Journal of Criminal Law and Criminology

Volume 50
Issue 6 *March-April*

Article 3

Spring 1960

Classicism, Positivism and Social Defense

J. M. Canals

CLASSICISM, POSITIVISM AND SOCIAL DEFENSE

J. M. CANALS

The author, a native of Puerto Rico, received his first degree in law from Yale University, and the Masters degree in Comparative Law from New York University under Professor Gerhard O. W. Mueller. He is presently studying in the *Instituto di Antropologia Criminale* at the University of Rome, Italy.—EDITOR.

INTRODUCTION

Incursions into foreign legal fields rarely fail to yield fruit. However, the quest is often surrounded with difficulty, stemming from the factual impossibility of simultaneously growing along with two or more legal systems. Foreign legal writings seem to us—as ours seem to foreign readers—to take for granted a certain store of knowledge, the actual lack of which renders their full comprehension elusive. This is hardly a question of language alone, for if it were, translations would eliminate the problem entirely.[1] However, it is a fact that exposure to the vital environment gives to all words, and to legal terms especially, a wealth of meaning which dictionaries cannot supply.

This paper is an experiment in dealing with the background of contextually related terms. The terms: "classicism", "positivism" and "social defense" have been chosen in order to outline a method of inquiry which, it is hoped, will help to make the comparative study of law a less formidable undertaking.

The above terms constantly recur in foregin penal publications. There are criminal law journals bearing such names as "La Scuola Positiva",[2] or "Revue Internationale de Défense Sociale."[3] Some codes are described as "classical", and some penitentiary innovations as "social defense" measures. It is immediately apparent that these terms are short-cuts to concepts of the highest importance, and yet, no legal articles here in the United States deal with them, albeit tangentially.

The simplest way to describe anything is by calling to mind something familiar which resembles it. Unfortunately, no congruent phenomena to which we could point can be found in the American legal world. Surely, we may say that Corbin and Williston represent somewhat antagonistic schools of thought in the Contracts realm, but this could hardly be used as an example of the breadth and depth which movements such as classicism, positivism or social defense have in foreign lands. The variance of their basic ideologies—especially with regard to the first two—and the infiltration of their influence in all criminal fields is more pronounced, indeed more virulent, than in any American situation. However, it will become apparent that the conflicts which exist elsewhere rage as fiercely here in the United States, though at more practical levels and somewhat stripped of their philosophical implications.

A simplified introductory definition might be ventured as follows: classicism, positivism and social defense are schools of thought, prevailing in modern times, with differing views concerning the theoretical bases and the practical methods which should underlie the application of social action designed to prevent antisocial conduct or behavior of political significance. Many writers agree, and it is the premise of this paper, that Classicism may be considered a thesis, Positivism its antithesis, and Social Defense a synthesis of both. In other words, in pursuing its goal, Classicism adopts an objective posture, Positivism a subjective one, while Social Defense more often than not propounds a compromise solution. The explanation of the genesis, development and subsequent influence of these movements is the substance of this paper.

[1] For this reason, M. Marc Ancel may confidently state that: "It is obvious that the translation of a legal term from one language into another is still a constant source of error." Observations on the International Comparison of Criminal Statistics, memorandum submitted to the International Group of Experts on the Prevention of Crime and the Treatment of Offenders, *1* INT'L. REV. CRIM. POL. 43 (1952).

[2] Published in Milano, Italy, since 1891. It did not appear between 1943–1946. The official title since 1947 is: SCUOLA POSITIVA, RIVISTA DI CRIMINOLOGIA E DIRITTO PENALE.

[3] Published in Genoa, Italy, by the *Societé Internationale pour la Defense Sociale.*

GENESIS AND DEVELOPMENT OF CLASSICISM

Not so very long ago, the social organization of the European mainland, from the legal standpoint, was characterized by: the predominance of acquired status as the basis for enjoying rights and privileges; scant differentiation between what is moral and what is legal and wide fragmentation of the legal order leading to difficulty in ascertaining the law. History shows that the attendant evils of inequality, inquisition and ignorance had been avoided or minimized in England. A possible explanation may be found in that, during the crucial period between the 13th and 15th centuries, Britons decided for the maxim *nihil de novi sine nobis* ("nothing new without us") whereas, on the Continent, the *quod placuit Principe* ("whatever pleases the Prince") formula prevailed.[4] But, be that as it may, the fact remains that enlightened humanitarianism in the 18th century led European reaction to victorious liberalism. Notice the almost antithetical relation between the evils mentioned above and the rallying cry for *Liberté, Equalité* and *Fraternité.*

The penal law movement later known as Classicism, may be considered a direct descendant from the fight for liberalism. As such, it incorporates certain principles whose spirit, if not their very tenets, also inform some of our most jealously guarded safeguards in criminal law administration. More evidence is found by tracing the ideas of Montesquieu and Voltaire—both of whom visited England and were great admirers of the English—through Rousseau, to Beccaria.[5]

The choice of Cesare Beccaria's *Dei Delitti e Delle Penne*[6] (An Essay on Crimes and Punishment) as leading manifesto for the ideology of penal Classicism, can scarcely be avoided. Beccaria was but a young Milanese of 26, when his short essay—written as a task for one of his teachers—was published in 1764. It was a closely reasoned and devastating attack upon the arbitrary, corrupt and inhumane practices of criminal law administration at the time. This eloquent plea set the foundations for a new penal, procedural and penitentiary system based on the principles which led to the French revolution, and the Declaration of the Rights of Man and of the Citizen contains the cornerstones of the system.[7]

The fundamental equality of all men was the basic major premise. This meant that men would be equally treated under law and that similar conduct, whenever punishable by prior legal provision, must be subject to similar punishment. Men had to know, then, what categories of conduct were punishable; thus, the necessity for criminal provisions to be set down in writing and with sufficient clarity to be comprehensible to anyone. Punishable conduct could only be that which encroached upon someone else's freedom in violation of the terms of the social contract. Furthermore, judicial discretion had to be stifled altogether by providing for the strict application of the laws as promulgated by the legislator.[8] Nevertheless, not even the legislator could provide for punishments which would infringe upon the inherent dignity of Man.

The above paragraph could be rendered more familiar in terms of: equality before the Law, legality and strict interpretation of the laws, necessity of an overt act, and prohibition against cruel and unusual punishments. It should not be forgotten, however, that these common law principles developed by evolution and thus correspond more closely with the Is of our legal order, whereas, on the Continent, their development was initiated by a revolution, and the journey from the Ought to the Is rarely lacks in pitfalls. Additional differences are introduced by substantial procedural variations existing between countries and systems.

The principle of equality in the Classicist

[4] The English choice in favor of participation in State activities is glaringly apparent in Magna Charta. Their distaste and rejection of the Romanic "*quod placuit Principe*" is shown in the writings of Bracton, Fortescue and Blackstone. See: JOLOWICZ, *Political Implications of Roman Law, 22* TULANE L. REV. 62 (1947), p. 64.

[5] Some wonderful examples of the efficacy of comparative studies in the dissemination of ideas, and also of the moulding of concepts according to time and place, can be seen by comparing Montesquieu, Beccaria and Bentham. The idea of the proportionment of the punishment to the offense, thus traced, leads one from Montesquieu's *Lettres Persanes,* especially letters 80 and 95, to BECCARIA'S ESSAY ON CRIMES AND PUNISHMENTS, Chapter VI, (London edition of 1867, pp. 21–26), and then over the Channel to Bentham's Principles of Morals and Legislation, Chapter XIV. Of course, the process is best perceived in philology, e.g. the term "riding coat" found its way from England to France. In France the spelling was changed to "redingote" and it returned to England with that spelling where it is still part of our language.

[6] It was first published anonymously, which seems to indicate that it was not likely to be well received by the circles in power. See MONACHESI, CESARE BECCARIA, *46* J. CRIM. L. CRIM. AND P. S. 439 (1955).

[7] Article VI states that the aim of the State is "to preserve the natural and inalienable rights of man"; Article 8, contains the formula *Nullum crimen, nulla poena sine lege.*

[8] Beccaria wisely avoids discussion by failing to describe what he means by "legislator." Chapter III of his ESSAY.

scheme effected far-reaching changes in the administration of the criminal laws. It sought to eliminate status as a factor entitling to privileged treatment or punishment.[9] Equality was predicated upon the firm belief that all men live under the empire of reason, that his conduct results from the conscious operation of his will after a process of reflexion and choosing among alternatives of action. The rule is freely-willed conduct, exceptions should be proven, and the Law is loath to recognize any unless the mental processes of the individual are so disturbed that his faculty of cognition-volition is entirely disrupted. What Holmes said about our own criminal law applies to Classical penal law in general, namely: that "the criminal law requires the individual at his own peril to come up to a certain height, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness."[10] While Classicism is most emphatic in requiring a degree of moral guilt—a *mens rea*—before criminal liability is incurred, the fact is that the mental element was not carefully studied by the luminaries of that school, nor was the time ripe for a depth understanding of the workings of the human psyche.

Having considered all men as identical integers in a natural equation, the Classical school turned to the scrutiny of the *actus reus*, and its contribution to legal science in this field is immense. Codification provided a suitable showcase for the display of the traditional attributes of Latin genius:[11] orderly reasoning and clarity of expression. The multifaceted problem facing legislators was how to describe, label and punish criminal conduct so that: (1) everyone could know what deeds were punishable (so that one's freely willed actions could be guided accordingly); (2) all imaginable types of socially damaging conduct could be covered (to prevent voids in the criminal law which could not be filled by a straight-jacketed judiciary); and (3) punishment could be computed with relation to the degree of moral guilt[12] (since, according to the Classicist free-will theory, moral responsibility should be the basis for liability). Classical codes, developed by a process of reasoned deduction, are logical structures of outstanding harmony and equilibrium.

The endeavor to abolish judicial discretion was another major step toward the full objectivity sought by the Classical School. Prompted on the one hand by a historical reaction to the times when judges dealt with persons according to their station and influence rather than according to the conduct with which they had been charged, and on the other by a deeply-felt belief that the new codes were the distillation of the right reason of the ancients, and therefore had to be protected from possible tampering by the judiciary, it was thought necessary to reduce the system to the level of a science dealing with observable facts, namely criminal deeds and conduct. Once the accused failed to overcome the presumptions of sanity and volition, the remainder of his personality and the circumstances which may have affected his personality with relation to his criminal conduct were scantily considered. The prescribed punishment followed inexorably after the

[9] Status always had its privileges in Roman law. In some instances, the holder of a certain status was imposed a lesser punishment for crimes normally punishable by death. For example during the Empire, the unlawful killing of a slave was punished by death, but a perpetrator belonging to the upper classes suffered banishment and forfeiture of property instead. BURDICK, PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW, (New York, 1938), p. 499. Of Romanic inspiration must have been likewise the decree of Philip Augustus (1181) which made profanity punishable by drowning in the case of plebeians and by the payment of a fine in the case of nobles. Commentary, attributed to M. Voltaire, to BECCARIA'S ESSAY ON CRIMES AND PUNISHMENTS, (London, 1767) p. XVI.

[10] HOLMES, THE COMMON LAW 50, Boston, (1881).

[11] This does not mean that only Latin peoples codified their laws, but that their codes set the pace for subsequent codifications.

[12] Since the determination of the degree of moral guilt as such is a practical impossibility, the Classical school adopted the expedient of equating moral guilt to the quantum of antisocial disturbance caused, as predetermined by the code provision describing the criminal deed. In the next cardinal step, raised by Carrara to the majesty of a first principle, the criminal deed was reified as a legal, not a factual, entity. Says CARRARA in his PROGRAMMA (6th Edition, 1886 Chapter 1, p. 21). Cited in FERRI, PRINCIPIOS DE DERECHO CRIMINAL, (Spanish translation, Editorial Reus, Madrid, 1927, hereafter cited as PRINCIPIOS): p. 42, note 5. "The whole great network of prohibitive and punitive rules must be grounded upon a fundamental truth. Our task was to find the formula that would express this principle, tie it with the fundamental truth, and deduce from it the special precepts. This formula had to contain the germ of all other truths. . . . The formula may be expressed as follows: crime is not a fact entity, but a legal entity, and it further indicates that crime is not an action but an infraction, that is, a contradictory relationship between the deed of a man and the prescription of a law. With such a proposal, it seemed to me that the doors were opened to the spontaneous evolution of all criminal law by virtue of a logical and inavoidable order." A further reification of punishment, also as a legal entity, led to the mathematical application of the Kantian theory of retribution (*Vergeltung*) on the basis of the imperatives of justice. See: CAIRNS, H., LEGAL PHILOSOPHY FROM PLATO TO HEGEL, Johns Hopkins Press (1949) p. 453.

judge linked the accused with the committed offense.

The Classical School, true to its humanitarian origin, was instrumental in toning down the harshness of former punishments. Not only did it oppose the infliction of capital and infamous punishments on the ground that Man is possessed of an inherent dignity which the State cannot violate, but it also restricted punishment to the culprit himself, and tried to abolish those which, like general confiscation, tend to damage the family's prestige or financial status beyond repair.

The codes of the Classicist period—roughly the entire 19th century—are for the most part divided into three parts: a general one covering what Professor Hall would call principles and doctrines;[13] the second dealing with felonies and their punishment; and a third dealing with misdemeanors and their punishments. Perhaps the most typical of these, the Zanardelli penal code for Italy (1889) contains 498 articles in a tripartite scheme. The French penal code of 1810, has one more division dealing with persons punishable, excusable and responsible for felonies and misdemeanors. It has 487 articles, and it is still in force, although the additions appearing in the 1958 edition cover as many pages as the original code itself. The articles of these codes are masterpieces of clarity and brevity, they do not share the exhaustiveness and repetitiousness of most of our statutes. The computation of the punishment for any given deed is almost mathematical. It would perhaps be no exaggeration to conjecture that a medium-sized Univac could be made to memorize a whole code and figure out punishments automatically. Such a contrivance would have been greatly appreciated by judges who were supposed to be mere button-pushers.

Viewed in a historical context, Classicism introduced or popularized a number of improvements in criminal law which have stood the test of time.[14] After the loss of prestige it suffered during the heyday of Positivism—some writers defining it as: legalistic reaction bound to disappear—it is enjoying once more, under the name of neo-Classicism, the favor of theoreticians and legislators alike. Examples are found, not only in those countries who, under authoritarian regimes, suffered from the flouting of traditional classical principles,[15] but even in Soviet Russia, whose latest criminal code promulgated late in 1958 marks a return to certain postures much in sympathy with neo-Classicism.[16]

Positivism: Its Genesis and Development

As the 19th century progressed, the masters of the Classical School increasingly devoted their efforts to studies lying in the periphery of the positive law as exemplified by the codes. They discoursed widely about the metajuridical foundations and justifications of their system, about different theories of punishment and criminal conduct. Surely, some of their followers tried to bring about a gradual retreat from the initial postures, especially through the introduction of means to evaluate the personal characteristics of the offender, of alternate punishments, and the like, but it remained for the Positive School to advocate and present a diametrically opposed system.

This new movement was consolidated by—and found its most articulate spokesman in—the person of one Enrico Ferri.[17] As a young man of 21, Ferri broke his first iconoclastic lance in a doctoral thesis entitled: "The Theory of Imputability and the Negation of Free-Will." This remarkable essay, published in Florence in 1878, advocated the use of the positive method in the study and prevention of criminality. By the positive method, Ferri meant a new approach then being employed by an Italian military physician, Dr. Cesare Lombroso, which consisted in carefully observing the characteristics of criminals in order to arrive at some conclusions as to the causes of antisocial conduct or behavior. This new inductive method had led Dr. Lombroso to the conclusions expressed in his book "*L'Uomo Delinquente*,"[18] namely, that some people are born

[13] Hall, Jerome, *The Three Fundamental Aspects of Criminal Law*, 8 J. Crim. L. *2* (Tokyo, Sept., 1957).

[14] Especially, the following: the right of the State to prohibit and punish antisocial conduct; the respect of the rights of individuals, which may not be sacrificed by the State for purposes of expediency; the innocence of one accused must be presumed and he should be given every procedural opportunity to defend himself; the principle of *nullum crimen, nulla poena sine lege*; criminal liability cannot extend to one not directly or indirectly participating in the commission of a criminal deed.

[15] Germany, for example, Especially the General Part of the 1958 draft penal code, German Federal Republic, Bonn.

[16] See: New York Times, October 20, 1958, p. 7, cols. 2–6, also: Current Digest of Soviet Press 33, September 24, 1958.

[17] See: Sellin, Enrico Ferri, *48* J. Crim. L. Crim. and P.S. 481 (1958).

[18] Published in Torino, 1876, this book was instrumental in the creation of new sciences dealing with the clinical anthropological study of criminals; i.e., anthropometrics, physiognomy, etc., and more recently, psychology, endocrinology, etc.

criminals, *i.e.*, persons affected from birth with an epileptic condition leading to what he called moral insanity, an affliction which could be perceived through specific psychosomatic symptoms and characteristics and explained by atavism.[19] While failing to endorse all of Lombroso's somewhat unwarranted—and now largely discarded—generalizations, Ferri did adopt the former's inductive method and set out to create a science which would explain the causes of crime within society and within the offender himself. The new school started by considering criminality a product of the criminal's heredity and environment. Criminal "behavior" rather than criminal "conduct" causes criminality.[20] Thus it becomes imperative to study which environmental factors (societal conditions and pressures) act upon which hereditary factors in a person to cause him to be fatally predisposed to engage in criminality. Because it denies free-will, Positivism is deterministic; because it is concerned primarily with the actual or would-be criminal rather than with criminal conduct and its results, it is called subjectivistic.[21]

It took a personality as strong as Ferri's to succeed in bringing to the forefront of learned discussion proposals as revolutionary as those of the Positivist School. Together with Lombroso (the inconspicuous senior partner), and Garofalo[22] (the judicial member of the Positivist trio), Ferri guided the movement with a heavy hand. His outspoken theories were advanced with chronological timeliness. He pointed to the recorded rise in criminality tc assert the "bankruptcy"[23] of classical penal law.[24] His statement that the only mission of the criminal law should be to organize in a legal way the defense of society against delinquency[25] was in consonace with the trend toward socialism which some of the excesses of liberalism had generated. His proposals to divorce his movement entirely from any and all religious, moral or ethical creeds came as a wave of anticlericalism was sweeping Western Europe.

The Positivist School outlined the fight against criminality from two different angles: one repressive and one preventive, depending upon whether or not there had been a manifestation of overt antisocial behavior. In the first case, the magnitude of damage withstood by society—which had played such a large part in the classical determination of punishment—was considered of slight importance compared with the antisocial potential of the accused. In the second case, the necessity of overt antisocial behavior was waived: if a given person's personality was found to possess a high antisocial potential he could be neutralized through reeducation, or even segregation. In both instances, the "dangerousness" (*pericolosità*) should determine the ultimate disposition of the criminally-oriented. Obviously, the whole administration of this repressive-preventive system revolves around individual ascertainment and treatment.[26] The School persuasively stated its position as follows: the individual plays the major role in the judicial tragedy, therefore his personality should be the main concern of criminal science. There can be no "reasonable" or "average" men in the criminal law as are abstractly considered in private law, because the latter deals with the normal activities of human beings while the former deals with their abnormal ones. The process of individualization was to be pursued in the legislative sphere (by setting up classification

[19] Atavism can be defined as a psycho-physical recession in a man that causes him to look and act like his most primitive ancestors. The following are examples of the stigmata by which they were to be known: dimple in the front occipital bone, crooked nose, anomalies in labial and aural configuration, pimples, etc. LOMBROSO, LOS CRIMINALES, (Sp. translation) Editorial Tor, Argentina.

[20] The distinction is brought out by Professor G. O. W. Mueller, in *On Common Law Mens Rea*, *42* MINN. L. REV. 1043 (1958), at p. 1047, note 17, where he tells us that the term "behavior" . . . "smacks of irrationality."

[21] See: *infra*, notes 26–28.

[22] See: ALLEN, FRANCIS. *Raffaele Garofalo* in *45* J. CRIM. L. CRIM. AND P.S. 373 (1954).

[23] FERRI, PRINCIPIOS, p. 44. This exemplifies one of the weakest spots in the Positive method: stating a conclusion on the basis of very sketchy premises. The recorded rise in criminality may have been just as well caused by an improvement in the crime reporting and recording methods, as well as by many other causes. See also: FERRI, *Reform of Penal Law in Italy*, *12* J. CRIM. L. & CRIM. 178 (1921).

[24] The term "Classical" in reference to the penal law movement was first employed by Ferri in his speech on the New Horizons in Criminal Law, pronounced at the University of Bologna in 1880. Jiménez de Asúa disputes Ferri's claim that he used the term admiringly, in EL CRIMINALISTA, Vol. 4, p. 149. (Argentina, 1951).

[25] FERRI, PRINCIPIOS, p. 50.

[26] It is on this basis that Positivism is called: subjective. It should be kept in mind that the Positivist's main concern with the individual is less related to his knowing, willing and feeling capacity, than with the quantitative, qualitative, social or genetic factors which inexorably produce consequences resulting in his antisocial behavior. Many feel that, by negating free-will, the Positivists denied man the quality which most distinguishes him as an individual. If so, the subjective approach is scarcely more than an interest in man as "subject to" his heredity and environment, and as a "subject of" anthropological study for purposes of establishing his actual or potential "dangerousness." See note 28.

of actual or potential offenders according to their personality, and not according to the criminal deed they commit, *e.g.*, passional or psychotic instead of arsonist, rapist or murderer); in the judicial sphere (by using the trial primarily to ascertain the dangerousness of the offender), and in the penitentiary sphere (by providing for individualized treatment or service of sentence).

The Positivist School could have made use of the concept of "dangerousness" not only for determining the neutralizing measures to be applied, but also as the basis for attaching liability;[27] instead, Ferri developed a theory of "social" or "legal" responsibility which turned out to be predicated upon an abstraction leading to as objective an application as had been made by the Classical School by manipulating crime as a reified juridical entity.[28] In his later years, Ferri tried to introduce the concept of dangerousness into the social responsibility theory, creating a distinction between "criminal" dangerousness—which would be the basis for imposing liability following an overt act—and "social" dangerousness, for which social security measures could be imposed in the absence of an overt act. The former would be applied by the judiciary, and the latter by the police administration.[29]

The outlines of the old criminal law proved insufficient to encompass the aspects covering the study of society and the individual, and this led to the creation of a new science known first as criminal sociology, and later as criminology. This has been, perhaps, Positivism's greatest contribution to penal law. The new science has been quick to borrow from the social, medical, psychological and psychiatric sciences and in the light of all new developments, criminology has propounded new theories of varying validity. The recognition of new classifications of offenders,[30] including the habitual criminal,[31] of new categories between sanity and insanity, are some examples. The use of psychology, including psychoanalysis, in studying the reactions of offenders to different kinds of sentences and treatments has opened up new approaches to the problem of reclaiming convicts to life in society. With this purpose in mind, sentences are now made to fit the criminal and not the crime. Suspended and indeterminate sentences, parole, segregation of certain categories of prisoners, etc. are some of the practices which have supplanted the popular fixed jail term of classical times. The establishment of juvenile courts is also due to Positivist influence. Increased discretion has been recognized to the judiciary, and in certain cases, to post-conviction administrative authorities. The extreme left of Positivism envisaged the ultimate separation of the criminal law from the regular judiciary and from any legalistic principles. To use Jiménez de Asúa's phrase:[32] criminology would end up "swallowing" the criminal law, and the fight of society against criminality would be carried on by sociologists and psychologists alone.

The Positivist School achieved moderate legislative success during the first quarter of the present century. The Norwegian code of 1902 shows evidence of its influence. The Ferri draft

[27] This would have been the result of pursuing Garofalo's theory of "*temibilita*"—a word roughly coterminous with "dangerousness," to its ultimate consequences. This theory was elaborated in several studies between 1877 and 1878, so it preceded Ferri's. See: JIMÉNEZ DE ASÚA, 7 EL CRIMINALISTA 32, 38; 8 *Idem* 66, 199. GARÓFALO, EL CRITERIO POSITIVO DELLA PENALITA, Napoli, 1880, and CRIMINOLOGIA, 1885.

[28] GRAMATICA, F., in PRINCIPIOS DE DERECHO PENAL SUBJETIVO, (Ed. Reus, Madrid, 1933), pp. 170, 171, denies the subjectivity of the Positivist school after an examination of the social responsibility theory. He proposes a truly subjective system based on the intent of the actor based upon knowledge of the illegality of his action. See also: JIMÉNEZ DE ASÚA, 7 EL CRIMINALISTA 36, 8 *Idem* 199, 200.

[29] JIMÉNEZ DE ASÚA, while favoring the application of security measures in the absence of overt acts—*El Estado Peligroso sin Delito*, 8 EL CRIMINALISTA 199, and Ley de Vagos y Maleantes of August 4, 1933, still in force in Spain—quarrels forcefully with the idea of placing the enforcement of any such legislation in the hands of the police. He advocates application, through the judiciary to those guilty of what we call crimes of personal condition, i.e. vagrancy, prostitution, homosexuality, etc.

[30] For FERRI, PRINCIPIOS, p. 46, these are: the born criminal, the insane, the habitual, the occasional and the passional. Prof. Donnelly, of the Yale Law School, classifies them as: psychotic, neurotic, psychopath, mentally defective, juvenile, addict, ideological offender, contagious or critically ill and situational offenders. The late Professor Seelig, of Austria, classified them in the following major types: the professional criminal, the perpetrator of property crimes for lack of restraining power, the brutally-aggressive criminal, the sex offender for lack of restraining power, the crisis law-breaker, the primitive-reactive criminal, the criminal out of conviction and the criminal for lack of community discipline. See, MUELLER, *To the Memory of Ernst Seelig, 47* J. CRIM. L. CRIM. AND P.S. 540 (1957).

[31] Surely the concept of recidivism was known in the classical codes: i.e. articles 56, 57 and 58, French Penal Code (laws of 1832 and 1891); Title 8, Book 1, Italian penal Code of 1889; but the study of habitual delinquents as such, was indeed introduced by the Positivist school.

[32] 4 EL CRIMINALISTA 107, 3 *Idem* 54.

of 1921 inspired the Soviet penal code of 1922, which remained in force for a short four-year period. In his last days, Ferri pretended that the Rocco draft—which became the Italian penal code of 1930—was much indebted to Positivism,[33] but this was just a figment of his senile imagination.[34] The use—and abuse—made by authoritarian governments of the imperative theory of law, and of Social Defense measures—both of which Positivism espoused—precipitated the disrepute of the movement. The Social Defense movement fell heir to Positivism's remaining assets, and true Positivism has ceased to play a role in the criminal law of the present.

The Advance Toward a Synthesis

It is hoped that the canvas which has been painted with such a heavy brush succeeds in portraying the fundamental opposition between the staunch Classical and Positivist positions: the one with its extreme hypostasis of criminal conduct, attachment of criminal liability on the basis of moral responsibility, and its imposition of punishment in Kantian proportion to the magnitude of the criminal deed; the other with its emphasis upon dangerousness, principle of social responsibility and its individualization of the sentencing criteria. As so often happens, the development of moderate postures within both schools, and the establishment of eclectic movements, cushioned the inevitable shock.

Between the French code of 1810 and the Zanardelli code of 1889, the Classical School developed a series of legal refinements which were embodied in the latter code, pertaining to aggravating and mitigating circumstances, and other factors increasing the discretionary power of judges at the time of sentencing individual offenders.[35]

It has been hinted before how Ferri modified his position during his last years to the point of believing that the Rocco draft was in substantial agreement with his school.

Lastly, the turn of the century witnessed the development of eclectic tendencies, which exercised varying degrees of influence. Typical of these was the *Terza Scuola* (Third School), which tried, *inter alia*, to reconcile the views of the two major schools on the question of determinism vs. free-will. It kept the classical principle of liability based on moral responsibility, but supplanted the concept of free-will by what it termed "voluntariness" (volontarietà). Naturally, this attempt at verbal legerdemain did not find much favor.[36] Other, more successful, tendencies shall be discussed under the next heading.

The Social Defense Movement

Speaking of terms and their meanings, "social defense" is as good an example as can be found of semantic metamorphosis. The expression, already appearing in Beccaria's writings, was used by Romagnosi to mean a right of defense aginst the criminal deeds of one and all, that is to say, against the danger of criminality as a general social phenomenon.[37]

Ferri and Carnevale used it in reference to the "social defense" function of punishment.

Now it has acquired a considerably larger meaning. Three contemporary descriptive attempts follow:

"The term "social defense" corresponds to a real truth of our times; it is . . . the vehicle, or the means of expressing . . . concepts whose expansive force can no longer be denied."[38]

"Nobody knows today what "social defense" is: whether a return to Positivism, or a new, unknown conquest. . . . Let us think . . . that this "social defense" . . . is a passing fancy."[39]

"The term Social Defense is somewhat misleading, cannot be considered particularly fortunate and should not be taken to refer to any school of penal or criminological thought."[40]

[33] Ferri, in La Scuola Positiva, (June–July 1925) pp. 391–393; Spirito, Il Nuovo Diritto Penale (Venezia, 1925) p. 10.

[34] Jiménez de Asúa, 7 El Criminalista 32, 33, 8 *Idem* 225.

[35] Mitigating circumstances were recognized in the French penal code in Article 463 (Law of May 13, 1863). They are found in the original text of the Zanardelli code (Art. 59), which also admits of conditional release from prison under certain circumstances (Art. 16).

[36] Gramatica, Principios (note 24) p. 101; Jiménez de Asúa, 4 El Criminalista 153. It was led by Carnevale, Impallomeni and Alimena.

[37] Giandomenico Romagnosi introduced utilitarian thinking into Classical theory. His theory of the *controspinta criminosa* (criminal counter-impulse) sought simply to deter would-be criminals by the threat of an evil greater than the good they might derive from crime. Genesi del Diritto Penale, part IV, Chapter II (1791).

[38] Ancel, Marc, La Defense Sociale Nouvelle (Cujas, Paris, 1954) p. 7.

[39] Jiménez de Asúa, 10 El Criminalista 36.

[40] Lopez-Rey, Manuel, *The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, *47* J.Crim. L. Crim. and P.S. 526 (1957).

Now that this much is clear, some genealogical investigation might be useful.

At the time when the controversy between Positivists and Classicists raged fiercest, the no-man's land separating them was occupied by equally intelligent—and somewhat less bellicose—men, whose chief interest was to promote the international interchange of ideas and to foster scientific studies and advanced and humane views in the field of criminal law. One of the first associations resulting from the enterprise of these men was the International Penal and Penitentiary Commission, which was created, under American auspices, following a conference held in London in 1875. The Howard League for Penal Reform—as it is known since 1921—can trace its origins even further back, to the year 1866. A most influential tendency was furthered by the International Penal Law Union.

The Union was founded in 1888, by three criminal law professors: Von Listz, Prins and Van Hamel, and it was active primarily in Germany and the Low Countries. It favored sociological inquiry while preserving a distinction between criminal law and criminology. It kept the Classical notion that the purpose of the penal law is to exercise a special tutellage over the most important social interests by means of the threat and execution of punishments which are considered necessary evils designed to prevent the greater evils which would be attendant to impunity.[41] The International Penal Law Union dissolved in 1914 and was reorganized after the first world war as the International Association of Criminal Law.

A more rapid proliferation followed the second world war. A cluster of similar Scandinavian societies formed, in 1948, an international committee under the rubric: Nordic Associations of Criminologists. In 1949, the statutes of the International Society of Criminology were approved in Paris. The same year saw the creation of the International Society of Social Defense, in Liege, Belgium. A most significant event took place in 1951, when the International Penal and Penitentiary Commission merged with the recently created (in 1948) Social Defense Section of the United Nations.[42]

This genealogical detour brings out a few facts: the very diversity of the organizations engaging in roughly the same kind of endeavors, points to a certain fluidity which precludes the use of the label "school" to characterize them generally. However, there is a perceptible sharing of values and identity of methods which amply justifies recognition of the phenomenon as a legal reality which may well be called the Social Defense movement.

Since the movement has no "program", sets up no "doctrine" and generally does not seek to create a "system", it admits within its fold people who in other surroundings would make strange bedfellows indeed. This fact makes for both its advantages and its shortcomings. Probably all adherents to the movement would agree that its purpose is to "cooperate with existing specialized organizations, with a view to the advancement of the application of the scientific method to criminal phenomena."[43] This happens to be the statement of general purpose made by the International Society of Criminology. In all likelihood, some would not go along with the International Society of Social Defense's wish to "utilize the findings of the human sciences to re-examine the bases of the relations between the individual and society."[44] Fewer still would agree with M. Marc Ancel that Social Defense "presupposes also a humanistic philosophy and a moral idea which make it go way beyond materialistic determinism."[45] It would be more appropriate if Social Defense limited itself to the application of a pragmatic-inductive method in studying criminality, and to the evaluation of the preceding studies for the benefit of the criminal law.

Social Defense has not taken a decisive stand with regard to the vital problem of the relationship which should exist between criminology and the criminal law in general. Several points of view can be recognized: the most extreme would do away entirely with legalistic criminal law and would entrust the whole defense of society against criminality to institutions operated by sociologists, psychologists, physicians, psychoanalysts, and the like.[46] The most conservative would preserve the logico-abstract structure of the crimi-

[41] CARRARA, PROGRAMMA DEL CORSO DI DIRITTO PENALE, (Lucca, 1861) cited in GRAMATICA, PRINCIPIOS DE DERECHO SUBJECTIVO, (note 24) p. 92.

[42] The Social Defense Section is within the Social Welfare Branch of the Bureau of Social Affairs, Economic and Social Council, UN.

[43] 1 INT'L. REV. CRIM. POL. 34 (1952).

[44] Ibid. p. 35.

[45] LA DEFENSE SOCIALE NOUVELLE, p. 35 *et seq.*

[46] This is the view most closely akin to Positivism, and it has been repeatedly rejected in recent Social Defense meetings. See, *inter alia*, the Proceedings of the First International Convention of Clinical Criminology, in 8 RASSEGNA DI STUDI PENITENZIARI 327 *et seq.* (1958).

nal law and have criminology exert its influence at the criminal policy-making level; its corroborated findings would trickle down to the trial level by way of legislation.[47] The most prevalent is in favor of having criminology exert its influence both in the policy-making and in the practical level; criminology and criminal law would be made to work together for the benefit of the individual and society.[48] Obviously, a discussion of these points of view is beyond the scope of this paper. However, it should be stressed that in recent years—especially since after the last world war—Social Defense has been veering away from the Positivist tenets which became tools of social domination in the hands of unscrupulous leaders. It has already been noticed how Positivism emerged discredited from the second world war. Some of the taint of disrepute washed upon Social Defense, and when its forces were reassembled after the war, its efforts to salvage its position were accompanied by a pendulum swing to more discreet and conservative views. Marc Ancel speaks of a "new" Social Defense, being born at the San Remo Social Defense congress held in 1947. Careful consideration of the recent pronouncements of the movement leads to a rejection—as outdated—of the criticisms which Jerome Hall addressed to the movement as late as 1947.[49] The resolutions adopted by the International Penal and Penitentiary Commission on its last session, are indicative of the trend. Numbers 1, 2 and 5, follow:[50]

"It is desirable that the social defense measures adopted in each country be organized systematically, and that, in particular, similar measures should be used for categories of offenders such as abnormals or habitual offenders and delinquent minors.

These measures should be imposed on the basis of pre-existing law only, and after a judicial decision taken with all the legal guarantees of individual liberty, even in the cases where it is understood that the task of making the choice of the measures is reserved for a specialized body.

The dualism of the punishment and the security measure, which is more and more attenuated in the practice of modern legal systems, should be avoided as much as possible; that it would be particularly proper, as far as possible, to stop the accumulation of punishments and security measures in respect to the same offender and it would be desirable to leave to the judge or to the body designed to determine the treatment, the greatest margin of discretion in the choice of the measure or of the sanction which it deems appropriate."

If it is true that the new trend is evidence that Social Defense is adjusting to the criminal law realities of the time, then the time of fulmination and invective should give way to a mutual policy of collaboration in which Social Defense criminologists and neo-Classical penalists may devote full time to their common task: prevention of crime.

However, the problems in the way of making that eventual collaboration possible are myriad, though fascinating. Here, the United States enters the picture in a very direct way.

The few American names[51] appearing in the lists of participants in Social Defense meetings around the world appears paradoxical in view of the fact that the United States today is one of the best—if not the best—places to observe Social Defense in action. It is not surprising that it should be so, considering that the movement's underlining ideas and methods are so ideally suited to our temperament and legal traditions. It would be dwelling upon the obvious to state our penchant for the empirical, inductive, pragmatic approach. We also share with Social Defense its distrust of philosophical niceties. Add to those considerations the following advantages inherent in our legal order: whereas in Europe the basic problem of how to incorporate criminological experimentation into the criminal trial practices has yet to be solved, our traditional procedural dichotomy of conviction stage and sentencing stage carried us over that hurdle with graceful ease;[52] where the Europeans view with a distrustful

[47] This point of view brings Social Defense closest to the neo-Classicists.

[48] One of the problems most discussed in Western European legal and criminological periodicals is the use that should be made during trial of the dossier containing the medico-psycho-sociological history of the accused. Some would have it used during the investigation and trial; others would restrict its use solely to aid in determining the treatment most conducive to the eventual rehabilitation of the normal offender and to the effective neutralization of the abnormal one. See: ANCEL, LE PROCES PENAL ET L'EXAMEN SCIENTIFIQUE DES DELINQUANTS, (Melun, 1952).

[49] PRINCIPLES OF CRIMINAL LAW, Indianapolis, Bobbs-Merrill Co. (1947) p. 550.

[50] 2 INT'L. REV. CRIM. POL. 98 (1952).

[51] They make up in quality what they lack in quantity: the names of Professors Tappan, the Gluecks and Sellin, are especially well-known internationally.

[52] See Cal. Penal Code, Sections 1168, 3000 and 3020 (Deering, 1949). Also MORRIS, CRIMINAL PROCEDURE, What Agency Should Fix Sentence, *46* KY. L.J. 260 (1958) esp. at 268, 269.

eye any theory which cannot be made to permeate a whole new criminal code, we are used to sectioning off parts of our criminal common law for purposes of scientific revaluation and eventual statutory promulgation. Think how long European legalism fought the introduction of juvenile delinquency measures, suspended sentences, psychiatric examinations for offenders, etc. for the mere reason that they would disrupt the harmony of the existing codified order; yet how easy it appears to us to pass a statute dealing solely and specifically with such practices. Then think of the variety of experimentation which can be carried on in fifty-one jurisdictions simultaneously, the results of which can be ready for evaluation immediately. And, are our legal conflicts any less real for lack of cohesive ideological cliques trained in the art of philosophical speculation? How about our dispassionate—and not so dispassionate—appraisals of problems such as free-will vs. determinism,[53] carrot or stick method of handling juvenile delinquents,[54] treatment or indefinite segregation of sexual offenders,[55] civil vs. criminal trial standards for dealings with crimes of personal condition juveniles and mental defectives?[56]

Criminal law alone among the legal subdivisions can boast of so close an identification with individuals and society. People in general react more "humanly" to a murder than to a dispute as to whether a particular covenant runs with the land or not. This fact alone suffices to render the comparative study of the criminal law exceedingly valuable. This paper started out to clarify three terms. In the process, a narrow avenue leading to the vital stream of modern Continental criminal thought was laid out. If a sense of identification and a feeling of familiarity with that stream have been imparted, this paper will have accomplished its purpose.

[53] For one of the most recent symposiums on the subject, see: DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE, Edited by SIDNEY HOOK, New York University Press (1958).

[54] See, for example, RUBIN, SOL: CRIME AND JUVENILE DELINQUENCY; A RATIONAL APPROACH TO LEGAL PROBLEMS, Oceana Publications (1958).

[55] See, *interalia*, DE RIVER, CRIME AND THE SEXUAL PSYCOPATH, Charles C Thomas, publisher (1958).

[56] See Justice Musmanno's dissent in In re Holmes, 379 Pa. 599, 109 A.2d 523 (1954), cert. den. 348 U.S. 973 (1955).