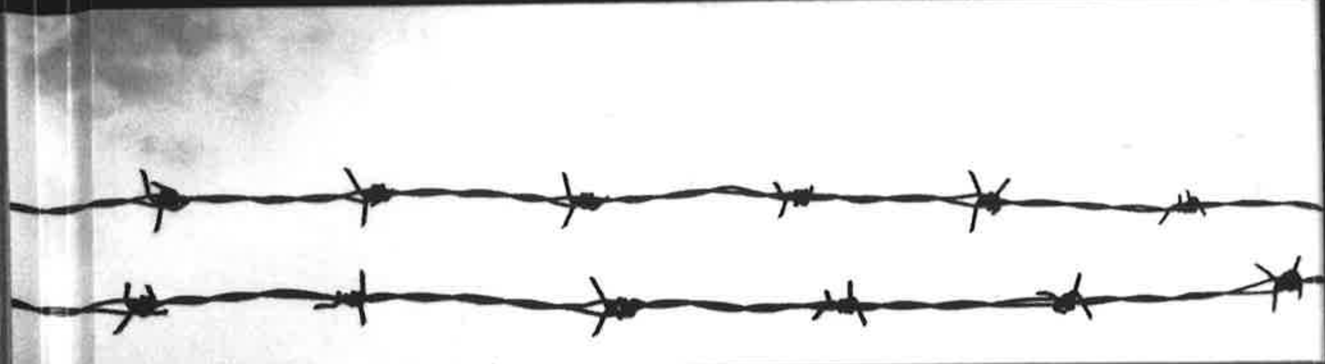

Reinventing Punishment

A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries

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From Repression to Prevention: The Uncertain Borders between Jurisdiction and Administration

In the first decades of the twentieth century, as European lawmakers and jurists were planning penal code reforms, the US idea of indeterminate sentencing was barely considered. Instead, the discussion in Europe focused on how to make the margins of indeterminacy of security measures and preventive detention not only consistent with the rules of criminal law 'in the making', but also with the tenets of the *Rechtsstaat*. The task for jurisprudence was to create legal devices and institutions to counterbalance the risks accompanying the flexibility of individualized punishments.

The two main fields of tension in the criminological reformatory movement in Europe were essentially the same ones that made the application of indeterminate sentencing problematic from the beginning and raised the question of its constitutionality in the United States—that is, the conflict with the principle of legality and infringement on the division of powers in the execution of sentences. In this chapter, I will examine the theoretical efforts made by European criminologists to reconcile the principle of legality with the vague notion of dangerousness and to reshape the division of powers within the framework of the dual-track system (section 9.1). At the London Congress of 1925, European and US penologists and criminologists reasserted their different positions about these fundamental questions, expressing different constitutional sensibilities (section 9.2). Nevertheless, by the 1920s, the problem of restraining or controlling administrative sentencing discretion was debated even in the United States: prison boards represented one of the many agencies that characterized the growth of the 'Administrative State' and, as such, demanded

new counterbalances to avoid infringements on the rule of law (section 9.3).

Given the principle that the execution of the sentence should be individualized, a penological fundamental tenet that in the early decades of the twentieth century was never questioned, the main problem concerned the distribution of legislative, administrative, and judicial authority in the sentencing phase. Section 9.4 examines how the Italian Criminal Code of 1930 sought to find a two-step solution: first, by trying to restrain the custodial measures of security and the conditions of dangerousness within the limits of the principle of legality; and, second, by judicializing the execution of both penalties and preventive detention. Section 9.5 is focused on the different positions of Latin and German countries on the judge's role in the execution of punishment and security measures at the Berlin Congress of 1935. Despite the justifications of the dual-track system, the inherent tensions of dangerousness-based preventive detention were hidden but not solved by this strained compromise (section 9.6).

9.1 Legalizing Dangerousness

The problem of the boundaries of punitive power is interconnected with the theme of the efficacy of the principle of legality in relation to the division of powers. The assignment of security measures to the province either of criminal or administrative law implies remarkable consequences for the meaning of the principles of penal certainty and strictness and entails the delegation of new evaluative tasks and broader discretion to the judge. Enlarging the boundary of criminal law to preventive justice is not simply a matter of 'legal geography', but carries with it a comprehensive rethinking of key institutions. In the first decades of the twentieth century, there were two contrasting approaches. The more radical approach was disposed to adjust theories to concrete social expectations without fear of dismantling established notions of crime, punishment, and responsibility to enable the design of a new system based on the assessment of social dangerousness. The more moderate approach, despite recognizing the need to modernize the punitive framework and to make abstract theories more consistent with facts, was inclined to integrate the criminal law system from the outside by adding preventive administrative measures to it without modifying its core identity.

Criminologists turned the rationale of the principle of legality based on the aim of protecting civil liberties into new targets of criminal policy. The boundary of criminal law was no longer defined by the nexus of law/crime/punishment, but instead by ascertaining that a crime was a minimum unavoidable condition for the application of a general 'criminal sanction' that was inclusive of both the classical retributive punishment and the correctional-preventive measures of security (see Ferri 1926c: 666). The Latin brocard expressing the formal limit of the rule was changed to the new *nulla poena sine crimine*. The choice limited the possibility of inflicting penal measures on the basis of subjective dangerousness deduced from behaviours that did not take the shape of an offence, but it reversed the original logic of the *nullum crimen nulla poena sine lege* without granting substantial protection against potentially enlarging the notion of crime. Nevertheless, the pretence of retaining legality even in a system founded on the criterion of dangerousness reveals that the principle's original meaning was made worthless.

Pragmatically, it was unlikely that a strict positivization of the evaluative criteria of the conditions of dangerousness relevant for criminal law would be achieved. Moreover, from the perspective of social defence, it was illogical to tie the presence of dangerousness to ascertaining a previous offence. Indeed, isolated proposals (Liszt 1904; see Wetzell 2000: 86) aimed to break even the thin embankments of legality and to disentangle the judgment on temibility from the necessary presupposition of a proven crime.

9.1.1 *De Asúa and the* Ley de vagos y maleantes

The most striking example is the Spanish law on vagrants and malefactors (*Ley de vagos y maleantes*) of 4 August 1933, which was 'a real law on dangerousness without crime' (De Asúa 1933; see also Belloni 1934; Martín 2009: 919–35) that entirely incorporated the dualistic theory of its draftsman Luis Jiménez De Asúa. The Madrilenian criminologist conceived of the law by modifying the first governmental draft and setting out different cases of dangerousness. Some cases presupposed the commission of a crime that, as many criminologists stated, was considered the symptom of an antisocial personality, and sentencing aimed to reform the offender or make the offender harmless. In other cases, the legal notion of dangerousness operated independently of the commission of a

crime. In these latter situations, measures of security had to be applied as a means to treat, rehabilitate, or neutralize dangerous individuals 'to correct the index of dangerousness and prevent future crimes' (De Asúa 1933: 431). Therefore, the law identified categories of dangerous subjects 'on the basis of antisocial and immoral behaviours' whose common trait was 'the ordinary abhorrence of work as well as the parasitic life at the expense of the labour of others' (De Asúa 1933: 431).

In De Asúa's opinion, the application of security measures at the end of a trial even in cases of dangerousness without crime that, although summary and shortened, granted the dangerous subject the rights to produce evidence, to counsel, and to appeal represented the fulfilment of the social defence system.[1] The 'law of biological social defence' enacted in Spain, he noted, 'is not an attack on liberalism', nor did it imply adherence to the authoritarian spirit of the German criminal law. On the contrary, 'the law on the dangerousness without crime is consistent with liberal systems rather than being in contrast with them'. Indeed, judicializing the application of preventive measures of security within a regular procedure allowed for the review of old police methods that were used to permit serious and unconstitutional violations of individual freedom (De Asúa 1928c, 1933: 446).

9.1.2 Retribution and prevention: The European dualism of methods

Clearly, the criminalization process between the nineteenth and twentieth centuries affected the classical liberal concept of the principle of legality by tempering the defensive scope of its individualistic matrix and emptying some of its corollaries in favour of social defence. The unending and intense international debate

[1] De Asúa considered the British Prevention of Crime Act of 1908, the Swedish law of 1928 on recidivists and criminals with limited responsibility, and the Belgian law of social defence of 9 April 1930 against abnormal subjects and recidivists (Collignon and Made 1943) to be precedents of the Spanish law, but clarified (1933: 442) that 'nowhere in the world there is a law like ours on the dangerousness without crime'. Only in Argentina, in a draft of 3 September 1924 (never enacted), did a lawmaker try to regulate simultaneously both the after-criminal and pre-criminal dangerousness, but it did so in a manner that was criticized by De Asúa (1928b: 316–19). There was a cautious reception of the pre-criminal dangerous state in the Brazilian draft of 1927 (De Asúa 1929: 115).

of criminal law scholars on the individualization of punishment, with an increasingly marked juxtaposition between US and European approaches, testifies to the efforts of criminologists to frame the criminal law of the future without renouncing legality, but by interpreting the *nulla poena* in a new light. The positivist idea of unifying punishment and security measures into the broad category of 'sanctions' was never enacted. Most European penal codes preferred to add complements of punishment to the traditional penalties by considering—as stated in the resolution at the Prague congress of 1930—that it was 'essential to complete the system of punishments with a system of measures of security to ensure social defence whenever punishment is not applicable or unsatisfactory' (*Actes du... Prague* 1931: 45).

Except for the Spanish *Ley de vagos y maleantes*, the commission of a crime provided for by law (and not simply the condition of dangerousness) was retained as the prerequisite for every *penal* measure that was restrictive of individual freedom. Moreover, the formal safeguards of judicial justice were extended to all the measures of over-punishment (*praeter poenam*). Thus, in all manners, traditional liberal systems absorbed the individualization of punishment with some modifications, but without completely transforming the fundamentals (the principle of legality and judicial safeguards). Security measures broadened the spectrum of the measures at the disposal of the judge by virtue of a decision that was parallel—rather than alternative—to that of punishment. Indeed, if the various punishments preserved their classical retributive character (Rocco 1911: 29, 31) and were only slightly modified by criminological considerations of the offender's personality and the purpose of social defence, security measures were, conversely, modelled entirely on the proposals of reformers and aimed at correcting or eliminating the criminal and preventing other crimes.

After the publication of the first Swiss draft penal code drafted by Stooss in 1893, many reforms (enacted or only drafted) in different European countries such as Germany, Norway, Czechoslovakia, the United Kingdom, and Italy, in addition to many laws in Latin American countries,[2] were based on the dual-track system.

[2] Among these, see, e.g., the Uruguayan law of 21 September 1907; the Argentinian Penal Code of 1922, which was modelled on European laws and provided for relatively indeterminate measures of security; the Peruvian Penal Code of 1924; the Cuban *Código de Defensa Social* and the Colombian Penal Code,

'A *dualism* of methods', as Franz Exner argued (1930: 17),[3] characterized the European criminal policy of the twentieth century and replaced the former '*monism*' that, by fighting against crime by means of punishment only, had necessarily led to an 'incomplete result'. According to the Viennese criminologist, if expiation and intimidation are the aims of punishment, its limits and manners of execution are designed to achieve these targets—thus renouncing any effective prevention of recidivism (as demonstrated by the experience of many traditional legal orders). Conversely, if the purpose of punishment is to combat recidivism, it must be so harsh and indeterminate as to lose whatever proportion it might have with the crime committed that it would seem unjust.

However, 'for different reasons... nowadays in Europe there is still a strong opposition against indeterminate punishments', whereas there is no objection to the indefinite duration of preventive detention for security reasons. Therefore, 'today, the necessary condition for the introduction of the indeterminate sentence is merely the incorporation of security measures into the legislation' (Exner 1930: 18). Thus, the divide between European and US penology is deep. As Exner noted (1933: 250) when commenting on the draft bill introducing the measures of security (*bessernde und sichernde Maßnahmen*) of indefinite duration into German criminal law, 'the indefinite sentence, in use in America... has not been included in the bill. In view of the ideal of individual freedom we are still afraid to leave the power to determine punishment in the hands of the penal administrative body—in other words to administrative office. Only the judge should be empowered to measure the penalty.'

Between the 1920s and 1930s, it was clear that the principle of indeterminacy could be accepted by the continental legal culture and legislation exclusively in the form of measures of security and the dual-track system, that is, measures 'strictly oriented to special prevention' that are applied to correct the criminal or, if rehabilitative treatment is useless or unworkable, to neutralize the criminal (Exner 1930: 18). After decades of theoretical debate, the first European idea of transforming indefinite detention into a

both of 1936; and the Mexican Penal Code of 1931. See De Asúa (1925: 236, 1946: 188–99, 376–84).

[3] Emphasis in the original.

supplementary measure of social defence, such as that advocated by van Hamel since the 1880s, found a final settlement.

9.2 'What a Vast Gulf Separates the Two Conceptions': Indeterminate Sentence and Measures of Security

One of the questions (third of Section I) of the IX International Penitentiary Congress held in London in 1925 addressed the application of the principle of the indeterminate sentence in the struggle against recidivism not only for grave offences, but also for any other case. Legal scholars continued to tackle the problems of the limits and implementation procedures of individualization, although the reports and the discussion of the general session openly revealed the split between the US and European reform movements. Indeed, the final resolution, after the declaration that 'the indeterminate sentence is the necessary consequence of the individualisation of punishment and one of the most efficacious means of social defense against crime', explicitly stated that the choice of a maximum limit of penalty that is defined by law should be left to 'the laws of each country' and that 'guarantees and rules for conditional release' should be granted 'with executive adaptations suitable to national conditions' (Butler 1926: 604). The awareness of the peculiarities of different legal systems prevailed over the ambition of achieving some type of uniform theoretical agreement with a shared programmatic decision about the changes to be realized. The principle of individualization was widely accepted but had to be realized in different forms in each state according to the legal traditions, the procedural frameworks, the importance accorded to the protection of individual rights or societal security, and theories of punishment as essentially retributive or reformative (see Brodrick's opinion in *Actes du ... Londres, Procès-verbaux des séances*, Ia (1927: 95)).

In the opening address, Ruggles-Brise, president of the congress by acclamation, considered the prevention of delinquency to be the main problem of the penitentiary question and recognized that from Lombroso onwards, much progress had been made thanks to the contribution of psychiatric science and studies on the prophylactic methods of criminal justice. He also noted that the international reform movement had been oriented by a spirit of 'penal

invention' stimulated by the growing awareness of the failure of traditional punitive methods. Conditional sentencing and indeterminate punishment were deemed by Ruggles-Brise to be the two main inventions of the previous fifty years. The second one, in particular, was American in its name and origin, 'but the idea of "indetermination", as a *mesure de sûreté* has been discussed in Europe for many years, and the phrase has a different meaning in America and Europe' (Ruggles-Brise 1927: 31). In Continental Europe, it was translated into perpetual segregation for socially inadaptable criminals, whereas in the United States, it was the distinctive feature of the protest movement against fixed penalties predetermined by law without any consideration of the offender's personality. As Ruggles-Brise argued (1927: 32), it is evident 'what a vast gulf separates the two conceptions', and the history of prison congresses shows 'what a confusion has arisen from a misunderstanding of the phrase'. However, he clarified that at the London congress, the expression 'indeterminate sentence' simply referred to the principle of the measures of security undertaken for socially inadaptable offenders, including persons who repeatedly threatened society, such as vagrants, drunkards, or persons who persist in serious crimes and jeopardize the security of the state. Indeed, many reports showed that the principle of security measures was spreading in most European and Latin American states and was adopted in many draft penal codes.

Compared with previous prison congresses and IUPL sessions in which the notion of indeterminacy had been discussed with reference to the original US formula, the London congress recognized its double interpretation. Against the 'manière américaine' that always trusted in the reformation of the offender and was optimistic, Gleispach (*Actes du… Londres*, Ia, 1927: 114) juxtaposed the 'conception continentale' that was rather pessimistic because it mainly referred to those subjects who seemed to be irredeemable (see also De Asúa 1918: 117). It was not merely a matter of different methods of application, but rather of a more substantial cultural difference and of the peculiar identity of the European (and, in particular, the continental) criminal policy compared with that of the United States. The continental criminal policy, whose main objective was social defence against the dangerousness of offenders, 'had to be mainly defensive and securitarian, and having little confidence in the reformation, preferred neutralising the criminal by means of measures of security'. Conversely, the US criminal

policy, whose distinguishing feature was its reformative purpose, tended 'much more than the European criminal policy towards the correction of the offender' (De Asúa 1918: 74). The programme of the former included among its essential points the criticism of short-term prison sentences, measures of security, and rehabilitative measures for juveniles. The latter programme was based on penitentiary institutions that were oriented towards re-education and prevention and featured the indeterminate sentence as its peculiarity.

Even a firm advocate of indeterminate sentencing such as De Asúa realistically concluded in his London report (1925: 236) that such method, originally thought of as 'an absolute and general formula for all offenders, nowadays is become, after long and discussed transformations, a criterion enclosed within maximum and minimum limits, applicable only within the field of measures of security, and, more limitedly, to dangerous recidivists'. It was able to prevail among theorists and lawmakers only at this cost. Despite Ferri's support and enthusiastic remarks (1926d) on the resolution passed at the London congress, that decision seemed to be too late to influence the continental legislation oriented at the dual-track system. Ferri noted (1926c: 819) that, unlike the original US idea, 'we want the execution of the indeterminate sentence to be transferred from the administrative authority to the judicial authority. We want the judge not only to determine the penalty in his or her decision but also carry out the execution of the sentence in relation to the personality of the convict.' Outside of the United States—where criticisms of the system were also emerging, as we have seen above—Brockway's radical proposal was rejected and transformed into the dual-track system (Hafter 1925b: 280).

In Europe, indeterminate sentencing continued to be considered an innovation too radically far 'from our traditions', as the Danish delegate Carl Torp argued at the London congress (*Actes du... Londres*, Ia, 1927: 98). Conversely, the solution of the dual-track system did not allow encroachment upon the basic principle of *moral* criminal liability founded on the idea of guilt. Any form of penalty that presupposed the suppression of the idea of *mens rea* resulted in its refusal among the conservative majority of European jurists based on the fear that it would have introduced 'into our modern science a germ of destruction, of death and, as a consequence, it would have opened the way to a new barbarity' (Roux in *Actes du... Londres*, Ia, 1927: 111).

9.3 The Growth of US Administrative Law in the Twentieth Century

During the interwar period, the delegation of sentencing powers to an administrative body represented the unsolved problem of the individualization movement. The prison board's authority was founded upon the expertise of its members and justified by the need to engage in the study of offenders' personalities. However, the new body questioned the foundations of the separation of powers and the role of the administrative power in the welfare state of the twentieth century. Indeed, the prison board is one of many administrative agencies that was instituted in the early 1900s whose legal problem should be analysed as part of the broader question related to the new balances among legislative, judicial, and executive branches that were designed to govern the increasingly complex social dynamics of industrialized societies.

The criminalization process shows significant differences among the US, continental, and British approaches regarding different constitutional reactions to the growth of administrative agencies that take prerogatives away from the other two branches. The issue of the legality of the prison board's power is strictly connected with the issue of its legitimacy and encompasses questions related to limitations of the board's power, protections for citizens against possible abuses, procedural rules of sentencing, and judicial review of the boards' decisions. The methods by which different legal systems address these problems concur in defining in peculiar ways both the purposes of punishment and the bodies in charge of applying and executing punishment. Indeed, the rule of law and the *Rechtsstaat* formulated different notions of administrative powers and the legality of administrative actions (Hamburger 2014: 277–81, 471–8; Sordi 2008). The same concept of rule of law was subject to diverse interpretations in the United States and the United Kingdom in terms of constitutional limits on legislative power.

At the beginning of the twentieth century, Albert Venn Dicey contrasted the British notion of rule of law with the French notion of *droit administratif* because the prerogatives vested in the administrative power and governmental officers by the French (and, more generally, continental) legal system were

inconsistent with the law of the land (Dicey 1902: 198–9). In Dicey's opinion, the continental administrative law, modelled on the transalpine sample, was based on two fundamental ideas that were completely foreign to English jurisprudence and legal tradition. The first was that government and its servants—as representatives of the nation—enjoyed a body of special rights, privileges, and prerogatives compared with those of ordinary citizens. The second was the need to retain a rigid separation of powers to prevent government, lawmakers, and courts from encroaching upon one another's autonomy. Thus, the dogma of the separation of powers, particularly between the executive and the judiciary, was interpreted differently in Continental Europe and the United Kingdom. In France, it referred to 'the powerlessness of the Courts in any conflict with the executive' and meant 'the protection of official persons from the liabilities of ordinary citizens' (Dicey 1902: 341). Thus, the independence of the government took shape outside of common jurisdiction and in the autonomy of administrative tribunals. It was a conception that was very different from the one prevailing in the United Kingdom, according to which all Englishmen, including civil servants of the Crown, were subject to the same rules and courts because 'the common law Courts ha[d] constantly hampered the action of the executive, and, by issuing the writ of habeas corpus as well as by other means, d[id] in fact exert a strict supervision over proceedings of the Crown and its servants' (Dicey 1902: 342). Using similar arguments, US constitutionalists celebrated the 'equal protection of the laws' as the US formulation of a principle that encompassed the English notion of 'due process' but was even more comprehensive and represented the polar opposite of continental administrative law (McGehee 1906: 60–4; Taylor 1917).

Nevertheless, the political and institutional transformations of the twentieth century forced even the Anglo-American legal culture to recognize the growth of administrative law and administrative agencies (Ernst 2014; Hamburger 2014). In 1915, even Dicey (1915: 149) recognized the gradual introduction 'into the law of England of a body of administrative law resembling in spirit, though certainly by no means identical with the administrative law (*droit administratif*)'. Between the 1920s and 1940s, despite resistance to change by more conservative scholars (Hevart 1929), Dicey's original distinction between continental

and English models of administrative law was increasingly questioned both in the United Kingdom (Jennings 1943: 53–61, 285–97) and in the United States (Frankfurter 1938a: 517; Garner 1924; Riesenfeld 1938). Compared with the initial framework designed by the framers of the American Constitution, both the constitutional meaning of the rule of law and the principles of separation and specialization of powers had changed substantially (Hamburger 2014: 325–45). The first characteristic of Dicey's definition of rule of law concerned the principle of legality, namely, that only a 'distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land' is punishable, and 'in this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint' (Dicey 1902: 183–4). In the United States, however, the Supreme Court modified all strict notions of this doctrine, with possible variations of the principle 'that still may be alleged to be compatible with the essential principle of a "government of laws, not men" ' (Pennock 1941: 10).[4]

Similarly, the tripartite genius of US institutions was criticized. Although not openly rejected, new political trends and the broader functions assigned to administrative bodies showed that it was 'outmoded' (Pennock 1941: 18). The rise of the administrative state affected the constitutional relations so much that 'the legendary separation of powers' seemed to lose its aura of 'sanctity' and was openly labelled an 'antique and rickety chariot' (Robson 1951: 16). The corollary of the rule of law, according to which the legislative power cannot be delegated, underwent great changes and became, in the courts' interpretation, a matter of limits within which lawmakers were able to delegate their powers to administrative agencies. US courts, which were not at all blind to the 'practical exigencies of government', but showed 'a remarkable ingenuity in the art of putting new wine into old bottles', conformed to the momentous growth of agencies and practices that seemed to challenge both the separation of powers and the traditional notion of the rule of law and formulated new legal notions such as 'quasi-judicial' and 'quasi-legislative' acts or powers to face continuous transformations (Pennock 1941: 19).

[4] See, e.g., *St Joseph Stock Yards Co. v. United States* (1936), 298 U. S. 38.

9.3.1 *From legal rules to legal standards: Pound and Frankfurter*

Pound's considerations on the gradual shift from rules to legal standards in the US legal system provided a new approach to the subject. In 1919, the Dean of Harvard Law School noted that the mechanical application of strict rules, rigid forms, and fixed principles (i.e. the methods by which legal liberalism had provided equality before the law and certainty in the administration of justice) were no longer suitable for the regulation of the complex legal conditions of the new century. Legal standards for administrative action represented a means by which the legislature might balance the advantages of flexible rules and the claim for the individualization of justice with the need to define the limits of discretional decisions of administrative bodies because standards are created 'to guide the triers of fact or the commission in applying to each unique set of circumstances their common sense resulting from their experience' (Pound 1919: 457). It was not a matter of abandoning the logic on which legal reasoning was based (and it did not involve renouncing the safeguard of certainty), but of finding a compromise. Indeed, as Pound argued (1919: 459), talking of 'standards and of application of them by means of intuition rather than by logic' implied support for a movement oriented to develop 'a better technique of using other instruments where legal logic has failed or is of little avail'. Delegating the application of legal standards to administrative bodies was certainly risky. These bodies could—as the courts had done before them—crystallize specific applications for specific cases into rules, nullifying the purpose of standards; conversely, they might not be able to develop 'any real technique of individualisation or any well-formed intuitions on the basis of experience' (Pound 1919: 464). Another serious danger of this method involved the tendency to bar lawyers from appearing before administrative tribunals charged with applying legal standards, because they were the only check that could legitimize confidence in the work of administrative officers (Pound 1919: 464, 465).

If social complexity demanded the delegation of increasingly widespread competences to administrative agencies, the problem was how to assure the legitimacy of their discretion. These agencies should develop true techniques of individualization; the knowledge of their officers should be certified and updated

on scientific progress; and the legal system should provide for checks and balances on the decisions of administrative tribunals that are not reviewable before ordinary courts. According to Felix Frankfurter, the peril of arbitrariness in the administrative application of legal standards represented the new face of the old conflict between rules and discretion and therefore implied a rethinking of constitutional law. The great twentieth-century society, which was subject to the growing influences of technology, industrialization, and increasing urbanization, demanded solutions that differed from traditional answers. Because 'profound new forces call for new social inventions, or fresh adaptations of old experience', the task of legal science consisted of defining 'instruments and processes at once adequate for social needs and the protection of individual freedom' (Frankfurter 1927: 617). This safeguard for citizens' freedoms and antidote against the abuse of discretion rested neither on the principle of legality nor on ordinary judicial protections, but instead on judicial review of administrative decisions (e.g. Pennock 1941: 148–210; Pound 1924, 1941, 1944). In this manner, a new relation between the judiciary and administrative agencies was forged that differed from the rigid separation of powers provided in the Constitution. There was no sense in continuing to set 'constitutional inflexibilities' against the 'living law' that would be inevitably entrusted to administrative bodies (Frankfurter 1938b: v–vi).

9.3.2 Sheldon Glueck and the Rational Penal Code

Pound's and Frankfurter's considerations involve the questions of individualization of punishment and sentencing power that were given to prison or parole boards. Indeed, the criteria for their decisions that were based on notions of dangerousness, rehabilitation, and social security are legal standards of the same nature as 'unreasonable rates', 'unfair methods of competition', or 'undesirable residents of the United States' applied by other administrative agencies charged with making decisions on sensitive issues in US socio-economic life (Cooper 1938; Pound 1914). It is no coincidence that US criminologists looked to Frankfurter's theses to solve the judge's dilemma.

Indeed, in 1928, when Sheldon Glueck sketched the programmatic guidelines for the enactment of a criminological penal code, he noted that the true problem of the reform movement remained

that of defining the right criteria for the personalization of treatment by courts and prison administrations. 'Effective individualisation'—as he noted (Glueck 1928: 464)—'is not based on guesswork, mechanical routine, "hunches", political considerations, or even (as so many judges seem to think) on past criminal record alone', but should rather be based 'on a scientific recognition and evaluation of those mental and social factors involved in the criminal situation which make each crime a unique event and each criminal a unique personality'. The preliminary question was to establish the right stage of the procedure in which individualization should be made and by what legal agency. The decisions of district attorneys involving the cases to be prosecuted and the legal definitions of offences or detailed *ex lege* determinations of the seriousness of crimes were all 'very crude individualisations' (Glueck 1928: 466).

However, even the indeterminate sentence movement had a limited impact on the punitive system because it did not take root in all states; in many jurisdictions, it was adopted only for specific crimes and within narrow limits, and, above all, it was defeated by judges who imposed sentences with minimum terms that were practically identical to the maximum terms or by parole boards that released prisoners after the minimum term without any verification of their resocialization. The legal individualization of acts and not of individual criminals 'was, therefore, bound to be inefficient', and judicial individualization lacking in scientific knowledge was 'bound to deteriorate into a mechanical process of application of certain rules of thumb or of implied or expressed prejudices' (Glueck 1928: 467).

9.3.3 *Glueck's critique of Ferri's project*

Glueck severely criticized both Ferri's Italian Project of Criminal Code of 1921, which was never enacted, and the ideologically opposite draft of the fascist Minister of Justice Alfredo Rocco of 1927. The US criminologist considered Ferri's project not ambitious enough and reliant upon a mechanical model of application of punishment by judges on the basis of criteria predetermined by law. However, in light of the US experience, any detailed and *ex ante* legal determination of rules to guide the courts' imposition of sentences had shown itself to be useless and ineffective in finding its way towards a true individualization of treatment.

The cornerstone of Ferri's draft was that the dangerousness of the offender should be valued by judges on the basis of prognostic tables of greater or lesser dangerousness that were predetermined by law. All such schemes, in Glueck's opinion, were subject to two main objections: first, these schemes too strongly emphasized that the only criterion was dangerousness; second, they relied on an individualization instrument that had previously been shown to be inadequate. Indeed, Ferri's choice to look only at the offender's dangerousness, even accepting the indeterminate sentence principle (Ferri 1921: 15), would have been 'unjust', 'unscientific', and 'uneconomical' because, by relying too much on the social interest in 'general security', it nevertheless excessively underestimated the rehabilitative potentialities of the offender (Glueck 1928: 469). Therefore, Glueck suggested substituting Ferri's scheme with a different basic criterion for a penal system that was founded neither on the seriousness of the act nor on the dangerousness of the offender, but 'upon his personality, that is, upon his dangerousness, his personal assets, and his responsiveness to peno-correctional treatment' (Glueck 1928: 469).

The concept of 'dangerousness' was absorbed into the broader concept of 'personality', namely, a more complex and dynamic phenomenon in constant development, of which temibility was simply one important (but not exclusive) symptom. Moreover, lawmakers could not foresee the classification criteria of offenders and could not define the types and lengths of treatment for different subjects; instead, they could only fix 'broad *penological standards* and leave to trained judges, psychiatrists, and psychologists, forming a quasi-judicial treatment body, the application of those standards in the individual case' (Glueck 1928: 470, emphasis added). The attempt of the Ferri project, and of other Italian criminologists (e.g. Grispigni 1920b), to balance dangerousness and individual safeguards through a peremptory taxonomy of the indexes of dangerousness, provided 'a sort of penal mathematic by which the judge [wa]s more or less mechanically bound' (Glueck 1928: 472 n. 24).[5] As Glueck noted (1928: 473), 'such detailed

[5] Similarly, De Asúa (1928c: 300) criticized the Argentinian draft bill of 1924 which provided a mixed definition and classification of all the situations of temibility because 'the dangerous state' is a subjective condition that varies by individual and circumstance and cannot be strictly predetermined on the basis of presumptive criteria fixed in law.

legislative prescription of criteria to be judicially applied to individual cases constitutes a peculiarly unsatisfactory and confusing solution of the dilemma of which judicial discretion is one horn and detailed legislative prescription the other'. This 'mechanical nature of the individualisation' (Glueck 1928: 474) was thus the weakness of Ferri's system.

Compared with the legislation in force at the time, Ferri tried to objectivize dangerousness based on the objectivity of facts by determining in advance its symptoms, types, and intensity and by assigning to judicial adjudication the application of all these criteria. In so doing, Glueck argued (1928: 472), Ferri was not only betraying the rehabilitative ideal (because there was no individual study of the criminal during the execution of the sentence), but was also taking a step backwards compared with the method applied in the United States. The US debate on the growth of the administrative state and the 'new legality' limited by legal standards seemed to offer to Glueck more convincing answers in terms of the efficiency of the social defence system than Ferri's endeavour to limit individualization within the strict boundaries of legal rules.

9.3.4 *Looking for penological solutions in administrative law*

The alternative proposal of a *rational penal code* suggested by the Harvard criminologist, who was well aware that individualization could not be resolved in an uncontrolled delegation to judges or to other administrative bodies, was founded on four principles. First, there was a sharp differentiation of 'the treatment (sentence-imposing) feature of the proceedings' from 'the guilt-finding phase'. Second, 'the decision as to treatment must be made by a board or tribunal specially qualified in the interpretation and evaluation of psychiatric, psychological, and sociologic data'. Third, 'the treatment must be modifiable in the light of scientific reports of progress'. Fourth, 'the rights of the individual must be safeguarded against possible arbitrariness or other unlawful action on the part of the treatment tribunal' (Glueck 1928: 475).

For Glueck, with regard to this last and fundamental point of individual protection, solutions had to be sought in the related and fertile field of administrative law because criminal law also belonged to public law and presented similar characteristics of preventive justice (particularly with regard to recidivism). Like

administrative law, it required experts (psychiatrists, psychologists, and social operators), and it shared with administrative law the constitutional problem that involved defining the methods of protecting individual rights against the arbitrary acts of administrative agencies (in this case, the prison board).[6] Surprisingly, for the solution of the crucial 'dilemma of free judicial discretion versus protection of individual liberty', many continental criminologists (Ferri included—see Ferri 1921: 110–11 and sections 74–7 of his project) resorted to the 'clumsy device of legislative prescription of detailed rules of individualisation' instead of looking at 'the field of administrative law' that 'would have suggested the much more simple and effective device of a treatment board' (Glueck 1928: 478).

Glueck's remarks were rigorous in their deconstruction of Ferri's project, but were much less developed and only summarily outlined in the *pars construens*. Indeed, the idea of entrusting an administrative body with the task of the sentencing phase did not automatically resolve the question of safeguarding individual rights against arbitrariness, but simply shifted the problem onto the already problematic issue of the relation between policy and law. Resorting again to a parallel with administrative law, and particularly thanks to Frankfurter's 'valuable clues', Glueck (1928: 479 n. 32) indicated the 'judicialisation of the administrative act' in the determination of appropriate treatment for every individual delinquent as the manner in which the two contrasting interests of individualization and protection of the individual might be reconciled. Indeed, this judicialization would involve three significant advantages: first, 'the definition of broad legal categories of a social-psychiatric nature within which the treatment board will classify individual delinquents'; second, 'the safeguarding of individual rights by permitting the defendant to have counsel and witnesses (of fact and opinion), and to examine psychiatric and social reports filed with the tribunal, while at the same time avoiding a technical, litigious procedure, hide-bound by strict rules of evidence'; and, third, the 'provision for judicial review of the administrative action of the treatment tribunal when

[6] A problem of constitutional legitimacy during the same period that is similar to the issue of the powers of the prison boards concerned decisions made by immigration officials and boards of inspectors regarding the admissibility of aliens into the United States; see Pifferi (2009: 74–8).

it is alleged to have acted "arbitrarily" or otherwise unlawfully' (Glueck 1928: 479 n. 32). It is notable that Glueck's conclusions seem to put him close to the continental model, in which the executive phase of punishment was removed from administrative jurisdiction and assigned to the judicial power.

9.4 The Administrative Security Measures in the Italian Fascist Penal Code

In Italy, the fascist legislature adopted an ambiguous solution that did not settle—but instead heightened—the quarrel over the character of the preventive measures *post delictum*. The Rocco Code of 1930 (still in force with few amendments) provided for an organic regulation of administrative security measures (articles 199–240) that were subjected to strict legality (article 199), were applied by a judge, were ordinarily applicable only to 'socially dangerous persons' who had committed a crime, and could be applied only in cases that were determined under the law even if no crime was committed (article 202). Social dangerousness was formally defined in relation to the commission of a crime and to symptomatic circumstances indicated under article 133 (article 203). In addition, cases in which there was a presumption of dangerousness were strictly defined by law (article 204). The positivistic approach to introduce systematic and peremptory regulation of penal dangerousness was combined with the anti-positivistic choice to consider security measures to be administrative (i.e. not penal) measures.

9.4.1 *Penal and administrative: The hybrid notion of Arturo Rocco*

The Code's system corresponded to the theory of Arturo Rocco, who considered such measures 'administrative police acts'—applied after the crime, but not because of the crime—because the commission of the offence was only a necessary premise followed by the study of dangerousness. With emphatic and self-celebrating rhetoric that omitted any reference to the theories of Ferri, Grispigni, or Longhi, Rocco (1930: 42) praised 'the new criminal law reformed and transformed by the fascist penal codification' that, thanks in particular to the new measures of security, 'crosses the historical borders and breaks the traditional barriers of criminal law'. Actually, it was nothing more than an attempt to partially

combine within a new concept the two notions of repression and prevention without encroaching upon the technical-dogmatic core of traditional criminal law.

The Italian dualistic solution tried to impose a legal distinction between punishment and measures of security that was, however, insufficient to appease the theoretical debate. Legality and judicial application made the measures more similar to punishments, but their administrative nature was confirmed. Like contraventions, measures of security were a hybrid, a body with two heads, one penal with procedural and legal safeguards and the other administrative in substance and purpose. Other scholars resorted to the idea of a third genus, an 'administrative criminal law', to set the character of the 'preventive not penal' criminal law (Goldschmidt 1925; Raggi 1907). However, the proposal was not convincing because the regulation of security measures was much better articulated than that of administrative measures, and their application and execution did not match accepted schemes of administrative law (see, e.g., Maggiore 1934). Instead of putting an end to theoretical struggles regarding the judicial or administrative nature of security measures, the Rocco Code, which was considered one of the most sophisticated and theoretically well-founded penal codes,[7] revitalized the debate on the new boundaries of criminal law.

9.4.2 *A matter of boundaries for criminal law*

Rocco's choice was interpreted by conflicting opinions. Some scholars (Cassinelli 1933; Florian 1930, 1931) emphasized the inclusion *within* the Code of security measures and thus insisted on their confluence within the notion of punishments and on the unity of the means of defence *post delictum*. Other scholars (Battaglini 1930) continued to think of security measures as administrative measures that were alien to criminal law and added to the Code only for reasons of utility without any substantive modification of the boundaries between the bodies of penal and administrative law.

Adherents of the so-called eclectic school, such as Alfredo De Marsico and Emanuele Carnevale, raised theoretical critiques of Rocco's dualistic scheme. According to De Marsico, the

[7] See, e.g., Hafter (1931); Overbeck (1930); and Rappaport (1932).

new challenge was how to formulate a notion of penal sanction after security measures had occupied the field of criminal law (De Marsico 1930, 1951a: 117). The target of his criticism was mainly the formal and technical approach of Manzini, Petrocelli, and Rocco, who wanted to raise a barrier between social facts and norms and thus marginalize the influence of sociology and psychology on criminal law (Petrocelli 1952). His position (De Marsico 1933: 1264, 1267) differed from both the dualistic theory (Petrocelli 1940: 131–65) that insisted on differentiating between punishment (belonging to criminal law properly) and security measures (belonging to administrative law) and the unitary thesis that aimed to eliminate moral responsibility as the indispensable foundation of any criminal system. According to De Marsico, the key to understanding the new frontier between punishment and measures of security was the role of dangerousness in the notion of crime.

Paragraph 2 of article 133 of the Italian Criminal Code demonstrated that the assessment of dangerousness had become an essential element of criminal law, radically changing its traditional boundaries. The double relation (i.e. crime/responsibility and crime/dangerousness) defined both the external boundaries of criminal law and the internal limits between punishment and security measures. If dangerousness consisted of facts or circumstances that were significant only outside of criminal law and criminal judges, then it was a matter of administrative law, whereas if it consisted of elements that belonged only to the jurisdiction of criminal judges, then it was a matter of criminal law. The internal limit was marked by the role played by dangerousness *in* and *out* of the crime; it could be included in the crime's structure as one of its constitutive elements, and it could thus be a determining factor of punishment as a degree of the offender's criminal capacity and liability (De Marsico 1933: 1282–3). However, 'social dangerousness' that was meant to demonstrate the probability of committing further crimes could also be an autonomous entity separated from crime and could determine the application of security measures (De Marsico 1951b: 59–60). Therefore, dangerousness would operate on three separate levels: a first level on which no crime is committed and subjects suspected of dangerousness are regulated by police measures that are administrative in nature; a second judicial level on which dangerousness coincides with unlawfulness as a constitutive element of a crime and becomes a criterion used

to measure punishment; and a third level that is also judicial in its character and on which social dangerousness is the legal condition for the application of security measures.

Carnevale criticized the administrative character given to security measures by the framers of the Penal Code and stressed that these measures implied an enlargement of the boundaries of the criminal law. He thought that security measures—instead of being extraneous to the original concept of punishment—were substantially and logically connected to and united with it (Carnevale 1931). Carnevale's reflection centred on the relation between deed, crime, and dangerousness. The notion of deed had been extended, as shown by article 133 of the Penal Code, even including elements of the offender's personality that were fit for assessing criminal inclination—that is, the dangerousness inherent within the commission of a crime. In this manner, the rule *nullum crimen sine lege* was only relatively modified because the evaluation of dangerousness, which was a factor in every crime, was delegated to the judge on the basis of standards that were only partially predetermined. Unlike De Marsico, Carnevale (1936: 257) regarded the notion of dangerousness referring to measures of security not as something autonomous and separated from the crime, but simply as an enlargement of the boundaries of criminal law.

Almost all of the Italian jurists believed that although the entry of subjective dangerousness into the province of criminal law with reference to crime and measures of security brought about flexibility of judgment, it did not have to impair the validity of the principle of legality in both *nullum crimen* and *nulla poena sine lege* (see, e.g., Carnevale 1936: 231–2 n. 3; Florian 1934: 903–5). Even after the Code, the questions of the classification of security measures as penal or administrative, of their judicial nature, and of the relation between dangerousness and the principle of legality continued to be regarded by Italian criminalists as a matter of boundaries, as a theme in which exegetical and dogmatic formalism might be balanced with considerations of the social nature of crime, and as the opportunity to provide social defence with appropriate legal devices. In Italy, until the Constitution of 1948, the technical approach prevailed and the principle of legality was formally retained, although it was becoming increasingly useless in a totalitarian political and institutional framework.

9.5 The Powers of the Judge in the Sentencing Phase at the Berlin Congress (1935)

The 1935 International Penal and Prison Congress held in Berlin represented a great opportunity for German jurists and politicians to celebrate the rise of the Nazi ideology. The authoritarian turn of the Nazi criminal law was characterized by a sharp break from both the individualist rationale of penal liberalism and the criminological approach that was accused of being too lenient with offenders, and, correspondingly, by a tough return to the ideas of retaliation and deterrence. The protection of the well-being of the state instead of individual rights, the defence of the racially identified national community by means of retributive justice in place of rehabilitative individualized measures, criticisms of the principle of legality, and the substitution of a volition-based penal law for the previous act-based penal law are all themes that were presented and celebrated in the opening address of the Berlin Congress as manifestations of the new totalitarian state.[8]

The Congress was attended by the delegates of fifty countries, including the United States and the United Kingdom, and the debate on some themes was deeply influenced by the political turn of the Nazi regime, which represented a breaking point in the penological and criminological reform movement. As had been anticipated in 1933 by Dahm and Schaffstein's theorization of authoritarian criminal law, the totalitarian Nazi state reacted to the unfounded leniency of the correctionalist tendency, which was mostly based on the goal of rehabilitation and the search for preventive individualized treatments, to restore a repressive and just-deserts penal policy, with the additional reintroduction of the death penalty. The question of the second section on administration[9] involved a fairly passionate clash of opinions between

[8] See the opening addresses to the general assembly given by Erwin Bumke, President of the *Reichsgericht* (Germany's old Imperial Court), Franz Gürtner, Ministry of Justice of the *Reich*, Roland Freisler, State Secretary of the *Reich* Ministry of Justice, and Paul Joseph Goebbels, *Reich* Minister of Propaganda, in *Actes du… Berlin*, Ia (1936: 3, 24, 434, 466).

[9] 'Are the methods applied in the execution of penalties with a view to educating and reforming criminals (intensive humanisation, favours granted, considerable relaxation of coercion in the execution of penalties by degrees) calculated to bring about the effects aimed at and are these tendencies generally advisable?'

advocates of the educative purpose of punishment and supporters of retributivism: the resolution proposed, which was a tentative compromise, was rejected, and no final decision was taken on this question.[10] It is not my purpose here to investigate the Berlin Congress and Nazi criminal law in detail, but only to examine two other topics discussed at the Congress that are related to the constitutional frameworks of the criminalization process: the topics relating to the powers of judges[11] and to the difference between penalties and measures of security.[12]

9.5.1 *The unsolved problem of individualization*

The relation between judicial power and administrative prerogatives regarding the execution of sentences and new measures of social defence, discussed at the Berlin Congress, represented the fundamental problem raised by individualization that remained unsolved in the 1930s. It was a constitutional matter because it affected the separation of powers, the legality of punishment, and individual rights (see, e.g., Castorkis in *Proceedings of... Berlin* 1937: 54–5). In determining the boundary between judicial and administrative jurisdiction, key questions continued to involve the convict's safeguards, legal limits to discretion, and

[10] The proposed resolution ('The execution of penalties must not be confined to the imposition of punishment but must also provide for the education and betterment of the prisoners') was opposed by the British delegate Alexander Paterson and the Belgian Delernieux, who succeeded in rejecting the proposal only because they asked to vote by nation and not by delegate (the great majority of which were German and had approved the draft resolution); see the explanatory report of Muller in *Actes du... Berlin*, Ia (1936: 529–33 n.1). This point was stressed by a very critical editorial published by the Howard League for Penal Reform and the National Council for the Abolition of the Death Penalty and re-published in the 'Current notes' of the *Journal of the American Institute of Criminal Law and Criminology* (1936), 26(5): 786. The Howard League had refused to participate in the Congress as a sign of protest against the Nazi penology. See also Bates (1948: 568).

[11] It was the first question of the first Section on Legislation: 'What powers must the judge of a criminal court possess in the execution of penalties?' Thirteen reports were written on this question.

[12] It was the third question of the second Section on Administration: 'How must the execution of penalties restrictive of liberty differ from the execution of measures of security involving deprivation of liberty? Must the progressive system also be taken into consideration for measures of security?'

procedural methods to reallocate prerogatives (Donnedieu de Vabres 1929: 184).

To the extent that the personality of human beings enters into penal systems, as De Asúa noted in his report (1935: 39), 'the task of the judges becomes more and more complicated, more and more difficult' and their functions are widened.[13] The classical idea that the judge should disappear after the final judgment clashed with reformist claims that the execution of the sentence is the crucial phase of the administration of justice, and, therefore, the judge should not be completely ousted from it (De Asúa 1935: 39, 40). The choice of delegating the execution of sentences to prison administration had led to some drawbacks that should be rectified because the judge and the administrative agency were driven by different ideas regarding the purpose of punishment (the former by general prevention and deterrence, the latter by special prevention) as well as by different bodies of knowledge and evaluations of the offender, such that they were often 'juxtaposed with no harmony like two pieces of Harlequin's dress' (Cornil 1935: 13).

The problem mainly involved the convict's guarantees because there were no clear rules to guide prison administration in the execution of repressive individualized measures. Formalities of judicial justice (such as cross-examination, arrest warrants, reasons for a verdict, and right to appeal), although a hindrance to the speed of trial, continued to represent for the defendant and for society as a whole a protection against arbitrariness (Conti 1935: 5; Cornil 1935: 14; Montvalon 1935: 81). Prison administration, conversely, was given broader powers without an exact definition of the procedures to be followed. However, even the delegation of all executive competences to judges was not a satisfying solution because they were not typically qualified to carry out these functions.[14]

9.5.2 *Latin versus German countries*

The conception of the punishment championed by liberalism was definitely waning, but the modern notion of individualization had not yet found a balance between flexibility of treatment and

[13] See also the Polish judge Georges Sliwowski and the Romanian Jean Jonescu-Dolj (Jonescu-Dolj 1935: 55–9; *Proceedings of… Berlin* 1937: 64–5, 56–7).

[14] See, e.g., Cornil (1935: 14–15); Hugueney (1935: 34); and Mullins (1935: 88).

individual safeguards and had not identified clear and constitutionally acceptable boundaries between the judicial and administrative powers. The new road was not plainly marked, and the tentative resolution of Berlin signalled the different theoretical approaches to the issue. The general report presented by Nils Stjernberg, professor of criminal law at the University of Stockholm, showed the difficulties in reaching a compromise. Most of the delegates expressed the conviction that it was 'the duty of the judicial authority to see that the penalty is executed in accordance with the law' and that courts should have the power to control 'the formal legality of the prison authorities' decision regarding such execution'. In particular, this position was advocated by those who insisted on the importance of separation of powers, but 'from the point of view of the legal guarantees of the individual, it [wa]s not necessarily the only one' (*Proceedings of... Berlin* 1937: 39).

In particular, there were three different opinions regarding the powers of judges to take part directly in the decision process involved in executing sentences in place of (or together with) prison authorities. Those who advocated enlarging the power of the courts insisted, on the one hand, on the importance of strengthening protections for prisoners by preventing any possibility of administrative agencies acting arbitrarily. On the other hand, these advocates stressed the opportunity to assure continuity and uniformity in how prisoners were treated to avoid decisions by prison officers based on specific and personal considerations. The representatives of so-called 'Latin countries' were in favour of this 'judicial' thesis and thought that sentencing decisions should lie within the jurisdiction of the same magistrate who pronounced the verdict. Among these jurists were supporters of the judge-physician pattern, which was influenced by the Italian Positivist School, who believed that the official who imposed the treatment should verify its effects, whereas others were guided by procedural considerations according to which every decision related to sentences that could affect the moral and legal character of punishment should 'for the sake of the legal guarantees to which the individual is entitled, rest with the judge by whom sentence was passed' (*Proceedings of... Berlin* 1937: 41).

Delegates from 'Germanic countries' had the opposite view and were opposed to any interference by the courts in carrying out sentences. To these delegates, fact-finding and the finding of guilt were onerous tasks for judges, who had no time, energy, or

criminological knowledge to be responsible for the execution of the post-verdict stage. These delegates believed it was better to entrust sentencing decisions to a unique person, typically the public prosecutor, who was considered a representative of the executive power, but close to the judiciary with regard to education and inclination.[15] A third tendency expressed by some reports advocated establishing mixed commissions that should be presided over by representatives of the judicial authority and should include specialists in psychiatry and criminology as well as representatives from the public prosecutor's department and from the prison establishment (*Proceedings of… Berlin* 1937: 43).

The resolution adopted expressed a moderate position that simply suggested some desiderata and involved no firm decision. First, it was considered desirable 'to entrust the important decisions concerning the serving of sentences of imprisonment without any reserve to judges, to public prosecutors or to mixed commissions presided over by the judge or the public prosecutor'. The second desirable point was 'to create forms of organisation…to extend the competence of judges and public prosecutors, in order to cover the direction and control of a supervision of delinquents with conditional sentences'. Finally, 'the specialisation of judges and public prosecutors' was desirable, as was the adoption of methods to stimulate their interest in criminology questions (such as visits to penal establishments) (*Actes du… Berlin*, Ib, 1936: 79).

In the 1930s, the penal and penitentiary systems remained divided regarding the allocation of powers in the execution of the sentence. In Europe, the idea of the 'supervising judge' introduced by the Italian Criminal Code of 1930 awakened great interest. Under the first paragraph of article 144 of the Rocco Code, 'the execution of punishment is supervised by the judge' who (paragraph 2) 'decides on the admissibility of the detainee to the outdoor work and gives his opinion on the eligibility to conditional release'. Moreover, the supervising judge can impose a measure of security in some cases provided by law (article 205) and has jurisdiction over 'the decisions by which, out of preliminary investigation or trial, measures of security are applied, modified,

[15] This opinion was expressed by the German delegates Otto Rietzsch and Paul Vacano and by the Chinese delegate Tien-His Cheng; see *Proceedings of… Berlin* (1937: 59–61, 67–9, 72–4).

substituted, and revoked' (article 635 of code of criminal procedure of 1930). Italian fascist lawmakers, followed by many other legislative bodies,[16] opted for a mixed judicial-administrative system in which the execution of the sentence was partially judicialized, but without binding the trial judge; the supervising judge was entrusted only with pre-determined decisional powers within his broader controlling competences. On the verge of the Second World War, the problem of prison law's legality still represented a problem that had been only partially solved by penal reformism.

9.6 'Reconciling the Irreconcilable': The Ambiguous Solution of the Dual-Track System

In the 1920s and 1930s, measures of security seemed to be the best compromise reached in Continental Europe and most of Latin America (De Asúa 1929: 109–16) between individualization and legality, and utility and justice (Carnevale 1938; Ferri 1926c; Rittler 1921). In the historical evolution of the institution, the 'primitive phase', which is characterized by a 'chaotic and very cautious' introduction into penal codes of measures of security applied to irresponsible or partially irresponsible offenders and juveniles, was followed by the 'organic phase', in which the Swiss draft code introduced a systematic and relatively broad scheme of security measures 'as [the] means supplementary to punishment'. Finally, the Rocco Code marked 'the fulfilment of security measures' because they were no longer considered supplementary, but 'essential to penal justice'—that is, they were not simply a complement, but a substitute for punishments (Radzinowicz 1929: 146–7). The dual-track system, the most typical expression of a 'halfway positivism' that represented the prevailing tendency in

[16] At the Berlin congress, the Italian model was appreciated, for example, by the Polish Stefan Glaser, the Yugoslav Thomas Givanovitch, the Italian Giovanni Novelli and Ugo Conti (*Proceedings of... Berlin* 1937: 50–1, 57–9, 47–9, 3–5), the Austrian Adolf Lenz (1935: 67–71), and the Romanian Jean Jonescu-Dolj (1935: 53–4). Many laws and criminal codes adopted (or had previously adopted) a prison tribunal similar to the Italian model; see, e.g., the Finnish prison tribunal instituted in 1933; the Austrian law of 1920 on the judicial prerogatives on conditional liberation; the Polish Criminal Code of 1932; the Brasilian Law of 6 November 1924; and the French and Romanian Projects of Criminal Code (see Jonescu-Dolj (1935: 60–2)).

the legislation of many countries (Cantor 1936; Gatti 1928: 331; Ruggles-Brise 1932: xiii),[17] represented the endeavour to 'reconcile the irreconcilable' (Radzinowicz 1929: 154; Spirito 1926: 26) because it aimed to merge into the same system conflicting principles such as retributivism and prevention, free will and dangerousness, and determinate punishments and flexible measures. However, from a practical point of view, the hybrid dualistic model turned out to be a further deprivation of an offender's personal liberty and no theoretical distinction was able to have a concrete impact on the methods and purposes of detention (Cantor 1936: 32–3; Lilienthal 1894: 112).

The mutual relations between punishment and security measures, which had different natures but were united in the task of combatting crime, could be interpreted in terms of 'substitution' (*Vikariieren*), which implied a single-track system (Rittler 1921: 103).[18] However, from this viewpoint, the substitution of a security measure for punishment was not convenient, because the possibility of waiving punishment should be limited and considered an exception to avoid any delegitimization regarding the authority of law—'otherwise the belief in the binding power of legal norms would be shaken' (Rittler 1921: 104). The French jurist Donnedieu de Vabres (1929: 182–4) remarked that punishments and security measures, apart from being both pronounced by a judge only after the commission of a crime, were in conflict with one another. First, they were conflicting because punishment

[17] The dual-track system was adopted—with some differences regarding the way in which to conceive security measures as supplementary measures or substitutes for punishments—in Norway (Law of 22 February 1929, which substituted § 65 of the law of 1902), Switzerland (Criminal code of 1937), Italy (Rocco Code of 1930), Denmark (Criminal code of 15 April 1930), Holland (Law of 2 June 1929), Belgium (law of 11 May 1930), Germany (law of 24 November 1933), Poland (first with the draft code of 1922—on which see Radzinowicz 1929: 161–8—and then with the Criminal code of 11 July 1932), Finland (law of 22 May 1932), Yugoslavia (Criminal code of 27 January 1929), Latvia (Criminal code of 1933), France with the draft code of 1932, and Czechoslovakia (draft code of 1926). In the United Kingdom, the Criminal Justice Bill of 1938 (not enacted) suggested modifying the Prevention of Crime Act of 1908 and introducing the possibility for the judge to impose preventive detention in place of (not in addition to) imprisonment.

[18] Theodor Rittler was one of the Austrian jurists who drafted an Austrian counter-project of criminal code (published in 1922) to amend the German draft code of 1919.

could ordinarily be imposed on all offenders, but security measures were exceptional means that were founded on peculiar conditions of dangerousness and were applicable only to specific categories (juveniles, lunatics, psychopaths, beggars, vagrants, and habitual offenders). Second, punishments and security measures differed as treatment because the infliction of pain was essential to punishment, but security measures should not similarly inflict pain. Finally, the duration of punishment was in proportion to the moral seriousness of crime, whereas the security measures were of an indefinite duration depending on the need for social defence, whose decision was delegated to prison administrators.

The theoretical divide between these two penal measures was quite clear. Nevertheless, in the passage from speculation to concrete application, the line became thinner until it almost vanished. Punishments and measures of security merged into one another and overlapped, unveiling the illusion of the dual track and causing 'the elegant house of cards ingeniously created' to collapse (Ferri 1911: 30). Some positivists (e.g. Ferri 1926c: 674; Grispigni 1920a) remarked with realism that whatever distinction might exist was groundless because the two devices complemented one another within the comprehensive notion of penal (indeterminate) sanction. As De Asúa noted (1928c: 302), only those who considered punishment a retributive tool reasserted the difference, but to those who criticized retribution, the difference was simply a matter of words. Although the radical proposal to unify both punishments and preventive detention into the notion of criminal sanction was rejected by lawmakers because it led to the 'abdication of criminal law' and despite the broad implementation of the dual-track system (Hafter 1925a: 237; Sauer 1925: 381), the definition of their differences continued to be problematic theoretically and—above all—practically. Indeed, although security measures were formally different, they were 'an authoritarian infringement on the rights of individuals and above all of their liberty' (Hafter 1925a: 232).

The difficulty in drawing a clear distinction between punishments and preventive detention is confirmed by the fact that, in 1935, the Berlin congress continued to address the issue of the difference in their methods of execution. The resolution, adhering to the advocates of the dualistic theory (Glaser in *Actes du... Berlin. Procès-verbaux*, 1a, 1936: 242; Saldaña 1935), reaffirmed a conceptual difference between the two types of measures with regard

to both their application and objectives and recommended the undertaking of security measures in special establishments separated from prisons and penal establishments. Moreover, it stated that the treatment of persons so interned ought to be clearly distinct from the treatment of individuals condemned to severe sentences of imprisonment. The last point of the resolution confirmed that, 'in view of the diversity of the individuals interned, it [wa]s impossible to set up standards governing in a general way all the details of the application of measures of security' (*Proceedings of... Berlin* 1937: 579).

However, the debate and reports reiterated the usual theoretical uncertainties and confirmed the evanescence of the distinction with particular regard to the concrete execution of the measures (Cass 1935: 258; Exner 1935b: 273). The Swiss draft criminal code of 1918, in which—apart from a few exceptions—the norms regulating preventive detention replicated the principles of imprisonment, the Austrian draft, which also provided for only a few differences between the two institutions, and, finally, the decree of 14 May 1934 regarding the execution of punishments enacted by the *Reich*, which made the preventive detention regime like the prison regime and substantiated the idea that a security measure was a punishment, did not characterize the legal peculiarity of security measures (Exner 1935b: 275). 'This variability of limits' between punishments and security measures, 'this assignment of the first ones in favour of the others' (Garzon 1935: 285), was exactly the element that characterized the existing condition of criminal law, in which the tendency to minimize punishment and exalt measures of social control was evident.

9.7 Conclusions

The growth of the preventive rationale of criminal justice exacerbated the problem of the boundaries between penal law and administrative law and between police power and criminal law. By enhancing the importance of dangerousness as the key justification for punishment, the basis of criminal justice shifted from repression to prevention, and, in so doing, the roles of the legislative, judicial, and administrative branches in sentencing were modified. Preventive detention raised questions of efficiency, knowledge, and guarantees. The status of a dangerous subject was better assessed by a body of experts in criminology rather than by judges, but the

risks of exposing individual freedom to uncontrolled discretion required legislative definition of conditions and limits as well as judicial checks.

US jurists recommended the substitution of legal standards for legal rules and the availability of judicial review as the best methods to find a new balance between flexibility and safeguards in the functioning of prison boards. In the debate on the conditions for legitimacy of the growing administrative state, the criminologist Sheldon Glueck relied on the arguments elaborated by Roscoe Pound and Felix Frankfurter to justify the validity, jurisdiction, and limits of the administrative body in charge of the sentencing phase. European jurisprudence, conversely, tried to reconcile the opposing visions of retribution and prevention through the dual-track system. Security measures, always future-oriented, and in some cases even the conditions of dangerousness, were subjected to the principle of legality, whereby their application presupposed the commission of a crime and had to be decided and reviewed by a judge or a special tribunal of surveillance (as in the Rocco Code) whose duty was to grant to the detainee basic jurisdictional safeguards even during the carrying out of preventive detention.

None of these solutions, however, was able to definitively and satisfactorily solve the inherent tensions between judicial and administrative jurisdictions, legality and discretion, and retribution and prevention that characterized (and continue to characterize) the nature of preventive detention.