentences which are only applicable to amendable delinquents.

The European penal philosophy is based on two principles:

a) That the Penal Code guarantees the individual that he will only be punished within legal limits and the Code constitutes an impassable barrier to the arbitrariness of the judge.

b) That the penalty has its end in itself and can never be organized or applied in view of the results that one expects from it, but in the relation with the infraction which has been committed, that is to say, that one punishes principally in view of absolute justice and not in view of the Amendment of the criminal. (Cf. GARRAUD précis XII ed. p. 15 et 18.)

The American Penal philosophy that one divines at the basis of American Penal Law speaks another language: the penalty is only a curative treatment, not only ought it not to be extended beyond the necessity of correcting the condemned, but also it ought not to cease before a change has been obtained in the individual. One began to introduce the curative treatment a hundred years ago in combination with *determinate* sentences. It suffices to recall the discussion which

preceded the construction of the Eastern Penitentiary at Philadelphia a hundred years ago. One wished to transform the soul of the delinquent by a total isolation, by repentance and reflection. One does not believe today in the reformatory force of isolation, but there is always the search for efficacious means in order to transform the character of the condemned. I find it therefore natural that in America fifty years ago one hit upon the indeterminate sentences. If it is a question of psychic transformation the period of the treatment cannot be determined in advance.

In Europe one forgets the point of departure of the American mentality which believes in the bounty of human nature, which also believes that a criminal is defective, that he is curable, so that it therefore exacts a treatment. We forget all that and we are inclined to reproach the Americans their lack of precision or logic (cf. the discourse of M. Silvela at the Congress of Washington Acts. V. I, p. 67).

Certainly there are certain inconsequences in this system, such as the determination of the maximum time of treatment. If one speaks of treatment, it would be more logical not to fix a maximum period. Let us not forget that all this system is in a state of evolution and that we see perhaps only one stage of this evolution, an intermediate period.

In order to finish this general sketch of the American picture it is necessary to touch upon the question of the guarantees of individual liberty. This question is all the more important in the United States since it is not a question of measures of safety that one does not recognize or of English "preventive detention" not applicable in general but in cases of extreme necessity. It is a question of a penitentiary system of every day.

Then what are the guarantees that there will not be abuses of this liberty of appreciation of the amendment of the prisoners which constitutes the basic idea of the system? Let us suppose for a moment, that which is hardly probable, that indeterminate sentences had been introduced in Europe, or let us suppose, what is more possible, that they have been accepted at least for measures of safety. In the first case as in the second there will be danger of arbitrariness, of abuses.

In Europe we would find a ready answer to these difficulties the surveyance of the courts, the decisions of the judge, that is what is necessary. I have read somewhere a fine European phrase, "the idea of a wise and independent judge is the keystone of liberty and law." It is without doubt a common opinion among European jurists. It can be asked whether the control of the judge will not depend on the

reports of jailers. But perhaps it is impossible to find a better system of control.

In the United States the same answer may not be given. There the judges are elected for short terms, they become judges, thanks to a political victory of the party to which they belong. That is why one says frankly in America "we have no confidence in our judges." The American judge is only good to preside at the trial of the delinquent, the rest is not his affair. The rest, that is to say, the effective period of the imprisonment or of the internment, if one prefers this word, depends on the administrative committee of the establishment. And who are the members of the committee possessing such a power? They are the men of confidence named by the governor of the state, that is to say by the chief of the administrative authority. What kind of men are these members of the administrative committee, savants, jurists, psychologists, or doctors? One knows nothing of these, we know that they are citizens, persons of confidence, their character decides their choice and not their scientific qualities. They are spoken of as representative citizens. At Framingham there is a man of affairs, a lawyer and a philanthropist who form the committee. The name of the board changes, they are called the board of persons of confidence (board of trustees), as at Huntingdon, Pa., or a committee of controllers, Board of Visitors as at Elmira, or the board of conditional liberation (board of parole). At Elmira the members of the board are designated for seven years, each year the mandate of a member expires, but he can be renamed. Mr. Melville, President, is member of the committee since 1902.

Again does this administrative committee of a reformatory or other penitentiary establishment under the regime of indeterminate sentences decide without being surveyed, controlled, without any possibility of recourse, of appeal? That is what I have demanded everywhere and I have generally received a negative answer as to the control. From time to time I was told that the governor or his employee, the commissioner of corrections, can have a certain influence as to the general functioning of the conditional liberation or that the committee recognizes when it is supplied with information concerning an inmate, or that the governor has the right of pardon and so forth. The conclusion is indeed simple: the administrative committee is really a Tribunal which decides in the first instance questions of conditional or definitive liberation. The system is perhaps supervised but not the concrete decisions, and we know that the right of pardon is a wholly exceptional way of recourse.

It is perhaps interesting to repeat the answer of Mr. Cass, President of the American Society of Prisons, to the above mentioned question. He wrote me that the decisions of the Board of Managers are based on characters and integrity of their members. "A large amount of the success of the administration of the indeterminate sentence and of parole depends upon the type of persons responsible for its administration. Members of Board of Managers who allow themselves to be influenced by pressure from the governor or from politicians, or judges, or influential citizens, cannot consistently function for the best interests of society, and in accord with the theory of the indeterminate sentence and parole. The judging of fitness for parole is an important public responsibility, and those who are charged with that responsibility should be wholly free from any outside influence."

If we search for a correlative institution comparable to the position of the administrative committee, we would find it only in the jury. The members of the jury decide also according to their conscience and their intimate conviction with the impartiality and firmness proceeding from men, honest and independent. There is only one difference between these two bodies: the members of the jury are designed by lot, the members of the Board of Managers are named by the chief of the administrative authority of the state. One does not think in the United States of changing this state of things, on the contrary one tries to develop it and at the same time to restrain still more the power of the judges and of the courts.

II.

Indeterminate sentences in their practical application in the United States do not make the same impression that they would, viewed from the other side of the Atlantic, of an idea wholly revolutionary.

If the decisions of the Tribunals give to the Executive Power the right to keep the condemned for a time absolutely indefinite, one would say: Here are the establishments of moral reform, the internment will last until the result is obtained.

One would suppose that it is thus in the special establishments introduced in almost all the states and known under the official denomination Reformatories. But it is not so. In no Reformatory does one keep the criminals longer than the maximum penalty permitted by the law for the crime committed. What does that signify? It is indeed simple: the judge condemns the delinquent to the punishment provided by the legislator, but he does not decide in what meas-

ure the condemned ought to undergo this punishment although he takes account of the maximum provided by the law. Have we not the same ideology in the practice of conditional liberation? The condemned can then undergo a shorter penalty than is necessary according to the judgment of the court and it is not the judge who decides the real period of his imprisonment, in general other factors decide this question. In France it is the Minister of Justice who takes cognizance of the applications for conditional liberation. Without doubt there are differences. First, the limit of the period of imprisonment is in America the legal maximum and in Europe the judicial maximum. There are also differences as to the minimum. In Europe conditional liberation can only be accorded after a sufficient time of expiation. As a consequence, one demands the expiration of at least one-half or even two-thirds of the penalty pronounced. In the United States there is no rule, there is not even a relationship between the minimum period of the accomplished penalty and the gravity of the crime. The laws and practices of the different states provide different minimums. There are minimums of eight months as in the Reformatory of Framingham, Mass., but also minimums of twenty months as at Lincoln, Nebraska. There is no doubt that the discretionary power of the district attorney as an executive factor is greater in the United States than in Europe. Nevertheless the introduction of conditional liberation in Europe has rendered inexact the precise idea of expiation as a basis of the punishment and of the idea of absolute justice. The real period of the penalty does not depend any longer on the gravity of the crime alone, but also upon the later conduct of the criminal.

It is the same confusion of principles with which we reproach the Americans. Perhaps European penal law is also passing through an evolution as in the United States, the first stage of this being already visible and consisting in conditional liberation and in the suspension of the execution of the penalty; two notions foreign to the domain of absolute justice.

III.

The condemned who leaves the Reformatory is not liberated in an absolute manner. His liberation is also conditional as in Europe. Is this period very long? In Europe its limit is the maximum period of the penalty contained in the judicial sentence. In America it is

the legal maxima at Rahway, New Jersey or a definite lapse of time as six months, one year, two years, as in the other states.[3]

In running through a work of great merit which carries the title of "Digest of indeterminate sentences and parole rules" one sees that the sentences of today are no longer limited to the reformatories nor to young people nor to individuals condemned for the first time. In the state of New York for example one recognizes three types of indeterminate sentences:

a) Those applied to the first offenders of sixteen to thirty years of age destined to the Reformatory (Elmira).

b) Offenders destined to the state prison, these should not have been punished formerly for a crime permitting the application of the prison penalty.

c) The delinquent condemned to internment in other penitentiary establishments such as the Workhouse or the Penitentiary.

It was at the Penitentiary Congress of London in 1925 that Mr. Sanford Bates, official delegate of the United States declared that in his state, Massachusetts, there are five species of delinquents to whom the indeterminate sentence is applicable: (1) Juveniles who have not attained the age of seventeen years (the period of their internment extends to their majority); (2) Young delinquents of seventeen years and older (in which case the term rarely exceeds five years); (3) Adults (the period is a minimum and maximum, for example, from three to ten years or from six to twelve years; (4) In the case of persons suffering from mental defects, the period can here be unlimited), and (5) finally the class of drunkards, mendicants and vagabonds (with a maximum of one or two years).

IV.

Apart from indeterminate sentences there is another thing in America which is interesting for a criminalist: it is the establishments "for defective delinquents," one at Napanoch, New York and the other at Bridgewater, Mass., the last being in combination with a Farm Prison and an Asylum for criminal insane. The characteristic traits of an establishment of this kind are to be found at Napanoch. A law of the state of New York of May 2nd, 1921, provides that a

[3]American conditional liberation is combined with a system of patronage confided to a special functionary, the parole officer, or to free philanthropic societies or to a private person. This surveyance does not answer in practice to the hopes of the Legislator. The accounts of the Prison Association of New York complain of it, but that is the fate of this institution everywhere including Europe.

defective delinquent aged more than sixteen years, accused or condemned of having committed an infraction can be confided to this establishment to remain there during the process or to undergo the penalty pronounced by the judgment. Apart from this category there can also be transferred there, men who have been condemned to undergo their penalty in another Penitentiary or Correctional establishment, but who have as the result of a later examination been recognized as defective. In the latter case they have to undergo the remainder of their penalty at Napanoch. When the term of the determined penalty has expired, or what is the rule, the legal maximum of the penalty (in the same manner as indeterminate sentences) is attained. it is necessary to resolve the problem what to do with the delinquent. The superintendent of the establishment can still have doubts as to whether the delinquent is still defective. This is probably the rule. In this case he proposes to the judge who has pronounced the condemnation to recognize the psychic state of the criminal. The judge delegates two experts not belonging to the staff of Napanoch. If they are of the opinion that the interned individual is still a mental defective the director again sends their report to the judge who has pronounced the judgment and the latter decides that the defective criminal ought to remain in Napanoch *until discharged by the law.* It results from the latter phrase, somewhat enigmatic that it is possible to retain defective criminals as criminal insane for an indefinite time. The fate of the defective depends only upon the superintendent who has the right of liberation if he is of the opinion that the delinquent is no longer dangerous, that it is reasonably safe for him to be at large.

The question which interests us is the following: What type of delinquent belongs to this group of defectives according to the American opinion? The answer to this question is the definition of defective delinquent accepted by the 56th Congress of the American Prison Association. It is the following:

The defective delinquent is an offender who, because of mental subnormality at times coupled with mental instability, is not amendable to the ordinary custody and training of the average correctional institution and whose presence therein is detrimental to both the type of individual herein described and to the proper development of the methods of rehabilitation of other groups of delinquents. Further, the defective delinquent because of his limited intelligence and suggestability requires prolonged and careful training, preferably in a special institution to develop habits of industry and obedience.

One sees that the point of departure in this definition is not the character of the delinquent, as the author of an infraction, but rather as member of a community of prisoners.

Indeed interesting is the system that one applies to recognize the degree of intelligence. It is the Binet-Simon system, Americanized, containing a list of questions. If the number of correct answers does not exceed seventy, the individual is categorized as feeble-minded. Let us not forget that at the present time in America there are a great number of immigrant families representing 38 different nationalities, and we will not make a mistake if we suppose that sometimes the lack of knowledge of the English language can be the cause of the classification of an individual among the types of limited intelligence.

V.

The establishment at Napanoch has its importance, not alone that it is the first experience in the selection of the demi-insane from the mass of criminals, but also because it obliges the judges along with the directors of all the Penitentiary Establishments in the state to ask themselves whether the delinquent does not belong justly to this defective group. This question recurring each day for eight years has conducted to results contained in two publications of Doctor Thayer, Director of the establishment at Napanoch. They are entitled:

"The Criminal and the Napanoch Plan" and "The Penology of Tomorrow." According to Dr. Thayer the population of Penitentiary Establishments in general are divided into four groups: a) Normal delinquents who are brought to a prison as a result of bad environment or lack of moral education, b) individuals of limited intelligence, c) individuals having psychopathic tares and finally, d) irresponsables.

Dr. Thayer pretends that the first category contains at the most fifteen per cent, the last at the most five per cent, and the rest eighty per cent, these are the defectives, the demi-fous. Much has been spoken and written of defectives who are destined to be the criminals par excellence. It is the anthropologic school which has made us attentive to this phenomenon. Nevertheless it suffices to take most any introduction to penal law in order to find a phrase similar to that of Mr. Garraud; "But the judges are powerless in the actual state of French legislation to take account of these conclusions" (page 255). It is not alone the French judges who are in a difficult position, there are many others. The state of New York and the state of Massachusetts, have already taken a stand on this subject and it is because of this that Napanoch and Bridgewater are institutions

of very great importance. The official proceedings of a State Commission charged with finding a proper site for the erection of an establishment for criminal defectives in the state of Massachusetts has employed a characteristic phrase in motivating its choice:

"The large class of criminal insane now housed in a department of the State Farm are perhaps the nearest like the defective delinquent of any class of our delinquents."

Dr. Thayer taking as point of departure the fact that most delinquents are defectives and as to defectives, one cannot fix the period of the penalty in an absolute manner, nor even decide if it will be necessary or not to exceed the legal maximum, provides in the criminal law of the future the following situation: The judge will direct the delinquent towards an institution without determining the period of the internment and it is the director who will decide this. This theory has many partisans in the state of New York even among the jurists. The former governor of New York, Al Smith, has declared himself in its favor. And one is astonished in Europe that indeterminate sentences are so popular in America! What is going to follow according to Dr. Thayer, will be even more than that, it will be the change in the nature of judicial judgments which will only be sentences of culpability deciding the choice of the establishment. Since normal delinquents are only a minority without importance in the criminal world, the penal sanctions of our Codes will only play their rôle in the limitation of the imprisonment only in exceptional cases. Such will be the penology of tomorrow.

VI.

The best proof that the progress of American penal law is not influenced by doctrines, but is the consequence of an experimentation which is not forced by any fixed ideas, is the treatment of recidivists. We recognize the optimism of the Americans who even when they are directors of a prison like Sing-Sing repeat that it is possible to reform most delinquents. In spite of this optimism one has had several occasions to recognize that the word "most" is not identical with the word "all."

It is not all criminals that one can reform. It was thought at first that it was the defective who are difficult to reform. Internment at Napanoch was therefore provided for them. But after some years at Napanoch it was found that is not alone the defective criminals that there are also a quantity of delinquents wholly normal who belong to the class of *incorrigibles.*

The moment of impatience has come. The Americans, when they become impatient, immediately seek a radical solution. The penologists of New York have said: "If there are incorrigibles who can neither be put in an Asylum for criminal insane nor interned at Napanoch as defectives, they must be put elsewhere. Being individuals wholly normal we will leave them where they ought to be in the ordinary prisons, but since the prison is destined above all to reformation to which they are not susceptible let us recognize in advance that all hope ought to be renounced of correction and of the possibility of conditional liberation. The logical consequence of this is to condemn them to prison for life. We say expressly: conditional liberation for them is not admissible because this is an institution applicable only to corrigible delinquents. Then it is only the pardon of the governor that can put an end to the term of the incarceration for life." It is in the year of grace, 1926, that the state of New York added to Article 1942 of the Penal Code an amendment which does not permit the Parole Board to conditionally liberate fourth offenders, that is criminals having committed a felony for the fourth time. These have to undergo the penalty of prison for life. It was an innocent amendment. It did not introduce the life penalty because the latter existed already, nor did it introduce a measure of safety. It said simply that the Parole Board cannot exercise its right of liberation with reference to recidivists and it is in this manner that the penalty of perpetual imprisonment has become a sad reality. The rule is however that an ordinary criminal condemned to prison for life can be liberated conditionally after seven years. (Dig. and ind. sent. 5).

The method employed with recidivists is quite simple from the point of view of theory. It might be objected that this imprisonment for life contains two different elements, one of which is the punishment for the last crime and the other is an act of social purification, serving to protect society from recidivists, from habitual criminals, from professional criminals.

From my point of view there has been combined the penalty undergone according to the commandment: malum passionis propter malum actionis, with a measure of safety without batting an eyelash. But the Americans would answer: "and you Europeans who insist so much on logic, do you do otherwise? Does not the Norwegian Penal Code (Art. 65) provide a prolongation of the penalty for recidivists especially because they appear to be dangerous for society, for the life, health, or fortune of its citizens? Do they not keep such delinquents in the same prison where they have undergone their

penalty for their last crime, even fifteen years after the expiration of the term of the last penalty? And the rélegation of the French Law is not this a measure of safety par excellence, and does it not figure in the French penitentiary system as a penalty and not as a measure of safety?"[4]

And perhaps the Americans are right.

It is indeed astonishing that the penologists of New York have not followed the English model and have not introduced the institution of preventive detention. There is no doubt that they have known it since already in 1910, Mr. Ruggles Brice, official English delegate to the Penitentiary Congress of Washington published a learned report under the title: "The English Law of 1908 on the Prevention of Crime." This report was written for the use of the members of the Congress of Washington; (Acts of the Penitentiary Congress of Washington, Vol 5, p. 421).

I suppose that the penologists of New York have to fight against the conservatism of the great public just as we have to do in Europe. It was easier to pass a law which does not change at all the prison for life, which is limited to not permitting the application of conditional liberation to recidivists, than a law which would introduce the separation of the criminal from society only for five years but in an establishment which would have a new name and which would therefore be a novelty.

In the first case it is only a punishment, in the other, it would be a novelty fought as an encroachment upon individual liberty and perhaps contrary to the rights of man.

It is indeed interesting from the psychologic point of view the report of New York Crime Commission which tells us the history of the New York law. We are assured expressly that one was convinced for a long time of the necessity of the permanent isolation of a group of criminals who are neither insane nor defective but who are nevertheless recidivists. The Crime Commission has inspired the above-mentioned Amendment of 1926. It is claimed also that the judgment condemning to prison for life have terror-stricken the

[4]Let us read then the characteristics of this institution as given by a French Professor, taken on the whole rélegation as it functions generally is only a brutally simple means of elimination.

When an individual has undergone the number of condemnations provided for by the law, the judges are obliged to add to the principal penalty that they pronounce for the last infraction a complementary penalty of rélegation. The principal penalty undergone, the relégué is sent to Guyane as a "relégué collectif." He is reduced to lead to the end of his days an existence analogous to that of those condemned to "travaux forcés à perpétuité." Hugueney Actes. of the Penitentiary Congress of London, Vol. 2, 299-300.

professional and organized criminals. We are told that several criminals have removed their activity to other states. The society believes that in spite of the protests raised by the amendment it will remain in force at least until next year. (LXXXII Annual report of the Pris. Ass., p. 30.) When I was in America the law was still in force.

It seems that this life imprisonment law does not correspond to the opinion of the great American public, that this law is only the result of debates among experts. It is clear that one fears that some day the legislator will revoke his decision by another act of his will.

Can one be astonished that a practical solution has been sought by avoiding a new theoretic discussion of measures of safety, that one has preferred to remain in the well-known path of the penalty? Protests have been raised against the severity of the measures and if it were a question of measures of safety the question might have been raised already if this sequestration is compatible with the constitution, as was done in the case of the legislation providing for the sterilization of degenerate criminal individuals.

The great American public is like the savant, of whom Anatole France said: "Savant et vieux, il n'aimait pas les nouveautés."

VII.

On my return from the United States I found the answers to the questions that I asked myself on my departure.

I have not found, it is true, in the country of Washington measures of safety in the true sense of the term, the sense that we give to it at the present time in Europe.

On the other hand, I have found that neither the principle of democracy nor the love of liberty opposes itself to the incarceration whose maximum term is only determined by the legal maximum of the penalty provided for such a crime. I have found also that democratic principles are not opposed either to the prolongation of the legal maximum, if it is a question of a defective already interned in a special establishment, where he has undergone his penalty.

These principles are also not opposed to penalties of imprisonment for life for recidivists, although it is evident that the gravity of this punishment does not correspond to the gravity of the last crime, which may be of little importance. Account is however taken of the character of the criminal in its entirety.

I have seen that democracy and liberalism are not incompatible with the decisions of conditional liberation, proceeding from a body

wholly different from the courts, from a group of persons of confidence named by the chief administrative authorities.

It seems to me that in this state of things we can look straight in the eye all those who attack measures of safety from the point of view of the rights of man, since we go further than the Americans in our scrupulous supervision of conditional liberation, for we have introduced in this matter the guarantees proceeding from the intervention of judges to whom we Europeans accord an unreserved confidence.

But all of a sudden I recalled this just remark of the French Professor who was afraid that the reports of jailers will nevertheless serve as the basis of these judicial decisions.

Are not these doubts well founded? That is true, but ought we not to profit by the American experience? The Americans have introduced in place of the control of the judge far from the prison or from a penitentiary establishment the control of a special jury, that is to say a jury of conditional liberation. And this moreover, comprises persons of confidence who are in perpetual contact with the establishment.

Here is something which leads to reflection: Could not one combine our judicial control which must be kept for the appeasement of our timid co-citizens, with the individual examination of each case by a body of experts and by persons of confidence who could be in a close relationship with a given establishment? Their opinion, would it not be worth more than that of jailers? And could not the judge be better convinced that the proposed liberation will neither be accorded too late or too soon.

It will be neccessary to come back to this idea.