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THE COLLECTION OF EUROPEAN PENAL CODES AND THE STUDY OF COMPARATIVE LAW

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FOREWORD by Louis B. Schwartz ‡

The essay below was written by M. Marc Ancel as an introduction to the four-volume compilation of the penal codes currently in force in Europe, edited by himself and Mlle. Yvonne Marx.¹ Two of the projected four volumes have now appeared, covering in alphabetical order, the codes of countries from Germany (Allemand) to Greenland. The project is of extraordinary interest and usefulness, since a French version of codes which would otherwise be available only in Swedish, Greek, Russian, etc., makes them much more accessible to Americans. But the enterprise would not be as valuable as it is without M. Ancel's analysis of the great tides of thought which, in their ebb and flow, have carried the penal law first in one direction, then almost in the opposite direction.

M. Ancel's essay calls for a foreword for several reasons. To begin with, he had a foreword of his own which is here omitted because

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1. *LES CODES PENAUX EUROPEENS* (1956) (published by the Centre Français de Droit Compare).

it was specially designed to place the project in the context of French legal history. Second, he should be shielded from responsibility for an abridged translation which is fairly freehand throughout and, at times, becomes more paraphrase than translation. Third, readers, especially those without background in comparative penal law, are entitled to an explanation of some unfamiliar terms and concepts.

As for the translation, often a French expression has no exact counterpart in English, but comes close to several possible English phrases. I have not hesitated to translate the same French expression differently in different parts of the essay. For example, "*technique juridique*" can be rendered as bland as "legal technique," but occasionally when M. Ancel speaks disapprovingly of a nineteenth century school of legal thought, it seems proper to make it "legalistic technicality." "*Offences de conduite*" refers to a class of offenses, rather loosely defined in terms of a course of behavior or way of life regarded as dangerous, *e.g.*, vagrancy, in contrast to prohibition of specific acts such as stealing or assault. The French phrase is translated below sometimes as "behavioral offense," sometimes as "offense of misbehavior" on the basis of a rather subjective sense of the flavor of the passage in the original. Doubtless both *lex* and *lexicon* have been violated in this translation; let us hope that the essential thought and spirit have been preserved.

Among the terms which may not be meaningful to the general reader are:

Principle of legality: the doctrine that the power to punish cannot be exercised except in strict conformity with explicit authorization by statute or other recognized source of law.²

Positivism: a school of thought, of which the Italians Ferri and Lombroso were leading exponents, which would base penal law on the study of human character and the effects of various influences upon it. Free will is rejected, and crime is attributed to hereditary and environmental factors. Some adherents show an uncritical acceptance of "science," meaning certain "findings" of sociology, psychology and anthropology, notwithstanding that such "findings," *e.g.*, Lombroso's propositions as to the physical types characteristic of criminals, have not infrequently proved to be illusory.³ Positivism may be contrasted,

2. Holmes' decision in *McBoyle v. United States*, 283 U.S. 25 (1931), is a rather extreme example: an airplane is not a "motor vehicle" within the meaning of the National Motor Vehicle Theft Act, because of indications that Congress had in mind earth-bound vehicles, notwithstanding definition of motor vehicle as including "any other self-propelled vehicle not designed for running on rails."

3. Cf. SUTHERLAND & CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 19 (5th ed. 1955). "Criminology at present is not a science, but it has hopes of becoming a science."

for example, with a system of punishment based primarily on relative gravity or moral reprehensibility of the behavior.

Social defense: generally speaking, protection of society postulated as the dominant aim of criminal law. In the organized "Social Defense Movement," which dominates European penological thinking today, it appears as a development of positivism implying, *inter alia*, doubt whether the prospect of punishment deters anyone from crime; strong emphasis on "prevention" of crime, particularly by rehabilitating offenders or by segregating "dangerous" types from society under indeterminate sentences of "preventive detention"; focus of concern on the offender's personality rather than on the particular offense that brought him into conflict with the law.

The Social Defense Movement, of which M. Ancel is an outstanding leader, is a lively and stimulating intellectual community fighting the progressive battle on many fronts. Its viewpoint is bound to make us re-think some things we have taken for granted. For example, there is no easy answer to M. Ancel's intimation that it is old-fashioned and wasteful to focus the attention of students and legislators on problems like "impossibility" in attempt, or fine distinctions in the definition of accomplice liability. He would regard these as peripheral "legalistic" issues, and would prefer to center attention on challenging new proposals for specialized legal institutions and more flexibility in sentencing, for dealing with delinquent children and youths, or with alcoholism and drug addiction. The Fourth International Congress of Social Defense, held in Milan in April 1956, was largely concerned with issues of the latter sort. "Classical penal law," with its emphasis on strict definition of offenses, prescribed terms of imprisonment, proportioning punishment to the offense, and moral responsibility, was under heavy attack as a set of anachronistic obstacles to the achievement of new goals of penology. It is not difficult to understand the violence of the attack, if one bears in mind that classical dogma was the thing that had to be overcome in order to establish juvenile courts in many European countries, relatively lately. Probation is a practice only now becoming established. If, to achieve these advances, it is necessary to direct fire against all the theoretical bastions of a predecessor system, including the principle of legality, the idea of deterrence and the concept of moral responsibility, perhaps it is worth the cost.

But it should not be forgotten that the ideas now under attack were themselves instruments of reform. Before men accepted the principles of legislative control, proportioning punishment to the crime,

and excusing the "irresponsible," there were few bounds to the savagery of sovereigns and judges. It is possible that today's sovereigns and judges may be so much better, or better informed, than their predecessors that the old precautions can be relaxed. It is doubtful, however, whether any substantial relaxation of safeguards would be acceptable in the United States today. Somehow we have succeeded in establishing the juvenile court, probation and the indeterminate sentence, while clinging to the old ideals. Indeed, in this country there is a movement to re-establish some "legality" in areas previously turned over to practically unlimited discretion, as in the field of juvenile courts. In the field of sex offenses, there is critical re-examination of the rash of recent "sex psychopath" laws permitting indefinite detention once the actor has manifested even minor sexual deviation.⁴

The American Law Institute is drafting a Model Penal Code solidly based on deterrence, on the principle of legality, on discrimination between the responsible and the irresponsible. Accordingly, when I talked about the Model Penal Code before the Institute of Comparative Law of the University of Paris, on M. Ancel's invitation, my paper was entitled "Progress and Retrenchment in Criminal Policy."⁵ Progress? Decidedly yes. For children and youths there will be non-penal or modified-punitive treatment. Responsibility will be tested by more realistic criteria than *McNaghten's* rules. The legislature, through the Penal Code, will continue to define carefully the offenses for which a man can be deprived of liberty, and to determine the limits of punishment, but judges and especially parole boards receive adequate power to individualize treatment in relation to the personality of the offender, as well as to other circumstances. A form of "preventive detention" is contemplated by provision for "extended terms" for persistent or professional criminals and for "dangerous, mentally abnormal" offenders.⁶ However, one of the most significant decisions of the American Law Institute was to reject the proposal to have completely indeterminate sentences tailored to the individual case by parole or other "experts." Having experimented along these lines long before Europe, we found that there was not as much reliable knowledge as we had hoped; that a discretion in sentence which is poorly informed and unbounded either operates in an arbitrary, discriminatory fashion, or, with enlightened administrators, results in a

4. See Pennsylvania's New Sex Crimes Law, PA. STAT. ANN. tit. 19, §§ 1166-74 (Purdon Supp. 1956), 100 U. PA. L. REV. 727 (1952).

5. Schwartz, *Progrès et Temps d'arrêt en matière de politique criminelle*, Revue de Science Criminelle et de Droit Penal Comparé, Jan.-March 1957.

6. MODEL PENAL CODE § 7.03 (Tent. Draft No. 4, 1955).

policy of proportioning sentence to offense with variations depending on the offender's progress in rehabilitation. Thus do the most progressive systems, as M. Ancel would rank them, return in practice to a sort of "middle way."

No one would be less surprised at this outcome than he whose wise moderation guided the drafting of the unrevolutionary resolutions with which the Fourth International Congress of Social Defense concluded,⁷ after many orators had almost made it seem as if tomorrow there would be only hospitals and other benign institutions, no prisons.

7. I have elsewhere summarized these resolutions as follows: "The resolutions adopted call for scientific research into the real causes of crime; emphasis on prevention rather than punishment; continued scrupulous regard for human dignity and individual rights; adhesion to the principle of legality, *i.e.*, immunity from punishment for behavior not previously proscribed as criminal; special study of the problem of unintentional offenses, notably in auto traffic; special preventive measures in relation to behavior and situations involving a probability of harm; establishment of uniform criminal statistics; inquiry into the reality and efficacy of deterrence by exemplary punishment; and broader use of the findings of bio-psychology, psychiatry, sociology and other sciences, in view of the 'apparent' insufficiency of traditional methods of repressing crime." To be published in the *American Journal of Comparative Law*.

PART I

Simultaneous presentation of all European penal codes presently in force may serve several aims. One may, first, simply juxtapose the positive rules in force in the repressive systems of the European countries. This method was for a time in fashion in the last century, more in the civil than in criminal law. Such was the pre-eminence of the Napoleonic Code, and so well did it seem to crystallize the civil law of the day, that lawyers found it natural and sufficient to place its provisions opposite those of other European codes of the nineteenth century. One of the first works on comparative law of this sort is the *Concordance entre les Codes civils étrangers et le Code Napoléon*, published in 1840 by Anthoine de Saint-Joseph, which constituted then an undoubted novelty as well as an almost unequalled tool for comparative work at the time.⁸

Today this method may seem somewhat over simple. However, it flourished during the dominance of that school of interpretation (the "exegetical") which claimed that all the civil law was to be found in the texts of the Napoleonic Code. If such was the case, and if, moreover, in conformity with the original idea of the eighteenth century reformers, the statute alone was authoritative and contained the whole of the law, it was sufficient to place the texts of the national codes beside each other to obtain an exact and complete picture of the system that was applicable in the different countries.

As the exegetic method lost its influence, as case law assumed its creative role, as the legislation of the Consulate moved into the past, it became ever more apparent that such "concordances" were insufficient. This does not mean that comparison of texts is valueless. In continental European countries, written legislation—especially codes, where they exist—remains the essential source of law. This legislation provides at least the framework and fundamental principles. It enables one to perceive the part played by various legal conceptions in each codified system. The present collection of codes aims to facilitate this study of the legal conceptions or institutions of the different systems.

Such study may be disinterested: simply a question of getting to know, for the satisfaction of the mind or for the needs of science, the institutions operating in other countries. But one may also pursue a more utilitarian purpose. The Society for Comparative Legislation,

8. For other works published by the same author, see ANTHOINE DE SAINT-JOSEPH, *CORRESPONDANCE ENTRE LES CODE DE COMMERCE ÉTRANGÈRES ET LE CODE DE COMMERCE FRANÇAIS* (2d ed. 1851); ANTHOINE DE SAINT-JOSEPH, *CONCORDANCE ENTRE LES LOIS HYPOTHÉCAIRES ÉTRANGÈRES ET FRANÇAISES* (1847).

founded in Paris in 1869,⁹ made its object "the study of the laws of different countries and research into the practical means of improving the various branches of legislation."¹⁰ This formula continues to direct and inspire its activities in 1955. With this conception, the survey of foreign legislation also has as its object the discovery of areas wherein domestic legislation can gain from foreign legislative experiments.

But there is yet another *raison d'être* for such a collection of foreign codes. As the study of comparative law has developed, astute lawyers have been increasingly sensitive to the existence of certain legislative currents going beyond national frontiers. These currents are felt, sometimes in different forms but usually with more or less equal force, in all legal systems which have reached similar stages in their evolution. This, of course, reflects the process of legislative imitation, but imitation quite different from that which was alluded to above in pointing out that the study of foreign legislation may lead to improvement of domestic law. In the latter case, imitation is both conscious and limited; the legislator knowingly finds inspiration in a certain provision of a particular foreign law. On the other hand, consideration of broad legislative currents manifested in several legislative systems suggests an imitation both general and almost always spontaneous. Of course, foreign example will then often be invoked to justify new reform, but the reform will not be an outright copy of the foreign proposal, nor will it be restricted within the same limits. Instead, it will appear as a sort of resurgence of legislative interest and effort in an entire branch of law.

Accordingly, study or even mere reading of the codes of substantive law, particularly the more recent ones, may be useful in measuring the general evolution of legislation and especially its significance. Modern penal law, particularly in Europe, passed through an active period of codification between the two world wars. If these codes are considered as a whole and from the aspect of the direction of their development, *i.e.*, dynamically, it is easy to perceive that their common features result less from deliberate imitation than from the fact that at the same time common problems tended, in continental Europe, to be given common solutions. To take only one example—the phenomenon of "security measures"—it is clear that the movement which in-

9. See Goule, *La Société de Législation comparée* in 1 LAMBERT, INTRODUCTION À L'ÉTUDE DU DROIT COMPARÉ 696 (1938).

10. Society for Comparative Law Stat., art. 2. This aim may be compared with that followed in 1801 by the Bureau of Foreign Legislation instituted by Bonaparte in the Ministry of Justice and with that advocated by Bonneville de Marsangy in 1864.

corporated this concept into the codes of the second quarter of this century represents a significant and pervasive legislative current.¹¹ The ability to identify such common factors is one of the advantages to be derived from a complete collection of codes in force in one part of the civilized world.

Specialists in comparative law may object that this approach neglects the notion of the "legal system," so strongly stressed in current comparative law analysis. Levy-Ullmann early distinguished between the legal rule, the legal concept and the legal system of which these concepts and rules themselves form a part.¹² H. C. Gutteridge¹³ and René David¹⁴ have also felicitously emphasized the importance of the legal system considered as a whole. Today specialists in comparative law know how dangerous it is to isolate one legal rule or even one legal concept from the system in which it is contained and outside of which it may not be explicable. Whatever their importance, codes, even the recent ones, do not contain the whole of the legal system of any given country. Each legal system necessarily has its roots deep in the past. Its ramifications lie in fields other than those treated in the given penal code. It cannot be understood without the case law, which gathers about the code itself, or the practices to which it gives rise or which it rejects. Such cases and practices are based on fundamental methods of expounding and applying the law, which ultimately are more revealing of the legal system of a country than the rules incorporated in the text of the code.

These observations, or if one prefers, these reservations, are incontestable; but they are aimed only at those who would pretend to acquire complete understanding of a given legal system merely from the text of the code itself. That this is impossible has been recognized ever since the theories of the exegetic school were abandoned. But the very text of the code tells something of the state of legislative awareness in a given country at the time of its promulgation. A code, when promulgated, necessarily reflects a certain conception or view of a country's legislative policy. The very form thus given to criminal policy, its newly defined content, the special character of the legislative expression—all may be of interest to the criminal lawyer or criminologist. From this point of view comparative law becomes a legal sociol-

11. See Ancel, *Les mesures de sûreté en matière criminelle*, RAPPORT À LA C.I. P.P. 51 (1950).

12. *L'oeuvre juridique de Levy-Ullmann, Contribution à la doctrine moderne sur la science du droit et le droit comparé*, 12 TRAVAUX ET RECHERCHES DE L'INSTITUT DE DROIT COMPARÉ DE PARIS (France 1955).

13. GUTTERIDGE, *COMPARATIVE LAW* (2d ed. 1949).

14. DAVID, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ* (1950).

ogy attempting not so much to juxtapose the legal rules of different nations as to chart the legislative currents which, at a particular period, are characteristic of the civilization common to several neighboring states.

Viewed this way, not only does the legal rule lose its relative importance, but legal technique may also be left behind, although comparative law writers have tended to rank legal technique as of first importance in comparative research. Certainly, each system elaborates its own peculiar legal technique which constitutes its essential originality in the field of legal science. But when one considers legislation in its dynamic aspect, in its transformations and in the deep currents which shape and modify it at a given period or in successive periods, one is necessarily carried beyond not only the formulation of the legal rule *stricto sensu*, but beyond the whole framework of a particular technical legal system. At the level of comparative criminal policy, differentiations based on legal technique alone soon appear insufficient, or illusory.

We shall return to this point in conclusion; but even as we proceed it will become evident that, although the profound difference in technique and spirit between continental European legal systems and English criminal law requires the utmost caution in comparing their legal rules, there exist certain remarkable connections, imitations and mutual influences from the standpoint of criminal policy.

These conclusions lead to what would constitute, if necessary, the best justification for this collection of European penal codes. Criminal law lends itself much more readily than private law to comparisons of an almost sociological nature, which attempt to evaluate legislative policies of the countries concerned. First the existence of the rule *nullum crimen sine lege* gives penal law a predominance and importance far greater than that of civil law.¹⁵ The latter may be silent but the judge is nonetheless bound to pronounce judgment on the case lest justice be denied. He must supplement the law where it is silent. On the other hand, there can be no question of supplementing the penal law in a system based on the rule of law. So penal law, of necessity, contains the whole of repressive law, even in systems which, like those in the U.S.S.R. and the "people's democracies" or the Danish system, give a place, however limited, to incrimination by analogy.¹⁶ For incrimination by analogy presupposes that the judge must refer to

15. See the general report on the discussions in the meetings organized to commemorate the eightieth anniversary of the Society of Comparative Legislation. *La méthode du droit comparé en matière de droit pénal*, 1 REVUE INTERNATIONALE DE DROIT COMPARÉ 511 (France 1949).

16. On the penal analogy in the Soviet system and the popular democracies, see pp. 373-76 *infra*; cf. JIMÉNEZ DE ASUA, DERECHO PENAL SOVIÉTICO 90 (1947).

a formal text which is close to the case under consideration, so that in any European country with a codified penal law the code remains the exclusive and complete expression of the legislative will in penal matters.

Comparison of penal legislation is easier and more justifiable than comparison of different civil laws in still another respect. The rule that all offenses and punishments must be prescribed by law necessarily involves fairly frequent modifications in the penal law. Doubtless, this is the age of wholesale legislation. The mass of laws promulgated each year in various countries has become such that no lawyer can boast ability to follow or comprehend them as a whole. But civil law changes have been least numerous. Social and economic laws of a regulatory character have multiplied, of course, causing some modifications in the framework of civil law itself; but the fundamental principles of this branch have been affected much less than those of penal law.¹⁷ Eighty years ago such institutions as suspended sentence, conditional discharge and transportation were still hotly debated or seemed hardly conceivable. However, when certain totalitarian regimes were set up in different European countries it was by spectacular alteration of the penal law that they marked their triumph over predecessors. Furthermore, economic necessities as well as the influence of the war and post-war period had their immediate repercussions in penal policy.

Penal law, because it is intended to be more rigid than civil law, may for that very reason become more flexible: the legislator must intervene to change a rule that the judge can neither modify nor sometimes even interpret freely. For this reason, too, a survey of penal legislation can tell more about the state of European penal law, than a survey of the civil codes could do in the field of private law.

And so the examination of penal codes in force at a given period in a particular part of the world enables us to perceive more clearly the dominant criminal policy of different States at the time. But it is not only the evolution of substantive rules of penal law that comparison of codes enables us to clarify or better understand. For three-quarters of a century penal legislation has been faced with the problem of how far it will go in accepting certain lessons or suggestions from the criminological sciences.¹⁸ Substantive penal law, even when not

17. Georges Ripert has been able to devote the first developments of his work, *RIPERT, LES FORCES CRÉATRICES DU DROIT* (1955), to "statiticism" and to the "continuity of law." Cf. the suggestive remarks of the same author, on the 150th anniversary of the Civil Code, in his *Conclusion* to 5 *REPertoire DU DROIT CIVIL* 805, *ENCYCLOPÉDIE DALLOZ* (Vergé & Ripert eds. 1955).

18. See *L'individualisation des mesures prises à l'égard du délinquant*, PUBLICATION DU CENTRE D'ÉTUDES DE DÉFENSE SOCIALE DE L'INSTITUT DE DROIT COMPARÉ DE L'UNIVERSITÉ DE PARIS (1954).

always perfectly aware of it, has gradually become impregnated with certain ideas extraneous to legal technique, derived from that which, for want of a better name, one may call "criminal science." It is beyond dispute that in certain special areas, such as the law dealing with juvenile delinquency, ideas of criminology have prevailed over the demands of legal logic and the limits of legal technique in the most advanced legal systems.

Only by comparing codes can one appreciate the exact state of the penal system and the degree to which it has become impregnated by elements outside of pure legal technique. The study of doctrine alone is here likely to lead to error. Sometimes theorists—especially innovators—overemphasize new discoveries of science. More often, especially in a country like France, doctrines of criminal law that might be termed official, tend to underestimate the influence of these developments on positive law. Prevailing doctrine in the first half of the twentieth century seems to have undertaken to maintain intact the façade of a neo-classical penal law, embodied in the French Code of 1810.¹⁹ Innovations appeared abnormal, in derogation of a system the untouchability of which is a matter of principle. If an author as well informed as Emile Garçon had taken up sooner, and to a greater extent, comparative study directed towards legal sociology, he might have perceived that the idea of conditional release under supervision was not an anomaly repugnant to the spirit of our system, but on the contrary a fruitful international notion stemming from a general movement of modern criminal policy, and which was to bring to our preventive system an exceedingly dynamic element of regeneration.

What we have said about theoreticians can also be said of those whose duty it is to apply the penal law, whether they be judges or officials who see that sentences are carried out. A retrospective glance at the continental European codes, and in particular, a comparison of the codes in the twentieth century with those in the nineteenth, indicates the distance covered and the fatuousness of certain ideological controversies. Substantive law, that is to say the living law, is not encumbered by quarrels when compelled to meet imperative needs of a social nature. Such needs govern, whether consciously or not, the movement of penal legislation.

The existence and demands of criminological sciences, which play the same role in criminal law as political science plays in constitutional

19. See Ancel, *Les notions de prévention du crime et de traitement des délinquants dans les législations pénales modernes*, 1956 *REVUE PÉNALE SUISSE* 1 (Switzerland).

law, provide further justification for comparing the penal codifications of countries united by common origin or by the necessities deriving from their geographical position.

Starting with mere juxtaposition of the codes, one could certainly build the basis of a comparative study of contemporary European penal legislation. But such a study would not be complete, and therefore fully valid, unless it considered not only the codes but also special laws and various features of the preventive systems of each state, in the light of each system's history and practical application. There can be no question of attempting this here. Bowing to the limitations of time and space, and in view of the foregoing observations, we set forth below a summary survey of the European penal codes, in such a way as to throw some light on the exact significance of the penal laws which currently govern old Europe.

The penal codes in force in the European countries today are of quite different vintages. The French Penal Code of 1810 is probably the oldest; the Greenland Code of 1954, which is legally if not quite geographically a "European Code," is probably the most decidedly modern. These codes, including the most recent, may be largely explained by the legislative process, often long and complex, which produced them. The twentieth-century codes flow largely from those of the nineteenth century, which in turn arise directly from the penal reform which swept irresistibly through Europe at the end of the eighteenth century. So Montesquieu and Beccaria are at the heart of the European movement for codification, and it is important to grasp this. A rupture occurred at the end of the "century of enlightenment" between the repressive system of the Old Law and the system which arose from the claims of the philosophers and the movement for penal reform. If one wishes to understand the European codifications, it is necessary to go back briefly to that period and to consider at least three essential stages or periods of codification: the formative period, beginning at the end of the eighteenth century and lasting until the beginning of the nineteenth; the stabilizing period of technical improvement which commences with the second half of the nineteenth century, and ensures the formation of classical penal law; and finally the modern period which for the European codifications may be dated from the Norwegian Code of 1902 and which, through vicissitudes and varying aspects, but with constants which must not be forgotten, continues until recent times. Only after separating these three successive periods can one hope to grasp the current significance of European penal codification.

FORMATION AND INITIAL DEVELOPMENT OF EUROPEAN PENAL
CODIFICATIONS

The European movement for penal codification dates from the second half of the eighteenth century. It resulted from two important movements. The first, the philosophical movement of the "age of enlightenment," went far beyond the framework of criminal law, but the other constituted more specifically a "movement for penal reform" which, with the support of the philosophical movement, effected during this period a complete revision of the repressive system in force in European countries.

From the point of view of legislative technique, the movement for codification constituted a reaction against the system applied in European States at the beginning of the eighteenth century. This reaction had two facets which must be clearly distinguished. First, the movement aimed at ending the primacy and even the existence of the "common law" of crimes, which governed ancient Europe until the beginning of the eighteenth century. Criminal law, which until then had been the law of custom, became a written law, characterized by the principle of "legality" (*i.e.*, previous definition of offenses) and usually embodied in codes purporting to cover the entire law relating to repression of crime. Secondly, these codes became, quite naturally, national in spirit. Until the end of the century, legislators in different European countries aimed at incorporating in their codes the principles of natural law, valid for all the peoples on earth according to Montesquieu,²⁰ and at developing those legislative concepts recognized as best by enlightened minds of the time. But circumstances soon forced each codification into its own national pattern. The wars of the Empire and the ensuing national upheaval caused the European spirit of the eighteenth century to disappear completely: nineteenth-century codifications soon tried to express purely national truths or to serve purely national needs.

In order to understand fully the impact of the codification movement on the common law of crimes, one must recall the state of criminal law in Europe in the first half of the eighteenth century. At that time there had been formed what might correctly be called a common penal law of the Europe of the Old Regime which, in turn was derived from three extra-national sources: Roman law, which remained in many respects the *raison écrite* of the lawyers of the Old Regime; canon law, which was also universal and which had increasingly pervaded the secular law including criminal law, especially

20. See 1 MONTESQUIEU, *DE L'ESPRIT DES LOIS* c. 3 (1748).

in procedural matters; and customary law, which, in the absence of written sources, had been brought into service to meet practical needs.²¹ Case law and especially doctrine were then quite naturally of an international character. Ortolan, speaking of the common law of that time said, "The jurist and criminal lawyer belongs to all countries and is an authority in all."²² This was even more true because the written laws usually dealt only with limited questions and because the legislative compilations of ancient Europe, whether official or private, were really only valid with reference to a common law which they presupposed but did not abrogate.²³

The result was a rather chaotic state of law, against which in 1744 the famous tract of Beccaria was to protest. The preface of this treatise of *Crimes and Punishment* begins:

"A few remains of the legislation of a former conquering people, compiled by order of a prince who reigned at Constantinople twelve centuries ago, afterwards mixed with the customs of the Lombards, and buried beneath a voluminous muddle of obscure commentaries, compose the old heap of opinions which a large part of Europe has honoured with the name of Laws. Even today the bias of routine as deadly as it is general is such that an opinion of Carpvovius, an old custom pointed out by Clarus, a torture thought out with barbaric complacency by Farinacius, are rules followed calmly by men who ought to tremble when they decide on the life or fortune of their fellow citizens."²⁴

The common law of custom was the first to be affected by the movement for penal reform. Even before the middle of the eighteenth century, European governments were eager then to bring some order to legislation which consolidation of customs had not succeeded in clarifying.²⁵

21. See Graven, *Beccaria et l'avènement du droit pénal moderne*, in *GRANDES FIGURES ET GRANDES OEUVRES JURIDIQUES* 102 (Geneva Law Faculty No. 6, 1948); cf. 1 JIMÉNEZ DE ASUA, *TRATADO DE DERECHO PENAL* ¶87 (1950).

22. ORTOLAN, *COURS DE LÉGISLATION PÉNALE COMPARÉE* 106 (1841).

23. The famous *Caroline* (*Constitutio criminalis Carolina*) of Charles V in 1532, the *nieva Recopilacion* of Phillip II of Spain in 1566, Colbert's criminal Ordonnance of 1670 and the *Leggi e costituzioni* of Piedmont of 1723, preserved this common law, with and in addition to their own provisions. Without it they would have been almost meaningless.

24. This passage, now famous, opens the preface to the work, BECCARIA, *DEI DELITTI E DELLE PENE* (1764). The translation in text is from the French edition prepared by Hélie in 1856.

25. One remembers the early efforts at codification in France: how the theoreticians, Bourjon and before him Pothier, eager to untangle the complexities of the "common law of France" combined their efforts with the legislative initiative of D'Aguesseau. The great criminal statute of 1670 is itself to an extent an uncompleted attempt at codification of penal procedure. On this ordinance, see the classic develop-

The movement increased in strength and vigor as the philosophers won acceptance of the notion of written law and the idea that it must contain the principles of natural law applicable to human society. From this doctrine the concept of a constitutional law evolved enunciating in precise terms the principles on which the nation rests. Among these were a number of essential rules of penal law and criminal procedure. It was in obedience to this movement of ideas that the *États généraux* of France promised solemnly, in the famous oath of the *Jeu de Paume*, not to disperse before having given France a Constitution. The principle of legality is manifested here in a striking way; and its first expression, the Declaration of the Rights of Man and Citizen, devotes much attention to penal law.²⁶ Provisions for repression of crime, insofar as they are likely to injure or limit the natural rights of men, must logically be the first to receive legislative formulation. And so the first, indeed, the only code promulgated by the French Revolution was quite naturally a penal code, that of 1791. It was not until the Consulate that the finishing touches were put on the codification, and one must wait until the Empire before a new penal code was drafted for France. To a large extent it undid some of the daring proposals of 1791.

This movement was, of course, not confined to France. It appeared during the course of the latter part of the eighteenth century throughout continental Europe and, as we have already noted, it drew its strength from the revolt against excesses of the ancient systems of repression, the abuses which Voltaire and Beccaria had so clearly pointed out. The movement on the continent toward reform of penal laws and institutions also drew inspiration from contemporary English²⁷ and American experiments. In the period preceding the French Revolution this reform movement constituted one of the most

ments in 2 ESMEIN, HISTOIRE DE LA PROCÉDURE CRIMINELLE EN FRANCE ET SPECIALEMENT DE LA PROCÉDURE INQUISITOIRE 177 (1882).

In Sweden, a general code was promulgated in 1734, containing nine titles, including penal law and procedure as well as civil law. Even more clearly the *Codex juris bavarici criminalis*, promulgated in 1751 by the Prince Elector of Bavaria, Maximilian Joseph III, attempts to include in a single code the provisions relating to offenses, punishments and criminal procedure. It was the first code to forbid all recourse to the *Gemeines Recht* (common law) though the author, Baron Krestmaier, felt it necessary to justify and almost excuse himself for doing so. The criminal statute promulgated by Maria-Theresa of Austria in 1768 (called the Theresiana) also eliminated all recourse to "common law." These were the first manifestations of the principle of legality struggling, still in a confused way, to emerge: henceforth penal law must be found in the terms of the statute.

26. See especially articles 5-9 of this famous document. Article 8 is particularly important here: "The law must only lay down sentences which are strictly and obviously necessary, and no one may be punished except by virtue of a law laid down and promulgated prior to the offense and applied in due course of law."

27. See 1 RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 399-601 (1948).

curious aspects of enlightened despotism. But legislative monuments like the Bavarian Code of 1751 or the Austrian criminal ordinance of 1768, already cited, innovated only in the field of legislative technique. In the main, the old provisions were retained, the severities and even the cruelties of the penal law of the former order were preserved, if not aggravated, and the procedure still accorded practically no rights useful to the defense.

Against the harshness of this law the humanitarian and protective movement rose energetically. By the middle of the century it had reached the sovereigns of the time, who were sensitive to the teachings of the philosophers. This movement inspired the *Essay on the Reasons for Establishing and Abrogating Laws* of Frederick of Prussia in 1748, and prompted the same prince to see to the undertaking in 1780 of a general code inspired by new ideas, the various parts of which were to be submitted to the general approval of the public. This reform resulted in the Prussian *Landrecht* of 1794, which in its second part (title XX) deals with penal law. It is notable for its relative moderation of penalties, its attention to preventive measures, and its adherence to the principle of legality. In 1767, Catherine of Russia created a commission to prepare a code and gave it some "Instructions" which have remained famous. This code, sometimes inaccurately referred to as the Code of Catherine II, was inspired directly by the ideas of Montesquieu and Beccaria. Louis XVI himself, after having done away with judicial interrogation under torture in 1788,²⁸ evinced the intention of proceeding to a general revision of the penal laws by surrounding himself with all the leading lights he could bring together and inviting all suggestions.

In all the preceding cases, the results accomplished did not measure up to the enlightened purpose of the sovereign. But Leopold II of Tuscany promulgated at Pisa in 1786 a criminal code drawn up by a commission headed by Beccaria, who directly inspired its preliminary declaration. This code, which was based on the general principle of legality and which abolished torture, general confiscation, the death penalty, and branding, constitutes historically the first legislative codification expressing the new penal law of continental Europe. The Austrian Criminal Code promulgated at Vienna by Joseph II in 1787, which abolished the death penalty and established the principle of legality, is another manifestation of the new movement for codification. One need only compare it with the *Theresiana* of 1768 to measure the

28. See MELLOR, *LA TORTURE* (1949) ; 2 ESMEIN, *op. cit. supra* note 25, at 399.

distance covered. The French Code of 1791 belongs in the same legislative perspective.²⁹

However, the wars of the Revolution and the Empire thwarted this movement for reform, at least insofar as the mitigation of penalties was concerned. In 1803, the Austrian Code of 1787 was revised to re-introduce the death penalty, although without bringing back torture, but the principle of legality was preserved as well as many of the recognized rights of the defense. The Criminal Code of Tuscany of 1786 was amended in 1795 in the direction of greater severity. After the Code of Brumaire in the year 1794, which despite its title "Code of Offences and Sentences" (borrowed directly from Beccaria) was but a code of procedure, France in its turn regressed somewhat. The Code of Criminal Procedure of 1808 and the Penal Code of 1810 doubtless did not forget all the lessons of the Revolution, and article four of the Code of 1810 constitutes a striking reaffirmation of the principle of legality, but both codes are clearly marked by the totalitarian character of the regime which promulgated them.

The Bavarian Code of 1813,³⁰ inspired if not actually drawn up by Feuerbach, is historically the last great legislative manifestation of this period of formation. It too was marked by severity and exemplary punishment, sometimes going beyond that of the Code of 1810; but it contains certain innovations remarkable for the time including the beginnings of a system of concurrent sentences, conditional release and even indeterminate sentences. Above all it affirmed more strongly than ever the principle of legality. Although it was accompanied by an official commentary, all other commentaries and debatable interpretations were strictly forbidden. The text of the law alone was to bind the judge.

If one desired to make fine distinctions between successive periods and recognize every nuance of the historical evolution, one would have to distinguish the period immediately following the fall of the Empire and the first stabilization of Europe from the preceding period of formulation. However, it is not incorrect to include both these periods in the same examination. Immediately after the fall of Napoleon, nineteenth-century Europe was erected upon the ruins of the Empire. The first period of formation extends roughly from 1748, the date of

29. Its immediate influence is apparent. After having inspired the Valaisian draft of 1795, it is to be found again at the basis of the ephemeral Helvetic Code of 1799, the legislative commission for which declared that it could make "no finer present to the country than by giving it, in place of the former arbitrary and barbarous criminal organization, a different procedure, built on the new principles, which we have adopted." Cited by Graven, *supra* note 21, at 174.

30. See VATEL, *CODE PÉNAL DE BAVIÈRE* (1852).

the publication of the *Esprit des Lois*,³¹ to 1813, the date of the promulgation of the Bavarian Code. The second period from 1815 to 1867, when the Belgian Code was promulgated, still remains a period of formation wholly dependent upon the preceding period.

Such differences as there were appear chiefly in the attitude of the new legislators. To be sure, the humanitarian universalism of the preceding century had not disappeared. People were still concerned to set up the best codification possible; but the influence of Montesquieu, who, anxious to reconcile positive with natural law, tended to make legislation a veritable social science, was replaced by the influence of Bentham, more concerned with giving a utilitarian character to the provisions of substantive law. Moreover, Europe, shattered by a series of political and ideological convulsions, sought stability above all. So it is, then, that an effort to stabilize and reconstruct marked the legislation of the beginning of the nineteenth century, as each new or transformed country endeavored to give itself a code. In many of those countries freed from French domination, the new codifications were marked by their concern for national, one might almost say in certain cases nationalistic, aims.³²

There is no need to dwell at length on the codifications of the first half of the last century. Nearly all the codes promulgated then have since ceased to be in force, with the exception of the French Code of 1810, which, as we have already said, might well be assigned to the previous period. Two influences dominated European codifications of penal matters: that of the French Code of 1810 and that of the Bavarian Code of 1813.

The influence of French law is due, first, to the fact that it was imposed on territories attached to France—the Low Countries or present day Belgium, the left bank of the Rhine, a part of Italy, the Hanseatic cities and certain Swiss cantons. Moreover, it influenced other countries indirectly under the control of France, such as the Italian and Helvetian Republics, the kingdoms of Italy and Holland,

31. It is hardly necessary to remind one that Montesquieu is at the basis of all this legislative movement. Graven, *Montesquieu et le droit pénal*, in MONTESQUIEU, SA PENSÉE POLITIQUE ET CONSTITUTIONNELLE 209 (1952).

32. These new codifications did not always come about as quickly as desired. As early as 1815, the Low Countries wished to dispose of the French Penal Code, which had been imposed upon them by armed force; but the Dutch codification was not completed until 1881. In Bavaria, the arbitrary and harsh character of the Code of 1813 led almost at once to consideration of modification which did not materialize until 1861. In Prussia, after numerous controversies, weariness finally imposed in 1851 a code based on the French. In the same way Belgium undertook codification immediately after 1830, but the new code could not be promulgated until 1867. Italian unity dates from 1860; its civil and procedural codes were promulgated as early as 1865; but it was only in 1889 that the Zanardelli Code came about. As with the Belgian codes, this was by then in the second period of the nineteenth-century codifications.

and the Grand Duchy of Warsaw. The disappearance of the Empire was not enough to destroy this influence. The prestige of the Napoleonic codification, and especially that of the Civil Code, remained strong throughout Europe. An occasional effort to re-establish the pre-Beccaria served only to demonstrate the anachronism of the old ways.³³

Moreover, the Napoleonic codification was clearer, more practical, more adaptable than the Germanic, whether it was the Austrian model of 1803 or the Bavarian model of 1813. It met fairly well, at least for early nineteenth-century Europe, the requirements of classical penal law, without such defects as the rigid sentencing structure embodied in the French Code of 1791 and it conformed quite closely to the ideal of a bourgeois society, where man is presumed to be master of his acts and responsible for the liberty that the law allows him. Legal punishment, fixed by law and imposed by the judge alone, was regarded as having a sufficiently intimidating character to discourage potential criminals. And in the period of peace and prosperity following the Restoration, this system could even be attenuated through humanitarianism. Liberal penal law has to its credit the 1832 revision of the French Code, which mitigated punishment considerably, abolished corporal punishment, branding and the iron collar, and, above all, made general provision for mitigating circumstances.

Opposing this first influence, which was strong in Europe at the beginning of the nineteenth century, the German, or, more correctly, Bavarian influence was felt in some Swiss cantons³⁴ and in certain codifications in German states.³⁵ It was also to be found in Sweden, where Feuerbach's Code was translated and reviewed, as well as in Greece, where the Penal Code of 1834 took the Bavarian model (mitigating its severity) in replacing an earlier code based on the French.

The Bavarian Code of 1813 owed its influence to qualities opposite to those which at the same time produced the even more striking success of the French Code of 1810. It attracted lawyers by its scientific rigor and its refusal to make any concessions to Benthamite utilitarianism which was then infiltrating European legislation. This

33. In the Pontifical states, Pope Leo XII reinforced the former penal law on December 21, 1827, but without reintroducing torture and certain corporal punishments accompanying the death penalty. After 1814 Savoy and Piedmont once again came under the *Leggi e costituzioni* of 1770. The Spanish reaction of 1814 for a time menaced, without abolishing all, the reforms brought in 1811 and 1812, but the Code of 1822 took its inspiration quite openly from the French Code. It is true that this code was only applied for fifteen months, and the reaction of 1823 went back to the former law: *Siete Partidas* of the thirteenth century, *Nueva Recopilación* of 1567 and *Novísima Recopilación* of 1805.

34. Notably the code of the canton of Saint-Gall, 1819, and that of the canton of Basle, 1821.

35. Duchy of Oldenburg, 1814; Saxe-Weimer, 1838; Wurtemberg, 1839; Hanover and Brunswick, 1840; Hesse-Darmstadt, 1841; Bade, 1845.

zeal for methodical construction was at the expense of simplicity, if not clarity: many of the provisions were involved or obscure, and the code overdid distinctions, recognizing, for example, three different kinds of attempts³⁶ and three degrees of complicity,³⁷ as well as three degrees of guilt as accessory after the fact.³⁸ But a new and special care had been given to drafting definitions of particular offenses and many astute precautions were taken to limit the power of the judge, to the delight of criminal lawyers eager for logical construction and an objective and legalistic penal law. Insofar as it anticipated the system of concurrent sentences, conditional release and even indeterminate sentences, it was clearly in advance of the penal conceptions of the time.³⁹ Only excessive scientific refinement and especially a harshness which clashed too directly with liberal and humanitarian currents prevented it from having a more widespread influence.

Europe in the first half of the nineteenth century continued to be marked principally by French-inspired codification.⁴⁰ But by the mid-

36. Bavarian Code of 1813, art. 60, distinguishes between the proximate, distant and mixed attempt.

37. *Id.* art. 74.

38. *Id.* art. 87.

39. See *id.* art. 19, for concurrent sentences (substitution of the noble sentence of imprisonment in a fortress for the infamous sentence of chains and of forced labor or the work house); *id.* arts. 13 and 16, which provide that those condemned to these sentences may be released after having served three-quarters of the sentence; *id.* art. 12, under which a sentence to forced labor is pronounced for a determinate or indeterminate time (under the latter release may intervene after ten years of perfect conduct, providing that the convict has undergone the sentence for at least sixteen years). It should be noted that it was only after 1830 that there appeared in European legislation the system of concurrent sentences; that conditional release did not begin to be widespread in the laws until after 1860; and that the Europe of 1890 was still practically unaware of the principle of indeterminate sentence that Brockway's experiment had developed in the United States.

40. This influence is found again in the Code of the Two Sicilies of 1819, the second part of which is devoted to penal law; in the Code of the Duchies of Parma and Plaisance of 1821; and in the Albertine Code of 1839 governing Piedmont and Sardinia. The Spanish Codes of 1822 and 1848, the Austrian Code of 1852, even the Prussian Code of 1851, are still very closely linked to the Code of 1810, especially as modified by the reform of 1832. Binding has written that "tired out by interminable preparatory work, the Prussian legislator finally threw himself in the arms of the French law," which thus inspired the Penal Code of April 14, 1851. Cited in MESGER, STRAFRECHT 22 (1949). The Norwegian Code of 1842, less directly sensitive to French influence, is nevertheless also marked by the humanitarian utilitarianism which inspired the reform of 1832. The same spirit animates the Swedish Code of 1864, the Danish Code of 1866 and the Tuscan Code of 1853, which was to be the main model of the Italian Zanardelli Code of 1889. Tsarist Russia also was sensitive to this legislative movement. In 1832 a vast compilation, the *Zwod Sakanov*, represented an attempt at a general "corpus juris" for the whole of Russia. The fifteenth and last part is devoted to penal law. This penal legislation is recast in the Penal Code of 1845, the principal author of which, Bludow, endeavored to take his inspiration from the laws of Western Europe, and especially from the French codes. The law of judicial organization of 1864 was to be inspired later by the system of mitigating circumstances worked out in France by the reform of 1832; the revision of 1866 brought the Russian and French penal codes even closer together. The influence of the Code of 1810 is found once again in the first Turkish penal code, promulgated in 1858 with the intention of bringing the penal law of Turkey nearer to that of the European countries with whom the Turkish Government was then seeking to establish normal relations.

dle of the nineteenth century the formative period of European penal codification appears to have drawn to a close. The codes reflected the conceptions of liberal penal law—mitigation of penalties, a fairly limited system of concurrent sentences and judicial power to individualize within the well-defined limits—but left almost intact the basic position of the penal law resting on (1) recognition of the principle of moral responsibility, (2) the predominant purpose of deterring crime by threat of punishment and (3) proportioning of sentence to the gravity of the particular offense. This was the system which was to be worked out and improved technically in the following period, which, without too much inexactitude, can be said to start with the Belgian Penal Code of 1867 and to end with promulgation of the Italian Code of 1889.

THE GREAT NEO-CLASSICAL PERIOD AND EUROPEAN CODIFICATIONS

At the beginning of the nineteenth century, the object of the national legislatures of new Europe had been above all to provide penal codes suited to their political, social and ideological state. The first aim had been to meet the basic demands of Beccaria, then to incorporate the teachings of Bentham. After the bold enthusiasm of the first codifications, there was a return to a middle way which attempted both to satisfy these new principles and at the same time to restore a fairly strong dose of the old harshness to penal law. For this purpose the French Code of 1810 and the Bavarian Code of 1813 were natural models for European legislators to follow.

The very harshness of these two codes, however, soon appeared somewhat anachronistic. The humanitarian movement for penal reform at the end of the eighteenth century was followed, as we have seen, by a strictly liberal movement aiming at the lessening of sentences and the abolition of certain punishments incompatible with the idea, henceforth held, of the dignity of man. These ideas which had prompted the French revision of 1832 were to spread continuously in Europe. Especially after 1848 and the European prolongations of the Revolution which produced the second French Republic, did the humanitarian movement make its influence felt in substantive legislation. Another constructive force was to be found in the teachings of the penitentiary movement in penology. This school of thought emphasized concern with what could humanely and morally be done with the offender after he had been sentenced to deprivation of his liberty. The substitution of imprisonment for corporal punishment, or, in many cases, for capital punishment, brought about a considerable increase

in the number of persons detained in penitentiaries. Prison had, since the beginning of the nineteenth century, ceased to be a provisional place for detaining those awaiting trial, execution or transportation to the colonies.⁴¹ It had become normal to hold the convict there to serve out his sentence. As the number of persons so held and the length of detention increased, the fate of these condemned persons became a subject for concern. Thus, it was practical necessity, arising from the new legislation, that gave rise to penitentiary science. But these new practical solutions in their turn gave rise to legislative reforms.⁴² Thus, a fresh impetus for reform was introduced into penal legislation.

These currents had had some influence in the first part of the nineteenth century. But, with the second half of the century, still another element was to exercise a decisive influence on the evolution of penal codes, that of legal science. The French Code of 1810 and even, despite its extreme technicality, the Bavarian Code of 1813, were efforts to construct a penal law based mainly on three principles: legality, moral responsibility, and condign punishment. Around these new penal laws there were soon to accumulate works of exegesis, and then of scientific criticism. The teaching of Feuerbach⁴³ in Germany was supplemented and sometimes varied, if not quite contradicted, on the one hand, by the philosophy of Hegel and on the other by the more specifically legal discussions of first Mittermaier, then Binding. In Italy Romagnosi, Carmignani, and especially Carrara,⁴⁴ gradually caused the theories of Beccaria to appear insufficient, if not quite ob-

41. One must know the famous phrase of Ulpren, which until the beginning of the nineteenth century characterizes the old prisons; *carcer ad continendos, non puniendos homines*. On all this movement, see the author's observations in the introduction to ANCEL, *LES MÉTHODES MODERNES DE TRAITEMENT PÉNITENTIAIRE* 16 (1955).

42. See the French Laws of Aug. 5, 1850, [1850] BULLETIN DES LOIS (10th ser.) pt. 2, at 279 (France) (education and welfare of young prisoners), and of May 30, 1854, [1854] BULLETIN DES LOIS (11th ser.) pt. 1, at 1439 (France) (carrying out of a sentence to hard labor). This last law institutes the system of transportation, abolished in England at the same time by a progressive series of laws, of which that of Aug. 20, 1853, 16 & 17 VICT. 665, c. 99 institutes, for cases where transportation was no longer applicable, penal servitude (which did not disappear officially until 1948). See FOX, *THE ENGLISH PRISON AND BORSTAL SYSTEM* 44 (1952). In Belgium, it is the law of 1870 that made imprisonment in cells general, although in practice it had already been instituted from the time Ducpétiaux had presented to the Chamber à Mémoire à l'appui du projet de loi sur les prisons. An identical project had, on the request of Béranger, been voted for in France by the Chamber of Deputies in 1843. On the whole of this movement, see Pinatel, *La vie et l'oeuvre de Charles Lucas*, 18 REVUE INTERNATIONALE DE DROIT PÉNAL 121 (France 1947); Pinatel, *La Révolution de 1848 et le système pénale*, 1948 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 552 (France).

43. His famous *Lehrbuch, des gemeinen in Deutschland gültigen peinlichen rechts*, which caused him to be considered as the founder of German penal doctrine, was written in 1801. In this work, as in his *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*, Feuerbach endeavored to found penal law on Kantian philosophy.

44. The first edition of CARRARA, *PROGRAMMA DEL CORSO DI DIRITTO PENALE* was published in 1859. Carrara died in 1888.

solete. Even in France, after Ortolan and Rossi, the first of whom was sensitive to an idealistic humanitarianism, the second to the eclecticism of Victor Cousin, such authors as Carnot, Blanche, Faustin Hélie and others applied a more strictly legal method to the study of the penal code. Haus and Nypels, in Belgium, were soon to set off on an identical track.

These parallel Italian and German movements, which were to join and supplement each other at the end of the century in establishing the dominant penal doctrine, were characterized by their effort to systemize on the basis of metaphysical ideas and fixed jurisprudential dogmas. Accordingly, they temporarily cast into the shade theories both more subtle and more concerned with human reality, theories which foreshadow modern doctrines of social defense. These theories will have hardly any influence on substantive legislation until the coming of the anthropological school.

In Germany, Grolmann, contemporary and friend of Feuerbach, was among the first to perceive clearly the notion of special prevention, how a sentence of imprisonment can usefully be employed in an effort to reform the offender,⁴⁵ but this ran counter to the stream of Kantian doctrines espoused by Feuerbach. Similarly, Roeder's theories on rehabilitation⁴⁶ were to pass unnoticed in his own country before being revived in a striking way by the Spanish reformatory school of Dorado Montero at the beginning of the twentieth century. Romagnosi's *contra spinta criminosa*,⁴⁷ despite its concrete and social character (the very expression *difesa sociale* with Romagnosi sometimes takes on a strangely modern meaning), or rather because of this character, was soon to be supplanted by the *psychologischer Zwang* of Feuerbach, which easily took on the aspect of a philosophical abstraction. The efforts of Carlo Cattaneo, Romagnosi's disciple, to develop as early as 1843⁴⁸ specific studies of the *contra spinta criminosa* in order to promote scientific crime prevention based on human observation, and to facilitate a collaboration between medicine and law, were to remain

45. GROLMANN, GRUNDSÄTZE DER CRIMINAL RECHTS-WISSENSCHAFT (1798).

46. ROEDER, COMENTATIO AN POENA MALUM ESSE DEBEAT (1839). Roeder was to die in 1879; he passed unobserved in Germany, one reason being that his essential works on the history of ideas of criminal law are written in Latin. On his later influence, especially in Spain, see 1 JIMÉNEZ DE ASUA, TRATADO DE DERECHO PENAL ¶¶ 123, 289 (1950); 2 *id.* ¶¶ 508, 541, 542. See also VON MOHL, SYSTEM DER PRÄVENTIV-JUSTIZ (1834), where a certain foreshadowing of several modern penal theories can be found, but which met with almost no response.

47. Romagnosi, who died in 1835, published at the age of thirty his *Genesi del diritto penale* (1791), which was remarkably in advance of its time and which already announced some of the attitudes of the positivist spirit. See GRISPIGNI, SCUOLA POSITIVA 509 (1908); *cf.* BELLONI, SAGGI SU ROMAGNOSI (1940); FALCHI, IL PENSIERO PENAL STICO DI G. D. ROMAGNOSI (1933).

48. See BELLONI, CATTANEO TRA ROMAGNOSI E LOMBRoso (1931).

practically unheeded until the coming of the positivist school. In Belgium and France, Quetelet and Bonneville de Marsangy remained practically unnoticed, their prophetic passages were too much ahead of the times. The latter's name became connected only with the institution of police records and it was forgotten that he pointed the way to security measures based on consideration of the personality of the offender.⁴⁹ "Legalism" was then triumphant.

All this scientific work came to fruition in legislation as a result of political developments in different countries and European nationalism in the second half of the nineteenth century. Here it is sufficient to recall a few significant events. Belgium, which had become independent in 1830, was then still governed by the French Code of 1810, unmitigated by the purely French reform of 1832. Beginning in 1834, the Belgian Commission appointed to prepare a new code took as its basis the French Code, but with the intention of departing from it both as regards the severity of sanctions and legal technique.⁵⁰ Italy, after rapidly achieving a civil code, a commercial code, a code of civil procedure, and a code of criminal procedure following her unification, only with difficulty succeeded in working out a uniform penal code. Here again, humanitarian preoccupations existed side by side with preoccupations with legal technique. One of the basic controversies was whether or not the death penalty, retained in Piedmont and Naples but abolished everywhere else, ought to figure in the new code.

Nevertheless, some of the codes on which new legislation was still being patterned already appeared inadequate to fill needs demonstrated by legal science. The arrival of the anthropological school of criminology was to pose new scientific questions. In these circumstances and in an atmosphere of controversy, often heated, the famous Code of Zanardelli was adopted in Italy in 1889. In the Low Countries, all plans for reform of the provisionally-retained French Penal Code having failed between 1827 and 1870, in the latter year a law abolished the death penalty and a decree appointed a new commission to develop a definitive draft. This draft was to result in the Code of 1881, one of the most original of the period. Other states followed suit.⁵¹ Thus,

49. BONNEVILLE DE MARSANGY, *DE L'AMÉLIORATION DE LA LOI CRIMINELLE EN VUE D'UNE JUSTICE PLUS PROMPTE, PLUS EFFICACE PLUS GÉNÉREUSE ET PLUS MORALISANTE* (1864). The author writes notably that "the moral perturbations called crimes have, like atmospheric perturbations, presages which are almost ascertainable." 2 *id.* at 179. For all those attempts, interfered with by the restoration of the dogmatic formulations of the classic penal law, see ANCEL, *LA DÉFENSE SOCIALE NOUVELLE* 52 (1954).

50. The Belgian Code of 1867, writes Prins, is "a work of optimism and humanity, of hope and faith in the perfectability of man. It softened all the harshness of the Code of 1810." PRINS, *SCIENCE PÉNALE ET DROIT POSITIF* 60 (1899).

51. In Portugal, the Charter of 1826, which abolished corporal punishment and branding, provided for the promulgation of a penal code. This code, which was not

between 1860 and 1890, a wide legislative movement correlated with political developments saw the completion in Europe of a series of important codifications.

The movement made itself felt even in countries whose frontiers or economic stability had not been upset. In France, the two revisions of the penal code, that of 1832 and that of 1863, owed almost nothing to changes in political regime. Both represented efforts to work out and perfect criminal law technically. Even England, home of the "common law" and traditional citadel of unwritten law, or at least uncodified law, was then, for the first and only time in its history, sensitive to the movement for codification. Earlier, when the principle of legality became a governing principle in the continental systems, Bentham, the apostle of legislation, had not been able to get consideration of his legislative proposals.⁵² But seventy years later, Stephen prepared a draft code which aroused considerable interest and resulted, notably in New Zealand and Canada, in texts of written law.⁵³ During this period, while the Judicature Acts of 1873 and 1875 effected a wide reform of judicial institutions,⁵⁴ the Consolidation Acts of 1863 constituted important legislative efforts to put in order a range of criminal offenses traditionally dealt with by the common law. The superiority of the statute in determining punishable acts was definitely established: all new offenses were thereafter in practice created by acts of Parliament; and when in 1933 a judge decided to declare punishable, under the common law, behavior not previously defined as criminal,⁵⁵ this

promulgated until 1852, followed French and Spanish models very closely; in 1884 it was revised to conform with a law of July 1, 1867 which had abolished the death penalty and life sentences, and established the cell system. A new version with technical improvements was brought out in 1886. Spain, after having promulgated several codes, certain of which had only a short-lived existence but were to have a considerable influence in Latin America, finally worked out the Code of 1870, which was to remain in force for nearly sixty years; the Codes of 1822 (abrogated in 1823), of 1848 and of 1850. The Code of 1822, in particular, served as the basis of the penal law in Bolivia, California and Puerto Rico; that of 1848 for the Chilean Code of 1874. It contained technical innovations relating to the scale of sentences, the law of attempt and the definition of numerous offences. The Confederation of North Germany provided itself on May 31, 1870 with a penal code which, by Act of May 15, 1871, became the penal code for the whole of the new German Empire.

52. The influence of Bentham (1748-1832) had been very strong over the legislation of the continental countries at the beginning of the nineteenth century. But he proposed vainly in 1811 to the British Government a codification of the English law.

53. Sir James Stephen had published in 1877 a *Digest of the Criminal Law* in the form of a code; in 1878 a plan for a code, drawn up by him, was laid before Parliament and a Royal Commission was appointed to examine it. This Commission prepared a new code, finished in 1879, but it was abandoned, this time without even having been laid before Parliament. But Stephen's codification inspired several of the Dominion codifications, notably in New Zealand and Australia. See WILLIAMS, CRIMINAL LAW § 131 (1953). Stephen's codification also served as the basis of the Canadian Penal Code of 1891 (replaced by the Code of 1955). See MacLeod & Martin, *The Revision of the Criminal Code*, 33 CAN. B. REV. 3 (1955).

54. On this reform, see DAVID, INTRODUCTION À L'ÉTUDE DU DROIT PRIVÉ DE L'ANGLETERRE 78 (1946).

55. *Rex v. Manley*, [1933] 1 K.B. 529. On this decision, see the reservations of KENNY, OUTLINES OF CRIMINAL LAW 446 (Turner ed. 1952); cf. HALL, GENERAL

decision was greeted with surprise if not astonishment. Such developments in English criminal law can be related to the general European legislative movement of the last two-thirds of the nineteenth century.

The European codifications of this period appear at first sight to be a continuation of those of the preceding period. Like the earlier codes, they exhibit a concern for humanitarianism and liberalism which in France made the revision of 1863 the logical continuation or complement of that of 1832. But there became dominant in this later period not only a general and somewhat diffuse tendency towards mitigation of sentences, but an overriding interest in technical improvement of penal law. This preoccupation with technicality soon made the simple wording of the French Code of 1810, with its concern only for clarity and immediate efficacy, seem insufficient. Fault was found with its simplifications and several *inelegantiae juris*. The question of multiple offenses growing out of the same behavior, which Napoleonic penal legislation had dealt with a little too cavalierly in the Code of Criminal Procedure, was reviewed and incorporated in the text of the new penal codes.⁵⁶ One differentiated scrupulously between "rational" and "real" multiplicity, between "physical" and "juridical" multiplicity. So also it began to seem over-simple to punish attempts equally with the consummated crime because the *actus reus*, classical source and *raison d'être* of the repression of crime, could not be physically established.⁵⁷ Notably Carmignani and Carrara sought to examine microscopically the *iter criminalis*: a distinction was made between attempted crime, unsuccessful crime, and completed crime, with legal distinctions piled upon legal distinctions and endless disputes as to the extent of the various forms of the "impossible crime." The accessory was no longer assimilated purely and simply with the principal. The Italian Code of 1889 distinguished not only between principals and accessories, but between joint principals, accessories after the fact and accessories before the fact; and the law specified the effect of various personal and material circumstances, complicating vastly the notion of criminal participation.⁵⁸

Definitions of specific offenses also developed elaborate technicality, and interpretation of these definitions became casuistical. Carrara undertook in this respect a new effort at systemization. Soon the

PRINCIPLES OF CRIMINAL LAW 47 (1947) (where the author writes that the shock produced by this decision indicates how rarely this power has been exercised by English judges, though the common law recognizes the power in principle); Stallybrass, *Public Mischief*, 49 L.Q. REV. 183 (1933).

56. See especially Belgian Penal Code of 1867, art. 58; Italian Penal Code of 1889, art. 67.

57. See Belgian Penal Code of 1867, art. 52; Italian Penal Code of 1889, art. 61.

58. See especially Italian Penal Code, arts. 65, 66.

German *Tatbestand*, then the Ibero-American *tipicidad* were to appear⁵⁹ as the basic units of criminality:⁶⁰ that is to say, very nearly, that the only behavior which could confidently be said to be criminal were those precise states of fact which had previously been so adjudicated. These are but a few examples of the extraordinary proliferation of technicality in nineteenth century criminal law.

In order to understand these codifications of substantive penal law one must not lose sight of the movement for procedural reform which appeared at the same time. The drive for reform at the end of the eighteenth century called for changes in procedure at least as insistently as in substantive criminal law. The Napoleonic codification had seemed to achieve a harmonious balance between the new aspirations and the repressive tendencies of the old law. And the Code of Criminal Procedure of 1808, elaborated this famous *systeme mixte* of retaining the traditional inquisition at the stage of judicial investigation, while giving to the judgment stage the character of public, oral, accusatory procedure taking place before a jury, at least for major offenses, and guaranteeing substantial rights to the defense. This system was clearly in advance of the conceptions of the time; only after 1848 under the impetus of the Revolution, which in Paris had just overthrown the July Monarchy, did these trial rights become generally established in Europe.⁶¹ Almost immediately the technicality which characterized the substantive codes of the second half of the nineteenth century, appeared also in the realm of procedure. This was particularly the case with the Austrian Code of Criminal Procedure of 1873, which gave legislative sanction to what has been called the system of *procedure reformée*.⁶² Into a procedure founded in its essential principles on the French Code of 1808 there was imported a whole series of

59. The bipartite division prevailed in the Swedish Code of 1864, the Danish Code of 1866, the Dutch Code of 1881, the Italian Code of 1889. The Belgian Code of 1867, the Spanish Code of 1870, the German Code of 1871 and the Hungarian Code of 1878 kept the tripartite classification.

60. On the *Tatbestand*, see BINDING, HANDBUCH DES STRAFRECHTS 166 (2d ed. 1885); on the *Tipicidad*, see JIMÉNEZ DE ASUA, LA LEY Y EL DELITO 162 (2d ed. 1947). One may add to this notion the *Rechtswidrigkeit* of the Germans (1 LISZT, TREATISE 32 (1928)), which became the Latin-American *anti-judicialism* (Jiménez de Asua, *l'Antijuridicité*, 22 REVUE INTERNATIONALE DE DROIT PÉNAL 273 (France 1951)).

61. The Belgian Constitution of 1830 already had introduced the jury. In Austria, the Constitution of 1849 laid the bases of a public, oral and accusatory procedure, and these promises were kept, at least partially, by the Code of Criminal Procedure of 1850, abrogated, however, three years later; it was only by the law of judicial organization of 1867 that the jury system was definitely established. In Italy, as in Greece, it was established after 1848, and was sanctioned by the Roumanian Constitution of 1866, by which time the jury system appeared quite clearly as an essential guarantee of individual liberty.

62. See in particular, BERTRAND & LYON-CAEN, INTRODUCTION À LA TRADUCTION FRANÇAISE DU CODE DE 1873 (1875).

technical innovations, notably as to jurisdiction, the oral nature of the proceedings or public judgment, functioning of the jury and methods of appeal. There followed a whole group of reforms of penal procedure parallel to those whose importance in substantive criminal law has been noted.⁶³

With this series of codes—penal codes or codes of penal procedure—the classical or neo-classical law of the last century assumed its definitive legislative form. However, in the same year that the most significant of these codes, the Italian Code of 1889, appeared, Von Liszt, Adolphe Prins and Van Hamel founded the International Union of Penal Law, which undertook with varying fortunes (until the 1914 war), but with an undeniable effect, to stimulate revision of the existing penal system.⁶⁴ In this activity the Union was merely reviewing and carrying forward the work of the Italian positivists. When Lombroso published his famous work on the criminal man in 1876,⁶⁵ he was playing an historic role analogous to that played by Beccaria more than a century before. He, too, rebelled against the existing penal system. He denounced, as Ferri and Garofalo were to do in even clearer terms a few years later, its shortcomings, its inconsistencies, and its dangers. A new idea was born, that of the personality of the offender. Study of the offender's personality led to research into his dangerousness to the public.⁶⁶ The great contribution of the International Union was to throw the spotlight on this notion of dangerousness and to make it available, as one might say to legislators. The Union's historical importance in relation to the evolution of substantive penal law lies precisely in its reorientation of criminal policy in the direction of "social defense" against *periculosita* (dangerousness) of the criminal. This reorientation penetrated first into occasional special statutes and ultimately into new codes.

63. On the movement for the reform of penal procedure, insofar as it departs from the French model of 1808, see Clerc, *Le procès pénal en Suisse romande*, TRAVAUX DE LA SECTION DE DROIT PÉNAL ET DE SCIENCE CRIMINELLE DE L'INSTITUT DE DROIT COMPARÉ DE PARIS (1955).

64. On the International Union of Penal Law, its doctrine and action, see the special issue of 22 REVUE INTERNATIONALE DE DROIT PÉNAL 169 (France 1951).

65. The publication of the *Uomo delinquente* was in 1876; in 1880 Ferri published *I nuovi orizzonti del diritto e della procedura penale*, a work which in its later editions became the famous *Sociologia criminale*. The *Criminologia* of Garofalo dates from 1885; but as early as 1877, this author had published in the *Giornale napoletano du filosofia* an article entitled "Della mitigazione delle pene nei reati di sangue," in which he emphasized the importance of special prevention and developed the notion of *periculosité* as a criterion of penal repression.

66. In a very suggestive study, Father Gemelli has brought out in relief "the genial idea" of Lombroso, which consisted of basing penal science not on the *actus reus* but on the personality of the offender, a fecund idea, since it enabled the development and the whole modern orientation of various criminal sciences, notably after anthropology and sociology, that of criminal psychology. Gemelli, *La concezione dinamica della personalità nello studio dei delinquenti*, 8 RIVISTA ITALIANA DI DIRITTO PENALE 8 (Italy 1955).

The last years of the nineteenth century were to be marked by heated controversies over these matters, which need not be retraced here. But much earlier than the representatives of official penal doctrine would have admitted at the beginning of the century, the ideas of a penal policy, of social defense and of dangerousness began to infiltrate into legislation. Here again—French authors have too easily forgotten or have not wanted to remember—it was France that led the way. In 1885 two French laws were passed, one of which introduced conditional release and the other transportation, a typical security measure which constituted a striking recognition of the idea of dangerousness of the criminal.⁶⁷ Belgium in 1888 and France in 1891 introduced conditional release; and in this same year Belgium revived the old idea of putting an offender at the disposition of the government in order to give the government new freedom to deal with dangerous vagrants. In 1898, several proposals of this character in the draft of the Swiss Penal Code by Karl Stoops aroused general interest and the enthusiasm of Liszt. Thereafter, it was a question of a new legislation based on principles radically different from those handed down by classical penal law. However, conservative forces were still powerful. It was necessary to await the twentieth century to see these ideas really take their place in European codifications, coloring them in a way that was to distinguish them very sharply from those of the previous century.

PART II

THE PENAL CODES OF THE TWENTIETH CENTURY FROM THE BEGINNING OF THE CENTURY TO THE FIRST WORLD WAR

This first period begins in 1902 with the promulgation of the Norwegian Code, which the distinguished comparative penal lawyer Jiménez de Asua describes as the beginning of penal law considered from a criminological point of view. This code was conspicuous for its innovations, boldly breaking away from previous law. It established two forms of imprisonment sentences, one severe (*Foengsel*), the other milder (*Hefte*), and specified that the milder of the two sentences might be imposed if the act committed was not the result of an "evil purpose."

67. Emile Garçon, who assuredly cannot be suspected of positivist sympathies, wrote about a law of 1885 which subjected habitual offenders to a perpetual measure of security (*mesure de sûreté perpétuelle*): "Thus, while criminal lawyers abroad were painfully trying to solve the question of incorrigible offenders, France fully accepted the boldest solution, in conformity with the boldest conceptions of the Positivist School, and established a purely eliminatory sentence without being proportionate either to the objective gravity of the last crime of the offender, or with his moral culpability." GARÇON, *LE DROIT PÉNAL; ORIGINES — ÉVOLUTION — ÉTAT ACTUEL* 115 (1922).

The concept of purpose was used in the modern sense, referring to the underlying motives of the act, not to the abstract "intent" of neo-classical law. This substitution of one sentence for another constituted a decidedly modern method of individualization going far beyond mere discretion to impose concurrent sentences or other methods of grading or proportioning sentences accepted in nineteenth century law.

The most conspicuous innovation of the Norwegian Code was its recognition of the notion of criminal dangerousness (*état dangereux*) for which it prescribed a number of suitable security measures, whether for lunatics acquitted on the ground of irresponsibility or offenders whose sentences were mitigated because of their mental condition.⁶⁸ Habitual criminals might find themselves sentenced to a term of preventive detention if they appeared "particularly dangerous to society, or to the life or property of individuals."⁶⁹ Sentences were to be indeterminate within limits. Furthermore, the Norwegian Penal Code of 1902 anticipated later codes of the twentieth century by making the categories of punishable activity more general, purposely avoiding precise definition in certain cases, and leaving much room for the judge's discretion. One has only to refer to the interested and worried commentary of a neo-classicist like Emile Garçon to understand the real novelty of this code, which broke the trail for modern European codifications.⁷⁰

The Norwegian Penal Code was practically the only one to come into force in Europe between the beginning of the century and the first world war.⁷¹ But that historic catastrophe was not the only obstacle in the way of penal revision. As early as 1905 or 1908 it became clear, in view of the Norwegian Code and the prevailing current of ideas, that those projects based on earlier codes were largely outdated. They were even more so by the outbreak of World War I in view of legislation which had been developing on the fringe of existing codes in

68. Norwegian Code of 1902, art. 39.

69. *Id.* art. 65. The judge then puts a special question to the jury in reference to the nature of the crime, the criminal's motives, and the instincts revealed by the circumstances of the case. The matter was taken up once again by the law of February 22, 1929.

70. See GARÇON, *NOUVEAU CODE PÉNAL NORVEGIEN* (Monceau ed. 1903).

71. The Russian Code of 1903, which sought to bring Tsarist law into closer accord with ordinary European thinking of the late nineteenth century, was applied only to political offenses; otherwise the Code of 1845 remained in effect until the Russian revolution. A few proposals, notably the 1908 Swiss draft, prematurely called "final," aroused interest. This Swiss draft went back to, developed and diluted the Stooss project of 1898. There were also German and Austrian drafts of 1909 attempting to modernize the codes of 1871 and 1852. None of these projects came to anything; the 1914 war definitely ruined what chances they ever had of being translated into positive legislation.

various European countries. As in the last third of the nineteenth century, special penal laws tended to supplant defective codes. The legislator, feeling he could no longer resist reform movements on certain points, tried to make immediate but limited space for them. At least three fields were thus subjected to legislative renovation without waiting for the slow evolution of new codes.

The law of juvenile delinquency was the first to feel the impact of the reform movement. Juvenile courts appeared; and through them a new procedure and even a basic revision of rules applicable to juvenile delinquents were introduced. This happened in Sweden in 1902, in Denmark in 1903, in Portugal in 1911, in Belgium and France in 1912, in Hungary in 1913.⁷² So the special statute showed the way to the codifier of tomorrow. Similar innovations were forthcoming in the area of conditional convictions. The suspended sentence, first instituted, it may be remembered, by the Belgian law of 1888 and taken up by the French law of 1891, also continued to gain ground.⁷³ It was adopted successively in the Netherlands in 1901, in Italy in 1904, in Bulgaria and Denmark in 1905, in Sweden in 1906, in Spain and Hungary in 1908, in Greece in 1911. Beyond the Franco-Belgian suspended sentence, "probation" had appeared consisting essentially of supervision or educational assistance for the person convicted conditionally. Probation was supplemented and modified by the Danish suspended sentence in 1905, the Dutch in 1915, the Swedish in 1918, the Norwegian in 1919.⁷⁴ It accompanied the adoption of suspended sentence in Czechoslovakia in the 1919 reform.

The last movement for reform during this period involved the multi-recidivist or, as he came to be called, the habitual offender. Transportation to a penal colony under the French Law of 1885 was closely associated with the notion of recidivism: the law set forth in careful detail those cases in which repeated offenders were to be legally presumed beyond reform. The necessary number of previous convictions was specified, and in such cases the sentence was mandatory. But a new, more flexible and individualized version of the system began to appear in legislation. A period of preventive detention, discretionary with the judge and of limited duration, was substituted for automatic and perpetual penal servitude. New South Wales in Australia had adopted this system in 1905 in a law significantly entitled the "Habitual Criminals Act": to the purely legal notion of recidivism or multi-

72. See COSTA, *ÉTUDE COMPARÉE DE LA DELINQUANCE JUVENILE PART 11* (1952).

73. See UNITED NATIONS, *PROBATION AND RELATED MEASURES* (1951).

74. The simple delay was introduced in Norway in 1894.

recidivism came to be added the criminological notion of the habitual offender.⁷⁵

The idea was already contained in essence in the Norwegian Code of 1902⁷⁶ and it was found more or less explicitly in a number of draft codes, especially the Swiss draft of 1908, where the idea of social defense (in the primary sense of the phrase) against certain categories of offenders emerged. But the basic law of the period in this field remains the British "Prevention of Crime Act" of 1908 which established "Borstal detention" and "preventive detention" for offenders found by the jury to be "habitual criminals." Such detention was to continue beyond the expiration of the normal sentence. Although "preventive detention" was always ordered for a length of time fixed by the judge, the law gave him fairly wide power to individualize.⁷⁷ By virtue of its orientation of protection against habitual delinquency, and by its inauguration of the Borstal system emphasizing re-education and rehabilitation the act may be regarded as a first example of social defense legislation. One had to await the shock of World War I and the subsequent attempts at reconstruction before this legislative tendency became clearly defined, and at last triumphed in European codifications.⁷⁸

PENAL LEGISLATION BETWEEN THE WORLD WARS⁷⁹

Europe in 1919, emerging from the first great torment, reminds one to a certain extent of 1815. Old frontiers were once again changed. New or reconstituted countries took their place in international life, and

75. See Ancel, *Le Recidivisme en Droit Compare*, 26 REVUE INTERNATIONALE DE DROIT PÉNAL 9 (France 1955).

76. Norwegian Code of 1902, art. 65. Even before the Code of 1902, a Norwegian law of May 31, 1900 authorized commitment to work houses in certain cases of drunken disturbance of public order.

77. The length of the preventive detention was from five to ten years under the Act of 1908 (this measure being carried out after the sentence). This was a fairly large range for judicial discretion.

78. Another powerful influence was the movement in favor of indeterminate sentences, very active in the United States of America at this time. Cf. ANCEL, *LA SENTENCE INDETERMINÉE* 17 (1953).

79. Nothing of importance emerged in the European legislation during the 1914-1918 war. Of course, a few neutral countries were still able to promulgate new laws, instituting suspended sentence and juvenile courts, notably Finland in 1918, or adding to suspended sentence a system of supervision amounting to probation. *E.g.*, the Netherlands in 1915 and Sweden in 1918. But these were exceptions; war-time legislation, especially of the belligerents, aimed at practical, immediate and temporary ends, and disappeared almost totally on the return of peace. The national upheaval allowed the promulgation of a durable anti-alcoholic legislation. Law of March 16, 1915 (prohibiting absinthe and similar liquors); Law of November 9, 1915 (governing the opening of new drinking houses); Law of October 1, 1917 (the repression of public drunkenness). Intellectual currents to create an international penal jurisdiction to judge violations of the law of war, came to nothing. See DE VABRES, *LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL* 403 (1928); Saldaña, *La Justice Pénale Internationale*, 10 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONALE 227 (France 1925). It was no time for great works of legislation: new codification remained a task of the future.

quite naturally sought to provide themselves with suitable legislation. The upheaval caused by a long, difficult, and sanguinary war, was felt even in the victorious countries. Soon unanticipated economic problems arose. First currency inflation, then economic crisis, favored the birth of new ideologies. Immediately after the war, however, the Europe of Versailles was unaware of all the difficulties which lay ahead. The territorial changes seemed, if not final, at least of a lasting character. The former central empires were silent and withdrawn. Russia, in the eyes of superficial observers, appeared to have retreated into an almost Asiatic solitude.

In the field of penal law, the movement for reform or codification tended at first to return to or sometimes reproduce developments characteristic of the first period of the twentieth century. The shock of World War I, however, accelerated the codification movement. Lithuania, which had only just been established, enacted a penal code in 1919. Other European countries sought either new codes or revision of existing ones. Furthermore, the war had the psychological consequence of relegating to a seemingly remote past the scientific quarrels of 1880 and even 1910. The idea of internationalizing penal codes made rapid progress. Establishment of the League of Nations raised immense hopes, which were translated into an appeal for international cooperation and then for legislative unification. These efforts at unification reached their zenith in the establishment in 1926 of an International Bureau for the Unification of Penal Law.⁸⁰

The Bureau grew out of the International Association of Penal Law, established in Paris in 1924 to carry on the work of the International Union of Penal Law founded by Liszt, Hamel and Prins in 1889. But whereas the Union, at least in the beginning, had its own doctrine, derived partly from Italian positivism and attempting to further a new criminal policy, the International Association of Penal Law, founded by one of the most highly qualified representatives of the French eclectic school, J. A. Roux, above all tried to reconcile various doctrines.⁸¹ The doctrinal controversies of the positivist revolt were relegated to the past and seemed to lose their vehemence. Of course, immediately after the war, Enrico Ferri published his famous and controversial draft of a penal code,⁸² which attempted to incor-

80. This bureau, under the leadership of its Secretary-General Vespasien Palla, held conferences for unification in Rome in 1929, Paris in 1931, Madrid in 1933, Copenhagen in 1935, Cairo in 1938, and the final meeting was scheduled for Brussels in 1947.

81. 1 REVUE INTERNATIONALE DE DROIT PÉNAL 224 (France 1924).

82. FERRI, PROGETTO PRELIMINARE DI CODICE PENALE (LIBRO I) (1921); FERRI, PREFAZIONE (1921); see Cuche, *Le Nouveau Projet de Code Pénal Italien*, 1921 REVUE PENITENTIAIRE 299 (France).

porate a number of positivist principles; but this draft itself departed markedly from orthodox positivist doctrine, and when Ferri published his *Treatise* on penal law a few years later, and when in the last years of his life he took part in international congresses, it became increasingly evident that he, too, tended toward conciliation. Florian and Grisogni carried on the positivist tradition, powerfully and methodically. Positivism was, however, no longer a fighting issue. Intermediate positions prevailed and while the *Terza Scuola* survived for a while in Carnevale, the school of legal technicians gradually took hold, especially as its position accorded fairly well with the regime set up by Mussolini in Italy.

In the liberal climate of 1920 Europe, intermediary schools of thought naturally found a favorable response: they seemed to lend themselves to legislation within each State upon which national experts could agree. They also seemed favorable to international exchange or imitation of ideas. The congresses organized by the International Association of Penal Law,⁸³ and by the International Penal and Penitentiary Commission⁸⁴ attempted quite naturally to stress this conciliatory movement. Moreover, the specialists of several European countries, notably of Central or Eastern Europe, who took a leading part in these congresses, were often those called upon to prepare the codifications in their own countries. The result was a tendency to make all penal doctrines uniform, leading to a regime that one might loosely call "transactional." Stanislas Rappaport, speaking of the Polish Penal Code of 1932 a few years later, was able to talk about the *media via*.⁸⁵ This felicitous expression might be applied to the majority of European codifications of the period.⁸⁶

83. The Association constituted in Paris in 1924 held congresses in Brussels in 1926, in Bucharest in 1929, in Palermo in 1933, and in Paris in 1937. See the publications of these congresses, which are extremely useful in studying penal law between the wars. The Association recontinued its congresses after the war, meeting at Geneva in 1947, and in Rome in 1952.

84. The International Penal and Penitentiary Commission founded in 1872 and dissolved in 1951 organized a number of congresses before the first world war. London, 1872, Stockholm in 1878, Rome in 1885, Saint Petersburg in 1890, Paris in 1895, Brussels in 1900, Budapest in 1905, and Washington in 1910. Between the wars, it organized congresses in London in 1925, Prague in 1930, Berlin in 1935, and the particularly successful meeting at The Hague in 1950. Publications of these congresses constitute documents of the first order on the evolution of penal and penitentiary conceptions since the end of the nineteenth century. See TEETERS, *DELIBERATIONS OF THE INTERNATIONAL PENAL AND PENITENTIARY CONGRESSES (1949)*, where all the resolutions of the congresses are found together. The C.I.P.P. also published a *Recueil de Documents en Matière Pénale et Penitentielle*; on the Commission and its abolition, see the November issue, 1951, published by Thorsten Sellin, the last general secretary of the institution.

85. Rappaport, *Media Via du Droit Pénal Polonais*, 8 *REVUE INTERNATIONALE DE DROIT PÉNAL* 209 (France 1935).

86. Among the new codifications of the period was the already mentioned Lithuanian Code of 1919. The U.S.S.R., after having kept previous legislation not incon-

This is not the place to study in detail the basic provisions of the different codes, most of which still govern present day Europe or have left traces in the codes that have succeeded them. Our only aim is to recall the circumstances which led to their adoption and the spirit in which they were conceived. One must, however, review summarily the essential features which distinguish them from previous codifications and enable us to assign them to a particular stage of European progress in penal codification.

sistent with the revolutionary socialist legal conscience, provisionally in force by the law of November 24, 1917, abrogated wholesale all Tsarist legislation on November 30, 1918. On December 12, 1919 the Commissariat of the Ministry of Justice published *Guiding Principles for the Penal Law of the Republic of the Russian Soviets* to help the judge, asked to refer to his "socialist legal conscience." A code was needed, however, and the relatively calmer period of the N.E.P. made it possible to work one out. This was the Code of 1922, based, at least in its terminology, on Ferri's draft of 1921. It was replaced, after the 1924 Constitution, by the Code of 1926, in which Soviet penal law finds its first complete expression. On this code, see Garraud, *Introduction à la Traduction Française de J. Patouillet*, 34 BIBLIOGRAPHIE DE L'INSTITUT DE DROIT COMPARÉ DE LYON (France 1935); DE ASUA, DERECHO PENAL SOVIETICO (with the Spanish translation) (1947). On September 8, 1928 a Spanish Penal Code was published. It was almost as short lived as the Code of 1822, but its doctrinal influence remained great. See the remarkable introduction of Joseph Magnol to the French translation (Library of the Inst. of Criminology of Toulouse, vol. VI, 1931), who writes that this code is one of the first "to have translated into precepts of substantive law a few of the modern scientific doctrines in the organization of the fight against crime following the exigencies of social defense." (Intro., no. 1). This code, inspired by Saldaña, nevertheless, bears very clearly the mark of the regime which promulgated it: it was, therefore, abrogated by the Spanish Republic, which with a few modifications reinforced the Code of 1870. The regime which followed the Republic was to draw nearer, in the "recast text of 1944," to the 1848 Code. Estonia enacted a penal code in 1929. In the same year Yugoslavia adopted one which was carefully prepared and constitutes one of the most interesting legislative phenomena of the period between the two wars. See Djenekov, *Le Nouveau Code Pénal Yougoslave*, 1929 ETUDES CRIMINOLOGIQUES 123 (France); Givanovitch, *Le Code Criminel du Royaume de Yougoslavie*, 1932 REVUE PÉNAL SUISSE 305 (Switzerland). The following year saw two of the most significant legal monuments of the period: the Danish Code of 1930, advancing moderately along the new paths. See Lotinga, *Il Nuovo Codice Penale Danese*, 1 GIUSTIZIA PENALE 26 (Italy 1932); Lotinga, *Les Dernieres Modifications de la Legislation Pénale Danoise*, 2 GIUSTIZIA PENALE 187 (Italy 1938); and the "Fascist Penal Code," the Rocco Code, which naturally was an embodiment of the legalistic tradition. See especially CASABIANCA, INTRODUCTION À LA TRADUCTION FRANÇAISE (Publication de l'Office de Legislation Étrangère et de Droit International) (1932); cf. ISTITUTO DI STUDI LEGISLATIVI, IL CODICE ROCCO, E LE RECENTI CODIFICAZIONI PENALI (1931). The Polish Code of 1932 incorporated both progressive and moderate ideas. See Rappaport, *supra* note 85; Lemkin, *Le Nouveau Code Pénal Polonais*, 1932 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 1184 (Belgium). On April 24, 1933 Latvia adopted a new penal code; Rumania did likewise in 1936, accepting a few of the advanced proposals of the new European theories. See Moruzi, *Observations sur les Principes Fondamentaux du Projet de Code Pénal Roumain*, 2 GIUSTIZIA PENALE 138 (Italy 1937); On later modifications of this code, see articles by the same author in 1939, 1940 REVUE INTERNATIONALE DU DOCTRINE ET DE LEGISLATION PÉNALE COMPARÉE 105, 165 (France). Finally, in 1937 Switzerland completed the work undertaken in 1893 with a federal code which soon thereafter came to be considered by many criminal lawyers as the finest of this rich legislative period. Logoz, *Le Code Pénal Suisse*, 1938 REVUE PÉNAL SUISSE 1 (Switzerland); Logoz, *L'unification du Droit Pénal en Suisse*, 1938 REVUE DE DROIT PÉNAL ET DE CRIMINELLE 813 (Belgium); Clerc, *Le Nouveau Code Pénal Suisse*, 4 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 238 (France 1939); Clerc, *L'évolution du Droit Pénal Suisse de 1938 à 1939*, 1948 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 37 (France).

Compromise—the *media via*—is their dominant characteristic; different theories are reconciled in a pragmatic fashion. Even in the most ambitious of them, for example the Italian Penal Code of 1930, such eclecticism prevented absolutely systematic construction;⁸⁷ eclectic utilitarianism was chiefly interested in concrete solutions. Of course, most of these codes are scholarly and several of them bear the mark, if not the signature, of well-known penologists. However, the period of “technical” codification, culminating in Zanardelli’s Code of 1889, or, in the field of civil law, in the German BGB of 1896, was obviously finished. Legislators were to become concerned again with practical realities; the conciliatory *media via* was merely the first concession to renewed realism.

Prudent compromise was established and firmly supported by the guiding principles of classical penal law. Moral responsibility remained the essential foundation and, in principle, the measure for the sentence. Punishment retained its traditional retributive character, although under the fiction of general deterrence it was also supposed to prevent crime. Rocco found himself in agreement with Feuerbach on the main points. The same principles, with a few variations, are to be found in the Danish Code of 1930, the Polish Code of 1932, the Swiss Code of 1937 or the French draft of 1934. Nowhere did moral imputability or afflictive punishment disappear. One should not be misled by the positivist terminology of the Soviet Penal Code of 1926: the U.S.S.R. could consistently reestablish repressive sanctions in 1934, while continuing to call them “measures of social defense.”

The classical tradition still firmly adhered to the principle of legality; nearly all the preliminary articles of these codes reaffirmed the rule *nullum crimen sine lege*.⁸⁸ But meticulous legalism (*la casuistique criminaliste*) continued to reign in defining particular offenses in the “special parts” of the codes regarding offenses of a broad misbehavior type (*delits de conduite*) such as creating a common or general danger.⁸⁹ Similarly, the classical penal system of proportioning sentence to gravity of the offense was retained in principle, the law specifying the distinctions on which variation of punishment might be

87. The Italian minister Rocco boasted of having borrowed from each school “what good and truth” it contained. CASABIANCA, INTRODUCTION À LA TRADUCTION FRANÇAISE DE CODE ITALIEN DE 1930 xv (1932).

88. See the Italian Penal Code of 1930, art. I; Polish Code of 1932, art. 6; Estonian Code of 1933, art. 1; Roumanian Code of 1936, art. 2; Swiss Code of 1937, art. 1; The Soviet analogy (art. 16 of the 1924 Code) and the national-socialist analogy (law of June 28, 1935, modifying art. 2 of the German Penal Code of 1871) which thus appear clearly derogatory to the common legislative law.

89. Danish Code of 1930, art. 193; Polish Code of 1932, art. 215; Swiss Code of 1937, art. 221.

based. Some of the codes purported to regulate the effect, not only of aggravating, but even of mitigating circumstances.⁹⁰

A final characteristic by which these codes identified themselves with the codes of the second half of the nineteenth century is this: even when they de-emphasized legalistic "science," they remained quite responsive to the requirements of judicial methods of administration. In different ways and varying degrees, the Spanish Code of 1928, the Yugoslav Code of 1929, and especially the Italian Code of 1930 are conspicuous by meticulous drafting. The Swiss Code of 1937, although more felicitously simple, still sought to incorporate some of the technical precision demanded by modern criminal lawyers.

The foregoing observations emphasize the persistence of the triumphant neo-classicism of 1860 in the codes between the two wars. Nevertheless, there were some concessions to and tendencies derived from the positivist revolt of the end of the last century. This was most clearly evident in the generous reception and forthright approval accorded *mesures de sûreté*, which in the penal legislation of the late nineteenth century masqueraded as auxiliary or supplementary punishment. The avowed use of security measures, denominated as such under independent headings in the new formulation of positive law, is doubtless the most obvious and clear innovation of the codification of this period.

The example set by the Norwegian Code of 1902 was followed, the lesson of the International Union of Penal Law heeded, the demands of Adolphe Prins heard. In its very first congress, the International Association for Penal Law—which later was to show itself less inclined towards innovation—discussed boldly the question whether security measures should replace punishment or merely supplement it.⁹¹ The mere statement of this proposition, put to criminal lawyers in 1926, is enough to indicate the distance travelled in the preceding quarter of a century. Of course, the answer was a compromise in which retributive punishment retained the place of honor; but a code could no longer be called modern if it did not incorporate the new measures of social defense as well as traditional sentences.

Appearance of the security measure in legislation was the obvious token and consequence of penetration into penal thought of the idea that the offender's personality must be considered along with the facts

90. See, *e.g.*, the Danish Code of 1930, art. 84; Italian Code of 1930, arts. 61, 62; Swiss Code of 1937, art. 64.

91. See the resolutions in 2 *REVUE INTERNATIONALE DE DROIT PÉNAL* 461 (France 1926). Note, moreover, that the Congress found "that punishment, as the sole sanction of the offense, was not sufficient for the exigencies of social defense, either against the criminals most dangerous for their mental anomalies, or by their criminal tendency or habit, or in respect of more or less dangerous minors."

of the offense (*actus reus*). Recognition of the delinquent as an individual, the "principal character in the drama of penal justice," as Ferri called him, was in the final analysis the most important contribution of the positivist movement and the one which was to have the most fruitful consequences. This is not the place to elaborate on the point,⁹² but it should be noted that insistence on the importance of the individual personality was bound to revolutionize the "repressive" system. The change began to be effected at the moment when this personality in its essentially criminogenic aspect, "dangerousness," was made the object of the newest and most original provisions of the penal system. Particularly was it effected whenever the legislator, more quickly responsive to social needs than the official theory, determined to incorporate these provisions not merely in special statutes, regarded with suspicion as isolated legislative experiments, but in the texts of the codes themselves. Thus, the most representative codes of this period, unlike those of the last century, deal not only with offenses and punishments, but also with the offender.⁹³

There followed a whole series of consequences upon which we cannot dwell in detail, but which became apparent both in statutory penal law and in its administration, *i.e.*, the role thereafter given to the judge in penal cases.

Penal law remained, as we have seen, subject to the great principle of legality; so much so that even those who departed from it by permitting incrimination by "analogy" invoked a revised notion of the principle and abjured any claim of arbitrary power to enlarge the area of criminality.⁹⁴ Perhaps this was possible because the principle of legality no longer possessed the sharp outlines that it had when the legislators of 1791 adopted the system of predetermined sentences. Its limits, and even the survival of the principle of strict interpretation, were discussed; and practice and theory, especially in Switzerland after the Code of 1937, introduced many modifications.⁹⁵ In any event, twentieth century legislation followed the example of the Norwegian Code of 1902: categories of criminal behavior were broad and often

92. See on this point our communication to the international criminological course at Rome on the "classification des delinquants en droit compare." ANCEL, *SCUOLA POSITIVA* 355 (1955).

93. The Italian Penal Code of 1930 devotes a special chapter to the convicted person and the person injured (arts. 85-131); arts. 86-98 (will, and the ability to understand); arts. 102-04 (as to the distinguishing of habitual criminals and persons with criminal tendencies), are very characteristic of these new legislative preoccupations.

94. On the Soviet revolutionary rule of law, see in particular, 1 DAVID & HAZARD, *LE DROIT SOVIETIQUE* 159 (1954); 2 *id.* at 124.

95. Graven, *L'analogie en droit pénal suisse*, 1954 *REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ* (France); GERMANN, *METHODISCHE GRUNDFRAGEN, ETUDES DE DROIT CRIM. SUISSE* (1946).

purposely imprecise. What is more, by prohibiting not merely specific acts, but "behavior" designated as criminal or merely dangerous, there resulted an increase in the number of "behavioral crimes" which one particularly qualified Latin-American penologist regarded as basically inconsistent with the emphasis on factual patterns in offenses under the principle of legality in the great classical age.⁹⁶

Equality of sentences was associated with the principle of legality in classical law. Equality meant that all offenders were to be dealt with in the same way and condemned to the same punishment. Classical law was logical in referring only to the act regardless of the actor, just as it ignored motive in favor of the rare question of "intent." But by taking into consideration the individual personality of the offender, distinctions were set up and inequalities appeared. Recidivism ceased to be an abstract ground for lengthening the sentence; aside from its significance as a legal aggravating circumstance, it must be regarded as part of the personal equation calling for application of a special measure, more often than not indeterminate in its length. Thus, the habitual criminal takes his special position as a recognized individual category in the penal code. So also, for the abnormal person, the alcoholic, the drug addict, the idler. As penal law tried to take into account various criminal types, or types of criminal activity, it succumbed to subjectivism. Classical penal law, the law of the facts of the offense, was invoked against this "offender law" rather than "offense law." Juan del Rosal, who made a special study of this aspect of modern evolution,⁹⁷ notes that even the Spanish Code of 1944, though basically an offense law, accepted certain elements of subjectivism into the basic objectivism of its system.⁹⁸

Not only were legislative practice and the fundamental character of penal law itself greatly modified in the codes of the twentieth century, but also the role reserved by the legislator for the penal judge. Insofar as the law makes aspects of the offender's personality significant, it forces the judge to depart from the impassiveness dreamed of by Montesquieu or Beccaria in which the judge merely dispenses impartially a penalty fixed by law. In the great neo-classical period of the nineteenth century, codes had endeavored to specify meticulously the conditions under which a man could be treated as an habitual criminal or as an accomplice, and to prescribe explicitly the circum-

96. Soler, *La formulation actuelle du principe "Nullum Crimen,"* 1952 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 11 (France).

97. DEL ROSAL, LA PERSONALIDAD DEL DELINCUENTE EN LA TECNICA PENAL 27, 51, 88 (1949).

98. DEL ROSAL, DERECHO PENAL 271 (2d ed. 1954).

stances for mitigating or aggravating sentence; the judge's discretion was confined, as much as possible, within statutory bounds. This technique still survives in the twentieth century codes, but, as has been noted, often only as a concession to old habits. More and more twentieth century legislation reverts to the system—not long before regarded as over-simple—of the French Code of 1810 (or of 1832): a simple declaration that accomplices are to be treated as principals or that attempts are to be punished as completed offenses, or that mitigating "circumstances," without further explanation, shall be considered. Rocco rejected much that Zanardelli inherited from the legal subtlety of Carrara, but he did it knowingly with the very purpose of giving judges power to treat different individuals differently.

Only the judge can properly make such differentiations, not the legislator. The nineteenth century tried to permit it in a system which logically excluded it. The twentieth century is busy transforming the penal system, in order to make this discrimination among the individual cases compulsory. The legislator seems to be drawing from the teaching of Saleilles, asserting the superiority of judicial discrimination over purely legal discrimination.⁹⁹ In any case, it became normal in the codes between the wars, to direct the judge to select a sentence and determine its duration not merely on the basis of objective elements of the offense, but also on the basis of the offender's individual characteristics, his constitution and environment, his motives, and his attitude before and after the offense.¹⁰⁰ Some go so far as to invoke explicitly his "prudent discretion," a phrase that is gaining currency. Here, indeed, is a new note in penal legislation.

In summary, European penal codes preceding World War II show three features of legislative development which distinguish them from those of the preceding century:

(1) The focus of legislative interest has shifted. No longer is it sufficient to classify offenses, to define recidivism or complicity; it is now necessary to set up security measures, to find the best way of dealing with habitual crime or mental disorder and to perfect the law as an instrument of socio-economic progress.

99. According to Saleilles, the law either "provides only very wide bases and very elastic elements for appreciating, relying on the judge to make an individual classification from a special study of each offender . . . or it is the law itself that claims to provide the necessary criterion of the classification as our law of 1885 on recidivists, and that is the worst of all systems." SALEILLES, *L'INDIVIDUALISATION DE LA PEINE* 223 (2d ed. 1911).

100. Danish Code of 1930, art. 80; Polish Code of 1932, art. 54; Roumanian Code of 1937, art. 2; Swiss Code of 1937, art. 63; cf. Swiss Code of 1937, arts. 42 (interning of habitual offenders), and 41 (special discharge); Italian Code of 1930, arts. 132-133 (relating to the discretionary power of the judge in applying the sentence).

(2) Economic regulation, and concern with neutralization of certain forms of dangerous activity result in the creation of new offenses; but at the same time, there occurs what Sheldon Glueck has rightly called the process of "decriminalization"¹⁰¹ of certain fields of delinquency. Legislation dealing with delinquent minors moves more outside the traditional system of repression. Similarly, habitual criminals, the abnormal, the sick, and the drug-addicted are more frequently subjected to extra-penal treatment. Security measures are the instruments of this change: one passes from general prevention or deterrence by intimidation to special prevention through individualized treatment. The period to follow sees the movement gradually resulting in the more modern and more humane notion of treating the offender.

(3) The security measure was the outstanding innovation of this period. But since the traditional sentence still survived, based on moral responsibility and retributive punishment, a new mixed system appeared which was very characteristic in spirit of the whole of this legislative movement. A mixed system—taking account of both moral responsibility and dangerousness and providing both effective punishment and measures of security—is pulled in two directions, often in relation to the same categories of delinquents. This dualism posed new problems: whether penalty and security measures should be applied together or as alternatives,¹⁰² how the one or the other should be administered,¹⁰³ and how to tell one from the other.¹⁰⁴ The penal codes between the two wars barely raise these problems, and the solutions which they give are not without contradictions. But it is clear that dualism is characteristic of the first half of the twentieth century.

The European codes just enumerated form an important and often even the most remarkable part of the penal legislation of Europe between the two wars; but not the whole. A number of codes or reforms were begun but never adopted. Nevertheless drafts published in certain countries enlisted the support of theoreticians; these drafts were copied and discussed in other lands, directly influencing subsequent legislation.¹⁰⁵ Aside from these various drafts, we should also

101. GLUECK & GLUECK, *AFTER-CONDUCT OF DISCHARGED OFFENDERS* 99 (1949).

102. ANCEL, *LES MEASURES DE SURETE EN MATIERE CRIMINELLE* (1950).

103. See MORRIS, *THE HABITUAL CRIMINAL* 239 (1951); GERMAIN, *LE TRAITEMENT DES DELINQUANTS D'HABITUDE EN FRANCE* (1938).

104. See Grispigni, *Le problème sur l'unification des peines et des mesures de sûreté*, 24 *REVUE INTERNATIONALE DE DROIT PENAL* 756 (France 1953); de Asua, *La mesure de sûreté. sa nature et ses rapports avec la peine*, 1954 *REVUE DE SCIENCE CRIMINELLE ET DROIT PENAL COMPARE* 21 (France).

105. The famous Ferri draft of 1921 has already been cited. The Czechoslovak drafts of 1921-1926 were the subject of numerous commentaries. See Mírnická, *La législation pénale et sa réforme en Tchéco-slovaquie*, 1 *REVUE INTERNATIONALE DE DROIT PENAL* 202 (France 1924); Legal, *Rapport sur l'Avant-Projet de Code Penal*

take account of special statutes which, without being incorporated in the codes, modified or complemented them. Numerous laws on the continent continued to introduce conditional conviction, or to pick up the Franco-Belgian suspended sentence with educational supervision, borrowed from the Anglo-American probation.¹⁰⁶ Numerous also are the laws relating to juvenile delinquency and children's courts.¹⁰⁷ Particularly significant are the statutes setting up a special system of security measures outside or along with existing codes.¹⁰⁸

Thus, throughout this period European legislation was particularly active. Its development was, however, both accelerated and retarded by another influence which should be mentioned briefly. The reforms which have been discussed were, in general, carried out in a spirit of compromise. The prevailing current was still largely liberal, as that word was understood at the end of the nineteenth century. But the period between the two wars saw the coming of totalitarianism. This movement made itself heard primarily in the political field; but it also had an impact in the sphere of legislation and left its mark especially on penal legislation before the last war.

Authoritarianism was first felt in those countries where political revolution established regimes which were either totalitarian or aimed in that direction. Soviet Russia, Mussolini's Italy and National-

Tchecoslovaquie, 1923 REVUE PENITENTIAIRE 161 (France); Lemkin, *La Reforme du Droit Penal en Tchecoslovaquie*, 1932 REVUE PENITENTIAIRE 449 (France); AVANT-PROJET DE CODE PENAL TCHÉCOSLOVAQUE (Czecho-Slovak Association of Penal Law, 1927) (French translation). The French draft of 1934 also had its influence, completing in a way a system which might have worked well enough in the France of that time. See CODE PENAL PARIS (1934) (the work of the Commission for the revision of penal law, set up by the decree of December 23, 1930); MAGNOL, L'AVANT-PROJET DE REVISION DU CODE PENAL FRANÇAIS (1934); Matter, *L'évolution du droit criminel en France pendant le siècle dernier et le nouveau projet de Code pénal*, 17. REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE 172 (France 1937).

106. Czechoslovakia 1919; Austria 1920.

107. Austria and Poland, 1919; Netherlands, 1921; Germany, 1923; Italy, 1929; Greece and Czechoslovakia, 1931; Finland, and Roumania, 1936; Luxemburg, 1939.

108. The Hungarian laws of 1928, the Czechoslovakian Law of 1929, the Swedish laws of 1927 and 1937; on the law of 1929, see Kinberg, *Les lois suédoises de défense sociale contre les anormaux criminels et les délinquants d'habitude*, 8 REVUE INTERNATIONALE DE DROIT PÉNAL 154 (France 1931). On the later movement, see especially Simson, RECUEIL DE DOCUMENTS EN MATIÈRE PÉNALE ET PÉNITENTIAIRE 349 (1949); Schlyter, *les réformes suédoises dans le domaine des mesures défensives contre la criminalité*, 1947 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 191 (France); Strahl, *la réforme du droit pénal en Suède*, 1952 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 359 (France); Strahl, *Les délinquants anormaux mentaux en Suède*, 1955 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 19 (France); the Belgian law on social defense of 1930, the Finnish law of 1932, the German law of 1933, BERAUD, LES MESURES DE SURETÉ EN ALLEMAGNE D'APRÈS LA LOI DU 24 NOVEMBRE 1933 (1937); Schonke, *Les mesures de prévention sociale et amendement en droit pénal allemand*, 1951 REVUE DE SCIENCE CRIMINELLE ET DROIT COMPARÉ 647 (France); and the Spanish law of the same year on the *vagos y maleantes*; on this law, see Herzog, *Chronique de défense sociale*, 1953 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 354 (France); for the Portuguese Government regulation of 1936 relating to habitual offenders and penitentiary reform, see CANNAT, DROIT PÉNAL ET POLITIQUE PENITENTIAIRE AU PORTUGAL (1946); BELEZA DOS SANTOS, NOVA ORGANIZACAO PRISIONAL PORTUGUESA (1947).

Socialist Germany are three of the most significant examples. Nevertheless, Europe before 1939 knew other authoritarian regimes of lesser importance but not without influence on penal legislation. Despite the conciliatory modernism of certain of their provisions, neither the Spanish Code of 1929, the product of the dictatorship of Primo de Rivera, nor the Code of 1944, of General Franco's regime, can be considered as being properly "liberal." The Rumanian Code of 1937, largely inspired by the old liberal current of Western Europe, was the object of an authoritarian revision which, notably, reintroduced the death penalty and emphasized repression of crime. Mussolini's regime also re-established capital punishment for the gravest political offenses—without even waiting for the promulgation of the new code. This code itself was originally presented under the title of the "Fascist Penal Code" and Rocco, its author, boasted that it was a "political" code.¹⁰⁹

The authoritarian current thus checked the reform movement which had hitherto been identified with liberal tradition. But, because it was less bothered by discussion and precaution, the authoritarians could sometimes impose modification or even reform when it would have been impossible or difficult elsewhere. Thus the Italian Code of 1930 and the German law of 1933 introduced security measures into systems which had not yet accepted them; here reform was the beneficiary of the drive of totalitarian development. Indeed, it is typical of this totalitarian legislation that it very rapidly produced new and clear cut provisions. It would be a mistake to believe that all of them were inspired by totalitarianism. Some may be traced directly to earlier, unadopted proposals. Thus, certain laws of the Vichy government dealing with penal law and criminal procedure were to be adapted from the drafts of 1934.

Aside from this particular accomplishment, authoritarian penal legislation was characterized above all by its greater severity in repression of crimes against the internal or external security of the State. This resulted not only in abrogation of the specially favorable treatment of political crime accorded by nineteenth century codes,¹¹⁰ but in a complete reversal of that position. Political crime, as in ancient law, became once again high treason, the ultimate in crimes and the most severely punished. Totalitarianism makes full use of the death penalty for that offense.¹¹¹

109. See DE CASABIANCA, INTRODUCTION TO THE FRENCH TRANSLATION xv (1922).

110. See Ancel, *Le Crime Politique et le Droit Pénal au XXe Siècle*, 1938 REVUE D'HIST POL. ET CONSTIT. 87 (France).

111. See DONNEDIEU DE VABRES, LA POLITIQUE CRIMINELLE DES ETATS AUTORITAIRES (1938).

Authoritarian legislation also accorded a large place to economic offenses, for totalitarianism is necessarily accompanied by comprehensive control of economic activity. The controlled economy thereafter finds its support in penal law, and economic offenses become even more numerous. In Soviet penal law, they are the most serious offenses: in the 1926 Code, in force until after the last war, "sabotage" in all its forms, and, according to the law of August 7, 1932, theft from co-operatives or carriers are punished by death, while murder of an individual is punishable by a maximum of ten years of imprisonment.¹¹²

Authoritarian penal law also set up stringent rules to safeguard the family, public morality and public health. The offense of desertion appears and is developed, as does the offense of venereal contamination, and even, in the national-socialist mystique, offenses against racial purity. Even more onerous obligations are placed on citizens to compel them to collaborate in maintaining public order.

Lastly, authoritarian penal law was accompanied by procedural changes. The jury practically disappeared. The judge's powers were increased; the rights of the defendant diminished. Extraordinary courts multiplied, often operating on particularly detestable bases.

This authoritarian current dominated all European penal law in the years immediately preceding World War II. From this point of view, there is a complete contrast between the first years of the peace of Versailles and the last years before the war. It finally affected not only those countries under dictatorship but even countries that had remained faithful to democratic government. The practice of legislating by administrative edict (*decrets lois*) in France largely drew on this source, and was especially noticeable in the repressive revision in 1938 and 1939 of crimes and offenses against the security of the state.¹¹³ In the war legislation this went even further. Even England did not resist it; during this period the number of jurors was reduced from twelve to seven and firmly established principles were shelved in setting up a form of administrative internment for suspects.¹¹⁴

112. Cf. the German law of December 1936 on economic sabotage. See 2 *GIUSTIZIA PENALE* 165 (Italy 1937), which notes that it offers an example of an economic offence punishable by death.

113. Notably the government regulation of June 17, 1938 on the repression of spying, and especially the regulation of July 29, 1939 which recast the texts relating to the external safety of the States. French Penal Code (arts. 75 and 85). This order brought back the offence of non-disclosure of crime calculated to jeopardize the safety of the State, which the 1810 Code had made indictable in articles 103 to 107 which the liberal revision of April 28, 1832 had abrogated.

114. It is of no interest to review here the wartime legislation. A complete survey for the principal countries for 1938-1949 is to be found in 1 *ANNUAIRE DE LÉGISLATION ÉTRANGÈRE* [N.S.] (France 1954). In Europe it did not result in any new code. It produced almost everywhere a dense and often confused mass of legislative measures de-

CONTEMPORARY LEGISLATION

Perhaps the only significance of wartime penal legislation is that it so emphasized the authoritarian nature of the penal law that a reaction became inevitable immediately after the cessation of hostilities. It was this reaction which enabled European penal legislation to enter into the most recent phase in which we remain at the moment.

After the 1939-1945 war the political, economic, social and moral situation of Europe was once again altered. The war, by its length, by the destruction that it involved, by the excesses which it allowed, shattered the belligerent countries. But even the neutral countries experienced what one must call wartime legislation. When hostilities ceased, legislation of this sort continued to hold the center of the stage, for the problems to be solved by the legislators arose directly from conditions created by the war. The first question for penal law in those countries which had known enemy occupation, was to deal with cases of collaboration, what the Belgians significantly called *incivisme* (anti-patriotism). Nearly everywhere in Europe there was public demand for prompt and exemplary punishment. Changes of regime and revolutions, especially in countries that lost the war, resulted in legislation somewhat similar to the laws against collaborationists in the liberated countries. Furthermore, economic circumstances, the food problem, the requirements and regimentation of state control, continued to give rise to economic legislation of a markedly authoritarian character. Lastly, the political frontiers of numerous continental European countries were drastically modified. Germany was divided into four zones of occupation, and the "peoples' democracies" organized themselves gradually behind what was soon to be called the "iron curtain."

Under these conditions, it is understandable that the immediate post-war period, like the wartime period, yielded only fragmentary, empiric and clearly authoritarian legislation. There was no opportunity for new codifications. It is noteworthy that when France undertook a reform of its codes in 1944-1945, which in the optimism of the liberation seemed imminent, the penal code was the only one not submitted to a revision commission. Beginning in 1945, and increasingly

signed to meet temporary needs, and to provide means either for the repression of ordinary crime or of offenses against the rapidly expanding economic controls.

Many of the continental European countries were subjected to enemy occupation during this period. The legislation of the occupier was bound to disappear with the liberation of the territory; and the legislation of the governments set up or accepted by the enemy were bound to suffer the same fate. The unoccupied and neutral countries were too wrapped up in the anxieties of the moment to take on the additional task of bringing penal law up to date. Repressive provisions—and they were that in the fullest meaning of the term—had hardly any object other than to deal with immediate necessity; and they did not survive the circumstances which brought them about.

in the following years, new currents appeared, tending to stimulate new codifications or at least to change the legislative climate in penal matters. On February 2, 1945, France enacted a new statute on juvenile delinquency which, with bold simplicity adopted several of the radical theoretical positions. It is no coincidence that the same year saw the founding at Genoa of the Centre of Studies for Social Defense, as a result of the initiative of Gramatica. A new movement began to take shape which both synthesized certain impulses of pre-war legislation and at the same time endeavored to lay the basis of a new criminal policy. The part that the League of Nations played between the two wars has already been alluded to, notably its encouragement of attempts to unify penal law. The United Nations Organization which succeeded it likewise concerned itself with ways in which international cooperation can produce useful reforms. In 1948 it created a special section with the significant title "Section of Social Defense" to devote itself to international problems relating to the *prevention of crime and the treatment of offenders*.

This last phrase is full of dynamic significance. It is in the contemporary period that these two related notions of prevention of crime on the one hand and treatment of offenders on the other, assume their full importance and unite in the declared purpose of promoting a final policy that will be unequivocally progressive. The general movement for penitentiary reform which took on a new breadth at the end of the second world war¹¹⁵ is an added strength, for modern penitentiary reform is breaking away from former preoccupation with repression and is entirely directed towards prevention of criminality as it endeavors, by new or revised methods to achieve a real and effective treatment for those convicted.¹¹⁶

As we have seen, the new legislative momentum was felt, in certain fields, very early after the end of the second war. At first it was partially identified with the violent repressive impulse which in certain liberated countries like Belgium or Norway reintroduced the death penalty, long before abandoned in law or in fact, in order to ensure punishment of traitors.

Later it gave rise to a spate of special laws and limited code revisions.¹¹⁷ And, in addition, a certain number of new codes have appeared

115. See SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ, LES GRANDS SYSTÈMES PÉNITENTIAIRES ACTUELS (1950-51).

116. ANCEL, LES MÉTHODES MODERNES DE TRAITEMENT PÉNITENTIAIRE (1955).

117. We have already mentioned the French regulation of February 2, 1945, subsequently modified by the law of May 24, 1951. Sweden promulgated in the same year 1945, a very important law on sentences involving deprivation of liberty. See SELLIN, RECENT PENAL LEGISLATION IN SWEDEN (1947). It established both a penitentiary reform and new legislative criteria for sentencing based on study and evaluation of

in the contemporary period. Some of them are merely late manifestations of the reform movement between the two wars. Others move in new directions. The Spanish Penal Code of 1944 is primarily the product of political circumstances; it was presented, moreover, as a recasting or revision rather than a new work. It goes all the way back to the 1848 Code for some of its inspiration; but this return to legislative precedent of the last century was accompanied, notably where security measures are concerned, by certain novel modifications. Greece in 1950 enacted a penal code¹¹⁸ evincing careful scholarship and the influence of the Italian Code of 1930.¹¹⁹

The "peoples' democracies" have enacted legislation linked to a common model, the Soviet Penal Code, but with modifications to adapt to each nation involved. In 1950 Hungary promulgated the general part of her new code. In 1951 Bulgaria and Czechoslovakia provided themselves with new codes. Roumania, like Poland, retained its former code, but in 1949 introduced into it incrimination by analogy, which is still excluded by Polish penal legislation. This principle, which Bulgaria has accepted but not Czechoslovakia, may strike one as characteristic of the "peoples' democracies." But, as we have just seen, it is not universal there. More significant in the codifications of the "peoples' democracies" are the definition of offenses as "socially dangerous acts" to a regime of workers and peasants, and the importance attributed to economic offenses and the detail in which they are treated.

The Yugoslav Code of 1951 appears to be intermediate between Eastern European and Western codifications, although there is no

the personality of the offender. The English "Criminal Justice Act" of 1948 is notable for its innovations: it eliminates the old distinction between simple imprisonment and hard labor; it reorganizes the system of social defense measures applied either to juvenile delinquents or to adults. See FOX, *THE ENGLISH PRISON & BORSTAL SYSTEMS* (1952); FOX, *Le système pénitentiaire de l'Angleterre d'après le Criminal Justice Act, 1948*, in 2 *LES GRANDS SYSTÈMES PÉNITENTIAIRES ACTUELS* 307 (1955). In 1951, the Swiss Penal Code was revised to a limited extent, leading one to hope for yet greater modifications. In 1953 the German Penal Code in its turn underwent a far reaching and significant modification. See Mezger, *L'état actuel du droit pénal allemand, 1954* *REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ* 457 (France). This system, which knew nothing of conditional conviction, now adopts what amounts to probation, and also has special provisions for dealing with young adults. In 1954 Portugal reformed its Code of 1886, and if the reform was principally a "consolidation," it nevertheless evinced a desire for legislative development which is indicative of the climate of our period.

118. See Karanicas, *Le nouveau code pénal hellénique, 1951* *REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ* 633 (France).

119. Several of the developments of the period between the two wars were reproduced, notably in the matter of length of sentence (arts. 79-98). However, more stress is placed on the personality of the offender, on individualization of sentence, and on a variety of security measures than would have been so before World War II. The new code contains special provisions on euthanasia and graded punishment for the offense of abortion (arts. 300, 304).

conscious effort to reach a mean between opposing conceptions. Following the highly technical Code of 1929, it endeavored to bring out a number of simple and precise rules based on a penal policy derived directly from the principles that govern the Peoples' Federative Republic of Yugoslavia. Like other codes of the "peoples' democracies" it is avowedly founded on the political, economic and social bases of the new State, and the socialist order established by its constitution. In defining an offense as a socially dangerous act, *i.e.*, an act aimed against the regime, it considers the offender as a public enemy to be treated with extreme severity, and specially emphasizes economic offenses.

On the other hand, it remains faithful to the principle of legality as applied both to offenses and sentences, and to the rule *nullum crimen sine lege*. Considerable importance is attached to the classical notions of fault and retributive punishment. In the dualist system that it sets up, security measures play a smaller role than in the 1929 Code. Article 3 stresses the social objectives of the sentence, including social defense. It takes into consideration not only the subjective notion of the personality of the offender, but also active will and moral responsibility, which is thus introduced as a concept of social dangerousness. The judge is carefully given a margin within which he can effectively individualize.¹²⁰

Lastly, the Greenland Code of 1954 may be considered as the most curious and bold legislative experiment in penal codification yet attempted by a European country. To a considerable degree it deserves to be called the "Code of Social Defense."¹²¹ It draws especially on positivist ideas, reexamined for a system which is not necessarily intended to be determinist and which does not claim to be founded solely on scientific considerations. The criminal policy that Denmark enforces in this almost extra-European legislative enterprise, is, on close examination, the ultimate expression of penal policy emerging from diverse tendencies now active in the Scandinavian countries. The experiment is interesting; in any case, it is enough to show that the period since the end of World War II has opened up new horizons for legislative development in Europe.

GENERAL CONCLUSIONS

Having reviewed the formation and development of the European penal codes it would be proper to end by pointing out the lessons to be

120. See Vassali, *Il nuovo Codice penale Jugoslavo*, in 29 ANNUARIO DI DIRITTO COMPARATO ET DI STUDI LEGISLATIVI (1953).

121. See Gaudefroy-Demombynes, *Une application de la défense sociale nouvelle, le récent Code criminel Groenlandais*, *La vie judiciaire*, April, 1955, pp. 25-30.

derived from these legislative efforts and the substantive law which they produced. Again, there can be no question of presenting a complete comparative survey of European penal law currently in force. That would require taking into account legislative elements outside the codes and even certain extra-legislative elements. It is possible, however, to underline certain features that can be perceived clearly by considering the European penal codes. In order to do so, we must consider these codes from the comparative point of view, from the point of view of legal technique, and from the point of view of criminal policy.

From the Comparative Point of View

Examination of European codes from historical origin through recent evolution and current direction suggests three main observations from the comparative point of view:

(1) The first concerns the relative, if not illusory, character of the traditional groupings of legislation. Once having ceased to juxtapose isolated rules of law, comparative lawyers have customarily grouped various legislative systems according to descent from the same community or other special association. Thus, especially after the promulgation of the German Civil Code, one was quite ready to contrast the Latin group with the Germanic group. With greater justification, comparative lawyers contrast continental law to Anglo-American law. Now, examination of European penal codes reveals that, in the field of criminal law, these groupings are largely artificial for two reasons.

First, there exists between each of these groups or pseudo-groups connections far more numerous than generally supposed. In the special field of criminal law, these connections even exist between quite technical points of law. For example, the English McNaghten rules of 1843,¹²² despite their original technicality (normal for the common law) are practically identical with the rule enunciated by article 64 of the French Penal Code of 1810, embodying one of the basic points of classical penal law as regards moral responsibility. By consulting the most modern authors like Glanville Williams, it can be seen that the distinction, also purely classical, between intention and motive is not peculiar to continental law and finds its equivalent in the criminal law technique of England.¹²³

Furthermore, reciprocal influences operate from one system to the other. Common influences have tended to produce what might be called

122. On the McNaghten rules, see KENNY, *OUTLINES OF CRIMINAL LAW* No. 53, at 68 (Turner ed. 1952).

123. WILLIAMS, *CRIMINAL LAW (THE GENERAL PART)* 41 (1953).

“common legislative law” independent of national frontiers and particular legal techniques. This was the case, for example, of the nineteenth century mitigation in treatment of political crime. Similar common trends are individualization of sentence, increasing discretionary power of the judge since the end of the last century, penitentiary reform, and the advent and development of the particularly modern notion of “treating the offender.” Technical differences between legislative systems tend therefore to lose their importance not only in relation to results or isolated rules of law, but also—and this is not so widely realized—as regards the modernity of outlook of the systems or even changes in legal practice.

(2) Elimination of old groupings necessarily leads to the creation of new groupings. The present geography of European criminal law, as represented by the penal codes, no longer corresponds to that which could have been seen in the middle of the last century. Legal or criminalistic geography is essentially fluid. A political and historical accident like the establishment of the U. S. S. R. and the consequent birth of Soviet penal law may cause immediate substantial change; but homogeneous groupings can also result from a gradual evolution based on common acceptance of a certain number of basic ideas.

In the middle of the last century a basic distinction could be made in Europe between legislation based on the Napoleonic Code and legislation derived from the Bavarian Code of 1813. The movement of “scientific” legalism that we have put roughly between the Belgian Penal Code of 1867 and the Italian Code of 1889 connects certain later and more technical codes. From 1930 to 1945, one might seek to distinguish the group drawing on authoritarian penal law and the group that remained faithful to the general principles of liberal penal law. Thus for the alert specialist, each period presents different and continually changing classifications and subclassifications. Today all these former classifications are tending to lose precision; but the group of “peoples’ democracies” has gradually built up a system in definite contrast to Western European law. The 1951 Yugoslav Penal Code appears to stand intermediate between these two conceptions. Furthermore, and despite certain differences in detail which should not be overlooked, the Scandinavian countries today present related codes soundly organized from the point of view of criminal policy and in many respects worthy models for other penal legislation.

(3) This new legal—that is to say, human—geography seems to justify the conception of comparative penal law as legal sociology concerned not so much with rules as with specific responses of a given

society to the phenomenon of crime. Further study of the different European codes would enable one to approach this ideal more closely. Modern penal law as reflected in a code expresses, in the technical language of a system, ideas which are often extra-legal and beyond the system itself.

To understand the penal law of the period between the two wars, one should concentrate much less on the technical differences that may separate the Danish Penal Code of 1930, the Italian Code of the same year, and the Roumanian Code of 1936, for example, than on discovering how these three codes reacted to the idea of "dangerousness," how they gave new powers to the judge, how sensitive they were to the movement for internationalization or socialization of the criminal law. When one considers penal codes, especially the most modern, one should especially search beneath the techniques, to the legislative current that seeks to satisfy economic and social needs, to meet certain political exigencies, or to settle certain moral controversies. New provisions on juvenile delinquency, new social and economic laws, redefinition of crimes against the security of the state, and after the last war, the latest sections on euthanasia, abortion, infanticide or desertion of family, these are the clues to the movements of ideas and common concerns which are more significant socially, politically, and criminologically than in their strictly legal aspects. Now—more than at the end of the last century when pure legalism was triumphant—modern criminal law aims to satisfy needs and concerns that can only be appreciated in a frame of reference broader than the strictly legal.

From the Point of View of Legal Technique

The preceding reflections lead directly to certain conclusions relating to penal law techniques themselves. Here, contemporary legislation reveals its clearest differences from the legislative developments of the nineteenth century. Three principal conclusions can be drawn.

(1) Twentieth century codes change or eliminate the principal technical problems of the nineteenth century. In the last century, and especially after 1860, the codes differed primarily with regard to classification of offenses, the concept of attempt, the definition and effect of recidivism, and the concept of complicity. Controversy centered on the problem of attempts which cannot possibly succeed, probable harm, or the difference between act and omission. These problems still loom large in what has been referred to as official theory, especially in textbooks for law students. They indeed have the advantage of supplying suitable topics of discussion for sharpening the legal mind. But it is

enough to look at the penal codes of the twentieth century to perceive that today these problems have lost almost all their importance.¹²⁴

(2) Just as new legislative classifications succeeded old groupings, so new problems replaced outdated controversies. Modern penal law, born at the end of the nineteenth century, faces problems which were either not seen, or avoided, or distorted by classical penal law, especially the strictly legal formulation that this law received in the middle of the last century.

A few examples suffice to demonstrate the intense practicality of these new problems. The problem of insanity and partial responsibility, which in the nineteenth century found a solution both legally satisfying and socially ineffective, is met in the new codes by a system of graded preventive measures for persons of unsound mind, drug addicts, alcoholics, asocial and antisocial persons. But the legislator is confronted with the yet unsolved problem of classification of offenders, in addition to the two traditional classifications of classical law: offenses and sentences.¹²⁵ The latter classifications, at least under the Code of 1810, were more or less solved by using criteria of a purely legal and procedural character. Classification of offenders, however, compels one to face criminological issues, raised by the very fact that the crime was committed.

Penal codes of the nineteenth century sought to establish complex schemes of grading sentences. This ended with the advent of security measures, now reformative, now educational, sometimes semi-disciplinary. The German *Jugendarrest*, the English "penal week-end," "detention centre" and "attendance centre," security internment, "vocational therapy" and other new devices, supplemented, broadened and complicated the old range of penalties. To conditional release and suspended sentence, both accepted with difficulty by classical penal law, are added judicial discharge for good behavior, probation and an infinitely varied system of educative assistance both within and without the penitentiary.

124. French decisions long ago rejected the defense of impossibility. The Italian Penal Code of 1889 was notable for its disposition of questions of attempt, recidivism, and especially complicity, all by means of subtle distinctions likely to promote controversy among authors, and theoretically suitable as guides for judges. The Rocco Code of 1930, making a complete break, abandoned many of the distinctions associated with the teaching of Carrara. The implicit or explicit consideration given to dangerousness of the offender, the often diffuse but always present concern for the personality, above all the desire to make a working code, gradually suppressed the old technical controversies. At least their impact on the living law is minimal.

125. See Ancel, *La classification des délinquants en droit comparé*, CONFÉRENCE AU COURS INTERNATIONAL DE CRIMINOLOGIE DE ROME (1955); ANCEL, *LA SCUOLA POSITIVA* 355 (1955).

At this point we should note the development of family offenses, crimes of a social nature like failure to render aid or creating a common danger, and especially economic offenses. As a rule all these problems are handled in the new codes; but often this can be accomplished only by demolishing the old framework. The results can be seen in the development of the structural codes and the most modern statutes.

(3) In these circumstances it is not surprising that some legal systems completely reverse their former positions. Authoritarian penal law between the two wars was above all marked by reversal of former views on political crime, by violation of the principle of legality, and by the almost complete acceptance of incrimination by analogy. Almost everywhere, in democratic as well as authoritarian regimes, modern penal law tends to reverse the classical position on intention and motive, to look at both, or even to consider the motive rather than the old abstract intent. In contrast to the rule that the elements constituting an offense must be defined by law, and to "typicality," as Latin-American criminologists say, the modern legislator pronounces against behavior involving special danger to the community rather than against specified acts.¹²⁶ So we witness the establishment of the "behavior offense," taking us back almost to the old European penal measures devised for vagrants, persons of ill repute, and idlers. A similar movement in sixteenth century Netherlands was the creation of establishments such as the famous "Rasphuis" of Amsterdam, in which Thorsten Sellin rightly recognized one of the sources of modern penology.¹²⁷

This reversal of old positions, these far-reaching modifications of the internal structure of penal law, often ignored by criminologists or regarded as trivial regrettable accidents, because they are technically abnormal from the point of view of classical penal law, reveal their full significance when one sees, not the isolated special statute or rule, but the whole panorama of European codification in its dynamic evolution. One perceives then that this evolution is in reality necessitated by new forces, be they unionism, socialism, state control, or concern for protecting the family, youth and public morality. Once more, the weak structure of legalism breaks under the pressure of impelling forces; but now these come from a new conception of criminal policy.

From the Point of View of Criminal Policy

If one wishes to grasp the exact significance of modern European codes, they must be considered from the point of view of criminal

126. See Soler, *La formulation actuelle du principe: nullum crimen*, 1952 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 11 (France).

127. SELLIN, PIONEERING IN PENOLOGY (THE AMSTERDAM HOUSES OF CORRECTION IN THE 16TH AND 17TH CENTURIES) (1944).

policy insofar as they are expressive of the manner in which the European States intend to organize the modern fight against crime. Study of the legislative evolution and comparison of the twentieth century codes supplies the most precise and useful teachings. They can be summarized under three principal headings.

(1) After the brilliant but transitory triumph of legalism in the codes from 1860 to 1890, European codifiers appear to have lost interest in theoretical controversies, and turned to supplying solutions for the great problems of criminal policy confronting modern society. The codes tried to express—not without some contradiction, and often with a confusion that purist lawyers have delighted to point out—the dynamism of underlying socio-political tendencies. All the influences which have been mentioned, especially the movement for socialization and internationalization of penal law, have played their part. It remains to state precisely how this criminal policy is expressed in the new European codes.

In appearance, these codes are at once very close and very far from each other. They exhibit a welter or an artificial order of sometimes inconsistent provisions. They have been said, not without reason, to embody conflict between the neo-classical tradition and positivist tendencies. One may compare some of the codes and notice advance and retrogression sometimes within the same country. Thus, one could contrast the seemingly more “classical” Yugoslav Code of 1951 with the more “modern” Code of 1929. One could also contrast the traditional Spanish Penal Code of 1944 with the boldly neo-positivist Greenland Code of 1954. After the end of the last war, there were tendencies in Italy to retrogress from the Code of 1930.¹²⁸ Sweden was stirred by similar controversies tending notably to substitute a new code of “social defense” for the old penal code, arousing finally a sort of neo-classical opposition.¹²⁹ However, in their entirety, the European penal codes seem to have stopped at the midpoint where we have placed the Danish and Italian Codes of 1930, the Polish Code of 1932, the Swiss Code of 1937, and the Greek Code of 1950. Such are the appearances but, and this is the point, are they more than appearances?

(2) These contending forces, these advances and retreats, this *media-via*—do they perhaps hide the real problem? All these are the

128. See with regard to this, the reaction of Grisignini, referring to a preliminary project for revising the Italian Penal Code. Grisignini, *Regresso di un secolo nella legislazione penale*, in 1 TREATISE OF ITALIAN PENAL LAW, at app. (2d ed. 1950).

129. One will find these controversies fairly clearly echoed in the last volumes of the *Year-book of Nordic Criminal Lawyers*.

inevitable consequence of incorporating a concern for the dynamic personality of the offender into an objective and naturally static system of legalistic reaction. The nineteenth century codes, based exclusively on the criminal act, as defined in a system strictly applying the principle of legality, established an objective retributive system for the repression of crime. Whether one likes it or not, it is this same system of objective retribution which is under fire today and is gradually crumbling under successive attacks in modern penal legislation.

Some theoreticians make the mistake of concentrating on out-dated controversies. They continue to denounce the obvious excesses of the positivist school. They make much of the apparently felicitous but purely artificial balance which results from a system said to be "eclectic," without realizing that all these intermediary theories merely seek to preserve the essence of the classical system in order to minimize concessions to the demands of modern criminology. But for a long time the legislators have been far more sensitive than the professional penologists to the necessity of adapting criminal law to the needs of society and to the teachings of the science of man. Penal law will be built without such penologists, or despite them.

Accordingly, criminologists would be well advised to turn away from the study of legalistic rules, to consider the dynamic development of European codification, within national boundaries, and internationally. Comparative study reveals itself as extraordinarily rich in lessons for those who come to it with an open mind. They will be able to see how the great codes of the second quarter of the twentieth century succeeded those of the second half of the nineteenth century. They will then be able to see what the Danish or Italian Codes of 1930 created that was truly and validly new. Above all, perhaps, they can meditate on the case of the Swiss Code of 1937, probably the most successful code of this half century which has already undergone one revision and is about to undergo a second. Not that it failed to make a constructive contribution to twentieth century penal law, which is still finding its way, any more than the proposed reform of the Belgian law of social defense of 1930 shows that it was useless or ill-conceived.¹³⁰

(3) Modern penal legislation is actually in transition. Change is being imposed by the necessity of a more and more conscious criminal policy, forcing the codifier away from positions held by his predecessors in the middle of the last century. The only ones who are still unaware of it, or pretend to be unaware of it, are those who, comfortably settled

130. See Cornil, *Vingt ans d'application de la loi de défense sociale*, 1955 REVUE DE SCIENCE CRIMINELLE ET DROIT PÉNAL COMPARÉ 181 (France).

or asleep in the immobile passivity of traditional theory and practice, refuse consciously or otherwise to make the necessary effort to perceive the origin and force of these currents of renaissance. Such an attitude is not enough to destroy these currents nor will it convert into temporary aberrations the reforms and measures from which is emerging a new penal law of social protection and individual rehabilitation.

This sketch necessarily is incomplete. Periods of transition are always difficult for contemporaries to understand and the transitions themselves are always delicate. But only by considering European legislative movement in all its dynamism and in its successive legislative expressions can one understand thoroughly or fairly appraise the existence, power and direction of those basic forces which are preparing for, and perhaps already foreshadowing, the criminal law of tomorrow.