Reinventing Punishment

A Comparative History of Criminology and Penology in the 19th and 20th Century

MICHELE PIFFERI

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REINVENTING PUNISHMENT

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Reinventing Punishment

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

MICHELE PIFFERI

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General Editors' Introduction

Clarendon Studies in Criminology aims to provide a forum for outstanding empirical and theoretical work in all aspects of criminology and criminal justice, broadly understood. The Editors welcome submissions from established scholars, as well as excellent PhD work. The Series was inaugurated in 1994, with Roger Hood as its first General Editor, following discussions between Oxford University Press and three criminology centres. It is edited under the auspices of these three centres: the Cambridge Institute of Criminology, the Mannheim Centre for Criminology at the London School of Economics, and the Centre for Criminology at the University of Oxford. Each supplies members of the Editorial Board and, in turn, the Series Editor or Editors.

Michele Pifferi's book, *Reinventing Punishment: A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries* is an ambitious and wide-ranging analysis of the impact of criminological knowledge on the development of the criminal law. It provides a critical understanding of the shift to greater individualization in punishment and, specifically, of the idea and implementation of indeterminate sentencing. Pifferi's study takes the reader both across jurisdictions, contrasting the development of US criminal policy with those of mainland European policies, and across time, over the period from the 1870s to the Second World War. His analysis of the divergent developments in criminal law supporting reformist and preventive agenda is an exemplar of Nicola Lacey's (2009) notion of historicizing the process of criminalization. He charts with exactitude the comparative changes caused by the spread of criminological ideas on both sides of the Atlantic in concepts of punishment and of their reduction into the criminal law; and in so doing beautifully illustrates how legal culture is rooted in institutional and social differences with longstanding historical foundations.

While Pifferi is careful not to draw contrasts that are overly stark, his analysis does powerfully illustrate the predominant trends within the evolving US and European traditions in their use of indeterminacy. Although there is clearly no one Europe and no

one United States, since country and state differences are manifest, it is fair to observe that in the United States the underlying emphasis had been pragmatically on indeterminacy, fostered by the extensive use of administrative discretion by prison boards, with the objective of reformation. This can be, of course, a double-edged sword, with periods of incarceration being either foreshortened due to demonstrable change in the offender or, more commonly, significantly prolonged where change can neither be effected nor reliably proven. Practical inefficiencies dog the system. In contrast, the European tradition, as Pifferi demonstrates, largely pursued a double-track approach with detention being justified initially on grounds of proportionate retribution and with an indeterminate period of detention kicking in for purposes of social defence where offenders were identified as dangerous. Decision-making in the European tradition developed in judicial or quasi-judicial settings, with an emphasis on the investigative powers of the judge to collect all the relevant individualized character evidence throughout the legal proceedings.

Issues of certainty are clearly problematic with regard to both European and US jurisdictions. Proving that one is no longer dangerous can be as problematic as proving that one has reformed. Indeed, concepts of the unreformed offender and of the dangerous offender morphed on both sides of the Atlantic into common concerns about preventive detention, its legal justifiability, and how reliant both approaches were on experts in 'scientific criminology' to bring periods of detention to an end. Criminal law theory, in consequence, shifted in the forty years from the 1890s and across national boundaries, from something that focused on abstract law and liberal notions of the primacy of free will to something much more heavily dependent on psychiatry, psychology, statistics, and the other disciplines influenced by the new 'criminological' concerns. If free will did not exist, then behaviour could be amenable to change by altering the social and biological factors which underpinned it. But sentences needed to be individualized and oriented around the offender's personality in order to achieve maximum efficiency, which in turn undermined the principle of legality and the certainty of punishment. It was just that the locus for this process, prison boards or court-based settings, differed on the opposing sides of the Atlantic.

Pifferi's exhaustive historical analysis is based, as he explains, on 'the proceedings of international prison congresses, reports of

the IUPL, translated books and reviews, papers, bills, draft codes and academic studies' in a number of jurisdictions. Much of this on this side of the Atlantic has not been written in English, so his scholarly efforts provide vital access to materials that might otherwise have remained buried to many Anglo-American readers. In so doing, he provides an invaluable understanding of how the European approach, which was more closely aligned with a social defence rationale, contrasted with US criminal policy, which seemingly focused on a correctional and reformist agenda. This divergent process led to the formation of a distinct and distinguishable European penology, which managed to reconcile, as complementary approaches, retributive and preventive rationales. In the United States, the tensions arose around the broad arbitrary powers given to prison boards. Their role dominated until the 1920s, when the need for greater safeguards in their functioning became more pressing. It may seem curious to those of us who associate US jurisprudence with due process safeguards, but the irony is seemingly that US constitutional safeguards applied until the early part of the twentieth century to offenders pre-conviction; post-conviction those safeguards could be lessened since the objective became one of re-educating a proven offender. The act of sentencing could thus be an administrative act, with judicial involvement being confined to the process of achieving a verdict. Only latterly, as Pifferi traces, was there a rebalancing of this unchecked administrative discretion.

Reading Pifferi's analysis necessarily through a twenty-first-century UK lens is peculiarly telling. Not only does it bring home how awkwardly the United Kingdom sits between the European and US traditions—with the United Kingdom being neither fish nor fowl—but it also speaks to the enduring nature of some of the themes he identifies. As Harry Annison's recently published book *Dangerous Politics: Risk, Political Vulnerability and Penal Policy* in this Series testifies, the dilemmas of indeterminacy have returned to haunt criminal justice professionals and politicians alike. Understanding that the roots of these dilemmas lie in the late nineteenth and early twentieth centuries forcefully underlines that their solution is neither likely to be quick nor easy. In charting both the defensible use of indeterminacy and its indefensible use by Fascism and Nazism, Pifferi powerfully reminds us of the dangerously seductive power of 'new' ideas. Indeed, *M v. Germany* (2009) in the European Court of Human Rights has recently reignited

discussion of the pressing need for substantive differences to be achieved in the nature of detention for punitive purposes and subsequent detention for the purposes of social protection. The inherent tensions in the European dual-track system, implemented in the 1930s, have never been satisfactorily resolved: indeed, as early as 1939 Leon Radzinowicz asserted that it had caused 'a number of serious difficulties to arise in the field of penitentiary practice'.

As Editors, we commend Michele Pifferi's book as making significant contributions to the fields of criminology and penology. *Reinventing Punishment: A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries* is to be most warmly welcomed to the *Clarendon Studies in Criminology* Series.

Jill Peay and Tim Newburn
London School of Economics and Political Science
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1

Introduction

1.1 The Claim for a New Penology

In 1880, Italian jurist Raffaele Garofalo, one of the founding fathers of the Italian Positivist School of criminal law, published his first ground-breaking book, *Di un criterio positivo della penalità* (*Of a Positive Criterion of Penalty*). He openly denounced the failure of the retributive penal system, based on the classic ideas of free will, proportionality, and uniformity of sentences, and suggested substituting the fallacious notion of criminal liability with the new notion of 'temibility' (Garofalo 1880: 33). Prison Association of New York President, Charlton Thomas Lewis, in his 1899 address to the National Prison Association of the United States, strongly criticized the retributive system of the US criminal code, which was still applied 'merely by the tenacity of custom and the inertia of opinion controlled by tradition'. The trial judges' responsibility to fix the duration of imprisonment within the limits imposed by the codes according to their views of criminals' culpability 'resulted in gross and startling inequalities'. Lewis also denounced the classic 'method of apportioning penalties according to the degrees of guilt implied by defined offences' as 'completely discredited . . . and as incapable of a part in any reasoned system of social organisation as is the practice of astrology or the police against witchcraft' (Lewis 1899: 18). Similarly, the US prison reformer Frederick Howard Wines (1904: 18) stated that 'the inequity of definite sentences' had been demonstrated by experience because, although a term of imprisonment decided by a judge might be either too long or too short, 'the sentence of the court, once pronounced, was immutable and irrevocable'.

These few examples are a signal of the increasing rifts in the liberal foundations of criminal law at the end of the nineteenth century. The dissatisfaction with the administration of penal justice, both in Europe and in the United States, was fuelled by the

burgeoning problem of recidivism and the realization of the inefficacy of traditional custodial sentences for either deterrence or reformation.

However, the 'common law' systems in both the United States and the United Kingdom could be criticized for other reasons, and both needed to be reformed. In 1870, the English judge James Wilde, Baron Penzance, claimed that 'there [wa]s some amount of dissatisfaction with sentences and particularly with their inequality', which was 'due to the absence of any standard'.[1] Seven years later, the English lawyer Edward William Cox (1877: xiii, xviii) argued that 'practically sentences [we]re regulated by no rules', and were 'not based upon any *principles* capable of being generally recognised and acted upon': his work aimed to foster an '*approach to uniformity*... by recognising certain *general principles*' and to 'effect somewhat... the removal of the existing anarchy' by 'bringing about more of *system* in the apportionment of punishment, without too much fettering the discretion of the Judge'.[2] In 1895, Wines claimed that one of the most striking results of his study of criminal sentences in the United States was that 'criminal law [wa]s unequally applied'. His examination of different penalties in different states for the same offence, together with his comparison of penalties for different offences, led him to the conclusion that 'the length of the prisoner's term of confinement [wa]s largely the result of prejudice, caprice, or accident' (Wines 1895: 9, 16).

Criminal law had been influenced by the doctrines of the Enlightenment and by both the French and American Revolutions. Either because of its excessive rigidity (as in the case of the French penal code and its continental counterparts) or its lack of any rational sentencing standard coupled with unrestrained judicial discretion (as in the United Kingdom and the United States), the law was under pressure and needed to be modified. The 'new' field of penology was particularly affected by demands of reform grounded on varied theoretical or practical reasons and oriented towards different goals (both political and penological) and rationales of pubishment. What was at stake was much more than a debate surrounding the 'scale of punishment'. As Francis Lieber (1838: iii) explained when he coined the word, 'penology' should be a 'science, which will necessarily treat of punition theoretically,

[1] Quoted by Cox (1877: xi).
[2] Emphasis in original.

practically and historically; of its relation to the political community as well as to the psychologic state of the offender'. In the multifaceted and complex field of penology, the limits of which were—according to F. H. Wines—'incapable of exact definition' and which encompassed 'in short, all knowledge which has man for his subject or object', the advent of 'positivist criminology' or, as David Garland better defines it, 'penal modernism', started a revolution (Garland 2003: 50–2). This demand for reform sparked by criminology can be summed up by the movement for individualized punishment that spread across the civilized world. Founded, as we shall see, upon the shift from an individualistic idea of criminal justice to one grounded on social defence, and on the shift from repression to prevention, the individualization principle affects not only the just measure of punishment, but more broadly, both the legitimacy and the purpose of a state's right to punish.

1.2 The History of a Failure?

Nonetheless, despite a supposedly uniform international trend, the reception of criminological ideas about punishment and, more specifically, the interpretation of the individualization principle, varied dramatically in different periods, languages, and geographical areas.[3] This reception and variety are demonstrated in the following statements (which are thoroughly analysed in later chapters). For instance, if we read the report to the Secretary of State for the Home Department about the Eighth International Prison Congress in Washington (1910), written by Evelyn Ruggles-Brise, President of the English Prison Commission and of the International Prison Commission, we discover that the report's author finds the English system of punishment more akin to the European rather than the US system. What is developing in the United States is not a matter of casual affinities or differences, but 'a *new mental attitude* towards the conception of punishment on the part of a large section of the English-speaking race' (Ruggles-Brise 1911a: 358).[4]

[3] Nicole Rafter (2011: 145, 147) correctly pointed out how geographical distance, language barriers, and the lack of conceptualization as an independent field of study hindered the development of criminology, especially in what she called the 'cottage-industry' phase until the publication of Lombroso's *Criminal Man* in 1876.

[4] Emphasis added.

According to Ruggles-Brise (1911a: 358), this cultural change can be traced partly to 'a distrust of the judiciary, which has not the strength, or character, or tradition, which belongs to it in Europe', and partly to 'a reaction against the startling want of uniformity in the criminal codes of the different states of the Union, whence arises an inequality of punishment which cannot fail to strike the imagination of a race which, in its quick-march towards progressive ideas, takes an almost childish pleasure in defying tradition, and this especially in the domain of criminal law'. This strong, distinctive attitude stressed by the British prison reformer is closely related to the problem of the individualization of punishment and its possible methods of application. It also presents us with two contrasting views of punishment that characterize the European and US experiences. Strangely, the English penological approach, notwithstanding its differences from the 'civil law' continental systems based on written and rigid criminal codes, is considered to belong to the European tradition.

Following are two additional examples of contemporaneous observations on the differences between the European and US approaches to the individualization of punishment. The Belgian jurist Adolphe Prins (1896: 77), in his report to the 1894 session of the International Union of Penal Law (IUPL), considered the idea of the indeterminacy of punishment that was being debated and in some cases already applied in Europe (in the form of security measures) to be the opposite of the US indeterminate sentence system. The Spanish jurist Luis Jiménez de Asúa (1918: 74) wrote that there was a radical distinction between the European and US criminal policies: the European policy, which had social defence against the dangerous nature of offenders as its particular goal, was 'highly defensive and securitarian, and, having little faith in the correction of the criminals, it prefer[red] to neutralise them with the measures of security'. By contrast, US criminal policy aimed to correct criminals. Therefore, it was distinguished by the establishment of reformatories modelled on Elmira (De Asúa 1918: 148) rather than by European-style security measures.

Why did jurists insist on identifying and describing two different penological attitudes? Why, despite all of the unique features of the various state and national systems, did they repeatedly refer to 'European' and 'US' criminal policies? And why did English penal and prison reformers express kinship with the continental approach to punishment in spite of the institutional similarities

between the US and British systems (e.g. with regard to due process, trial by jury, verdict, and sentencing)? To answer these questions, we should reconsider two historiographical assumptions. First, the rise of criminology is usually considered to be an 'international wave', an 'international penological orthodoxy'—as James Whitman put it (2005b: 391)—'that made its weight felt on both sides of the Atlantic'. Because criminology is grounded in a scientific and experimental approach to criminality, because it relies on psychiatry, psychology, statistics, anthropology, and sociology, which have adopted (or could adopt) the same methods everywhere, it is neither determined nor limited by national characteristics or peculiarities. Second, it is usually said to be impossible to speak of a uniform 'European' penology prior to the end of the Second World War and the gradual formation, via harmonization, of a common European legal identity by the EU member states (Daems et al. 2013).

My argument is that by historicizing the criminalization process at the turn of the twentieth century, these two statements become somewhat questionable. The penological landscape in Europe and the United States is more complex, and the relationships between the global and the local in the growth of criminology, together with the relationships between unity and diversity in criminology's impact on criminal law systems, are always interconnected. This study suggests that, on the one hand, the historical analysis of the notion of the individualization of punishment (its interpretation, transformation, adoption, or better adaptation) in Europe and the United States sheds light on the very different development of the criminological reform movement on both sides of the Atlantic and, on the other hand, allows us to understand the importance of the international debate. By historicizing the individualization principle and, more specifically, by investigating how the idea of indeterminate punishment is applied, it is possible to recognize the formation of two different (European and US) penological identities.

The following investigation aims to demonstrate that European and US scholars were perfectly aware of the existence of distinct penologies rooted in their different legal cultures and traditions. In many reports written for international prison and penitentiary congresses, and in many speeches at sessions of the International Association of Criminal Law, European and US scholars clearly expressed their sense of belonging to either *the* European or *the* US penological model. One of my main objectives in this book

is to discover the peculiar characteristics that identify these two models and their legal foundations. The basic distinction between the two relates to the European and US approaches to criminal reforms: in summary, there is an opposition between European doctrinarism and US pragmatism. However, there is a deeper reason, a more culturally rooted explanation of the origins of these two unique identities, focusing on the impact of the *criminalization process* and the *individualization principle* on the foundations of the US and European criminal law systems, which were grounded in different legal histories and traditions. Briefly, the legacies of the French Revolution and the Enlightenment regarding both the idea and the forms of punishment were unequally applied on either side of the Atlantic. Europe rejected every possible type of discretion (whether judicial or administrative) in punishment and its execution, because such discretion was perceived as a return to the 'old regime', that is, a civil regression to the punitive, unrestricted power of judges in the Middle Ages, similar to the spectrum of unlawful law that had been fought by the Revolution. The US indeterminate law system, on the contrary, rested on the wide, discretionary power delegated to prison boards, which were administrative bodies.

In 1945, Jerome Hall (1945: 344, 345) wrote that despite the contributions offered by the new school, 'the most salient fact about 20th-century criminology is that it is a congeries of unresolved conflicts', whose 'basic inner-contradiction results from the pervasive failure to integrate those diverse streams of thought that have come to be known as Classical and Positivist criminology'. This book explores exactly the history of that *failure*, if one ever existed. The historical analysis of the individualization of punishment provides a different and more complex penological scenario, in which the influence of criminology on the foundations of the liberal criminal law systems is possibly not so striking, but nevertheless remarkable. By adopting this approach, the focus shifts from the history of the origins and development of criminology as a science to the history of its impact on the tenets of criminal law or, as Nicola Lacey put it, the history of the complex idea of 'criminalization'.[5]

[5] See Lacey (2007a: 197): 'the term "criminalization" constitutes an appropriate conceptual framework within which to gather together the constellation of social practices which form the subject matter of criminal law on the one hand and criminal justice and criminological studies on the other'; see also Lacey (2009a).

As Herbert Hart recognized (2008: 25), 'the ideals of Reform and Individualization of punishment (e.g. corrective training, preventive detention) which have been increasingly accepted in English penal practice since 1900 plainly run counter to the second if not to both of these principles of Justice or proportion', and the same could be said of the US and the other continental experiences. Certainly, not all of the aims of reformers such as Zebulon Brockway, Frederick Wines, Enrico Ferri, and Franz von Liszt were achieved. Moreover, the reform movement that they initiated seemed to be endless: it is a history of reforms claimed but never completely realized (e.g. the complete substitution of the dangerousness criterion for that of liability), unfulfilled promises (e.g. the decrease in criminality and recidivism), and theoretical statements disproved by factual confirmations (e.g. the rehabilitative efficacy of indeterminate sentences).

Nonetheless, the impact of criminological theories on different legal systems cannot be measured only in terms of patent achievements or nominal attainments: even in light of theoretical defeats and the apparent resistance of retributivism, the legacy of penal modernism lingers, as demonstrated by the prominence of preventive justice (Ashworth and Zedner 2014).

1.3 The Dilemmas of Indeterminate Sentence

When in 1954 the French scholar Marc Ancel published a study on *The Indeterminate Sentence* (conducted in the pursuit of a UN Social Commission decision), this was 'still an academic problem' internationally (Ancel 1954: 4). Indeed, it has been applied in different forms by different legal orders, conditioning the development of modern criminal legislation and raising questions of legitimacy that have never been fully resolved. The doctrinal struggle over the indeterminateness principle signals the breaking point between US and European jurists' positions and shows how opposing views on indeterminacy created one of the most important differences between the two penal systems. Specifically, the US legal order sees the indeterminate sentence as the better technique for the reformatory system, whereas the European systems accept indeterminateness initially only within the limits of conditional liberation and then in the form of the dual-track system, with supplementary and indefinite security measures. In 1935, comparing the US and German penal frameworks, the Austrian

jurist Franz Exner (1935a: 366) confirmed an opinion that was well established in continental culture, according to which measures of security must be indeterminate: a broader application of indefinite segregation is acceptable only for juvenile offenders, but it is absolutely inconceivable as a general rule, because conditional liberation already permits detention to achieve a desirable flexibility.

According to Ancel, theories and institutions originally conceived as opposite and alternative (conditional liberation and indeterminate sentence) later tend to approach or conform to each other in their practical applications. Nonetheless, using Ancel's words (1954: 8), 'in our opinion it would scientifically be a serious misconception of the exact status of the problem of the indeterminate sentence not to be aware, both of the theoretical differences which were prominent at the beginning and of the gradual but irresistible assimilation which then asserted itself in practice'. I seek to reconstruct from a comparative view the broken links, invisible relations, theoretical oppositions, and opportunistic tunings characterizing the doctrinal and normative controversy about what De Asúa (1913) preferred to call the 'punishment determined a posteriori'. Underlying this dispute is a reshaping of the scope and nature of the punitive power.

The rejection of the US model does not prevent the European system from endorsing the preventive paradigm, according to which all of the foundations of the criminal liberal system are gradually modified and distorted. The division between the European and US approaches (the former adopting conditional liberation and the dual-track system; the latter based on indeterminate sentencing) is, on the one hand, composed of contrasting discourses under whose surface flow similar currents of thought. On the other hand, the division is characterized by cultural traditions and distinct constitutional doctrines confronted by the challenges of a changing society. The ambiguity of the reform movement, supported by a rhetoric straddling the fine line between humanitarianism and utilitarianism, re-education and social control, brought together US progressives and European criminologists from the outset. The indeterminate sentence can be either 'an act of severity' or 'an act of leniency', and 'like Janus, has two faces' (Ancel 1954: 35)—the first being the possibility of extending the length of detention until the offender is no longer considered a danger to society; the second being the prospective reduction of sentence due to the offender's

reformation during a correctional process in which he is the master of his own destiny.

F. H. Wines, one of the most ardent US supporters of indeterminate sentencing, pointed out in 1904 that, thanks to developments in neurology and psychiatry, 'we can modify mental operations by securing and exercising control of the body. We can modify physiological action by controlling the mind.' Scientific knowledge, together with the failures of the classical retributive system, resulted in a new foundation of criminal law based on 'social self-defence', according to which whatever is essential for the protection of social order and security is legitimate, 'whether it be the redemption of the offender, his incapacitation for evil, or his extermination' (Wines 1904: 14, 13). The affinity of Wine's words with continental theories—e.g. Garofalo's theory of temibility, or Listz's theory on the scope of punishment—is remarkable. The swing of the penological pendulum towards prevention and social defence represents the theoretical setting for the long process of conceptual definition and legislative enactment of both indefinite punishment and preventive detention. Between the US and European reform movements, it is possible to pinpoint different languages, techniques, and conditions of applicability of criminal legal provisions, which can be traced back to different visions of the scope of punishment, different ways of balancing public interests and individual safeguards, and different criteria to allocate powers in the sentencing phase. At the outset, though, it is important to recognize that there is a common element uniting the US and European experiences—that is, the ambiguity of the criminological movement. Like a pendulum continuously oscillating between rehabilitation and neutralization, the criminological movement's erosive criticism of the classical notion of punishment leads to choices that are intrinsically contradictory because they are evaluative and, therefore, political. 'The problem', as Ancel (1954: 35) notes with reference to the indeterminateness of punishment, 'is neither one of legal definition nor of sociological qualification, but solely of criminal policy'.

1.4 Plan of the Book

The second chapter provides a general presentation of criminology and penology in the nineteenth and twentieth centuries and describes the book's methodological approach. The study explores

the impact of criminology on criminal law systems in Europe and the United States between the 1870s and the Second World War from a comparative perspective. My methodological approach is the historical analysis of law based on what Nicola Lacey has defined as the 'historicization of the criminalisation process'. Its object is the historical and comparative study of changes in the concept of punishment (i.e. its justification, legitimacy, ends, and application) caused by the spread of criminological ideas on both sides of the Atlantic. The sources analysed include proceedings of international prison congresses, IULP reports, translated books and reviews, papers, bills, draft codes, and academic studies. Because the international movement typically identified as the Positivist School of criminal law based its findings on continuous legal comparisons and legal transplants from other countries experimenting with new punitive measures (the case of Elmira is the most famous of these examples), the book investigates the consequences of this hybridization of penological patterns on national systems.

Chapter 3 addresses the international reform movement, and I argue that it is possible to recognize the roots of two different penological identities—US and European—that are characterized by specific ways of interpreting and implementing the principle of the individualization of punishment. My argument is that the cultural divide described by James Whitman in *Harsh Justice* (2005a) can also be analysed in relation to institutional, cultural, and constitutional reactions to the demands of positivist reformers. To demonstrate this assumption, I suggest reviewing two opinions: the uniformity of the criminological movement; and the impossibility of recognizing any uniform penological system in Europe or the United States during the period in question. Pushed by the international rise of criminology, the new target of individualized penalties was achieved in different ways in the United States, the United Kingdom, and continental legal systems (Germany, Italy, and France) based on their national traditions and legal cultures. Even if this principle was grounded on a reformative movement justified by both common ideals and scientific knowledge shared internationally, the ways in which it was enacted reflects constitutional peculiarities that can shed light on the divergent history of more recent criminal policies in different countries.

Chapters 4 and 5 focus on the interpretation and enforcement of the individualization of punishment and indeterminate sentencing

in the United States and Europe. They take a chronological approach, exploring the origins of the international debate over individualization and indefinite detention and the legal questions raised by these methods in the 1870s and 1880s. The American indeterminate sentence system was implemented in the 1890s, although European scholars at that time rejected its legitimacy. The 1890s offered a counter-argument against the indeterminacy principle that was grounded on the sociological theories of Durkheim and Tarde, and this was immediately espoused by criminalists such as Prins, Saleilles, and Conti.

Chapter 6 examines the international prison congresses in Brussels (1900) and Washington (1910). They are presented as the main episodes in which two different approaches to the individualization of punishment emerged. Thanks to its theoretical elaboration and its first legislative formulations (e.g. draft bills, laws, and codes), the separation between the US system of indeterminate sentencing and the European dual-track system (which included both punishment and supplementary security measures) was clearly recognized. Following the Washington Prison Congress in 1910, European scholars refined their repressive-preventive patterns of criminal law and combined both past-oriented penalties and future-oriented security measures. In so doing, they marked their cultural distance from the US legal system. By contrast, US reformers (particularly between the mid 1910s and the early 1930s) continued to defend the theoretical correctness of the indeterminate sentencing system and began to question its concrete methods of application, adjustments, and weaknesses.

During this period, the question arose regarding the constitutional fairness of different individualization models. Chapters 7 and 8 address the crisis of the principle of legality and its consequences, and analyses how the dilemma between legality and judicial (or administrative) discretion was addressed by European and US criminalists. Indeed, as a result of the impact of criminological theories, US rule of law and the European *Rechtsstaat* reshaped the balance between the state power to punish and individual rights in different ways. The chapters investigate how the new penology was considered to be consistent (or inconsistent) with the two constitutional frameworks in terms of the separation of powers, increasing administrative discretion in sentencing, the legitimacy of preventive measures against dangerous offenders, and the principle *nulla poena sine lege*. In particular, Chapter 7

analyses the solution adopted by US reformers pushing towards a bifurcation of trials into distinct guilt and sentencing phases. This method, however, did not solve the inconsistencies of the reformatory system, and by the late 1920s, a reaction against administrative discretion in sentencing led to the proposal of a disposition tribunal. Chapter 8 examines the path followed by continental criminalists, who suggested different methods of individualization of the trial from the stage of preliminary investigation. The London International Penal and Penitentiary Congress of 1925 represents the occasion that definitively confirmed the divide between the US approach of administrative individualization and the European choice for judicial individualization.

Chapter 9 investigates the problems associated with the shift of criminal policies from repression to prevention in the 1920s and 1930s. The notion of social dangerousness became the pivotal factor of criminal policies, and the priority task was to identify, control, and govern dangerous subjects. The main problem was to find a new balance between flexibility of treatment and individual guarantees. The power to inflict and enforce preventive measures of security was considered necessarily judicial by European jurists, although it was delegated to administrative bodies in the United States. The Italian fascist code of 1930, celebrated as a sophisticated theoretical compromise, provided a hybrid framework in which measures of security were considered administrative, but were imposed by a judge and as a consequence of a crime. The Berlin Congress of 1935 was the occasion to debate the different solutions (more inclined towards providing safeguards or more interested in strengthening the authority of the administration) to the issue of judges' prerogatives in the execution of sentences and security measures.

Chapter 10 addresses the rise of a new authoritarian paradigm of criminal law in the 1930s, especially in Italy and Germany. Fascist and Nazi criminal law accentuated the original and never-solved contradictions in social defence policies or the individualization of punishment, forcing legal scholars (both in Europe and the United States) to rethink the need for limits to the principle of individualization as well as preventive detention. As I sketch out in the conclusions in Chapter 11, this issue continues to represent a constitutional conundrum for criminologists and criminal law scholars alike.

2

Designing the 'New Horizons' of Punishment

Since the 1870s, criminal law has been deeply transformed by the impact of criminology. The new science, dedicated to the study of criminality as a social phenomenon and the analysis of the individual factors of delinquency, brings into question both the foundations of the state's right to punish and the legal machinery created to react to crime. Based on an eclectic and interdisciplinary approach combining different methods and knowledge that is 'a hybrid product of several sciences' (Parmelee 1918: 4), criminology not only has forced the reconceptualization of criminal law from the viewpoint of criminals instead of crimes, but has also prompted radical reforms of the liberal criminal law principles in Europe, the United States, and Latin America.

This book aims to investigate how the global spread of criminology between the nineteenth and twentieth centuries has concretely reshaped the boundaries of the purpose and legitimacy of punishment in a progressive tension towards—in Enrico Ferri's words—the 'new horizons' of criminal law. Rather than focusing on the internal history of criminology,[1] the research has consisted of a historical analysis of the integrated relationship between criminology and sentencing, specifically with regard to the individualization of punishment. If it is indeed possible to pinpoint some basic rules that—from Beccaria to the penal codifications of the nineteenth century—characterize both the *common law* and the *civil law* orders, the reformers' contributions call for a radical change

[1] The literature surrounding the history of criminology with different methodological approaches is extensive: see, e.g., Becker 2002; Becker and Wetzell 2006; Davie 2005; Dikötter 2002: 182–217; Emsley 2007: 181–99; Galassi 2004; Garland 1985a, 1985b, 1988, 1994; Mucchielli 1994; Salvatore 1992; Salvatore and Aguirre 1996; Wetzell 2000.

rather than a progressive evolution. The work of those who are considered to be the founding fathers of modern criminology—and above all the three Italian founding fathers Cesare Lombroso, Enrico Ferri, and Raffaele Garofalo[2]—advances a conceptual and normative revolution. Their more renowned ideas include the deterministic critique of free will, the substitution of social responsibility for individual liability, the offender's dangerousness as the criterion for punishment, and the principle of social defence.

Historians have investigated these themes widely, highlighting the differences between national schools (e.g. the Italian and French anthropological approach, the sociological approach of Ferri and Tarde) (Kaluszynski 2006; Nye 1976) and emphasizing the gap between programmatic intentions and real achievements, and between strong critiques and disappointing results (Koch 2007; Sbriccoli 2009a; Smith 2010: 179). The proclaimed revolution of modern criminal law, heralded by Ferri in his lecture at the Bologna University in 1881 and by Liszt in his Marburg speech on the scope of punishment in 1882, would have gradually dissipated under the pressure of more conservative, legalistic, and technical methods.

However, a comparative scrutiny of the *longue durée* consequence of criminology on different penological patterns is still lacking. Section 2.1 briefly considers the impact of the criminological movement on liberal criminal law. Section 2.2 examines the rise of the principle of individualization of punishment. Section 2.3 describes the different types of individualization conceived at the end of the nineteenth century. The focus of section 2.4 is on the contribution of an historical and comparative investigation of the criminalization process, with a combined international and local approach. Section 2.5 outlines how the individualization movement affected the principle of legality and how it gradually shifted the barycentre of criminal law from the protection of individual rights to social defence.

2.1 The Impact of Criminology on Liberal Criminal Law

According to Garland (1985b: 133), at the end of the nineteenth century, criminality was considered to be 'a knowable positive

[2] On the origins of criminology as a new 'knowledge activity', see Pires (2008: esp. 33–4). See also Allen (1954); Sellin (1958); Wolfgang (1961).

entity that, with the aid of scientific investigation and appropriate practical techniques, could be removed from the social body'. Nonetheless, its suggested programme 'repeatedly offered arguments and legitimations for intervention, but actually offered few effective means of carrying this out' (1985b: 133). Many reforms, such as indeterminate sentences, reformative prisons, and preventive detention, were not supported by thoughtful considerations on how they were to be achieved. 'In terms of its technological profile, then, the criminology programme offered an effective social defence—through eliminative means and police techniques—but little in the way of prevention or rehabilitation' (1985b: 134).

It is not easy to balance the various effects of the rise of criminology on criminal law in different legal systems. The reformers' initial intention to institute an irreversible, progressive movement of modernization of the criminal system is in tension with the methodological scepticism and rooted legal traditions that frustrate penal positivism's more innovative demands. Nevertheless, beyond the unrealized promises and the self-representations celebrating the new school's achievements, it seems undeniable that during the late nineteenth and early twentieth centuries, the criminological movement had a strong effect on both legislators and international criminal science.

The ideas that the law should punish the offender rather than the act, that punishment ought to be both a tool to reform the criminal and a technique for social defence, that a classification of delinquent types is both possible and convenient, and that punishment must be individualized are destined for long-term success. This apparatus of theories, indeed, satisfies two convergent interests: on the one hand, it reflects the increasing influence of external knowledge on criminal law; and, on the other hand, it meets the needs of the state's criminal policy.

The subject matter of this book is defined, then, by how criminology and criminal-law doctrines have fought, conditioned, and influenced each other to shape a new model of punishment. This methodological approach is required by the interdisciplinary nature of criminology and its original aim to reform criminal law by contaminating it with other sciences. The express will of the pioneers of criminology was not to found a new science, but to modify the existing criminal law. From the 1870s until the Second World War, the reactions of adherents to the Classical (or liberal) School against the new positivist trend implied the adoption of a

new language, the consideration of problems never before studied, and the refinement of legal techniques to preserve the boundaries of traditional knowledge. The considerable international success of criminal anthropology and criminal sociology, at least in Western legal cultures, cannot be historically analysed completely separate from the history of criminal law, because the two themes intersect each other in a unitary narration.

'Historically contextualised criminology',[3] especially throughout the period here investigated, asks for a viewpoint free from the disciplinary restrictions of the classical and positivist approaches, which are scientifically different but reciprocally bound to a permanent confrontation by opposition. In its attempt to reform criminal law, criminology started from a historical analysis of crime and a historical interpretation of the social, cultural, anthropological, biological, and economic causes of delinquency. The demands of the criminologists were fed by their interpretation of the cultural and political context, which also defined their targets and methods. The impact of the new science can be recognized only by analysing the historical coordinates within which it took place, or in Lacey's words, *historicizing criminalization* in the light of philosophical stances guiding theories on the scope of punishment, the changing relationship between individual rights, society's rights and state power, and the welfare policies of social control over deviant behaviours.

2.2 Individualization as the New Face of Punishment

In both Europe and the United States, the rationale of punishment has undergone major changes since the rise of criminology in the 1870s. The new scientific approach to crimes and criminals triggered deep transformations in the liberal criminal law tenets that originated in the theories of the Enlightenment and in the French and American Revolutions. The pivotal criterion for penal accountability shifted from the criminal act to the delinquent man, from repression to prevention, from retribution to rehabilitation

[3] The notion is suggested by Godfrey et al. (2008: 6–23); see also Lawrence (2012: 325). On the history of criminology as a complex knowledge, opened to both internal and external history, see Digneffe (1991); on the history of criminology as 'history of the present' in Foucauldian terms, see Pratt (1996a).

or incapacitation. Consequently, many basic rules and principles, such as *mens rea, actus reus*, and the principle of legality, were reshaped, adapted to new purposes, and differently interpreted. As Lacey argues, if attribution of criminal responsibility was definitely shifting from a character-based pattern to capacity-based practices, which emphasized the offender's individual freedom and psychological element, the contribution of criminology had the effect of 'displacing explicit character attribution onto the less visible areas of the prosecution and sentencing processes' (Lacey 2009b: 25–6). With regard to sentencing, the new principle that encompassed all of the calls for reform was that of the individualization of punishment—that is, the idea that instead of being abstractly proportioned to offences, criminal penalties should be flexibly adjusted to criminals, their dangerousness, the likelihood of their rehabilitation, and their deviant inclinations.

Cesare Lombroso is the author of the 1876 work *L'uomo delinquente* (*The Delinquent Man*), which is considered the manifesto of criminal anthropology. Lombroso and Enrico Ferri, the father of the Italian 'Positive School of Criminology' and author of *Criminal Sociology* (1884), gave a theoretical impulse to the principle of individualization. Lombroso's primary idea was the necessity to study not the crime as an abstract event, but the concrete delinquent man who committed the offence: each offender can be recognized by some physical and physiological characteristics and features that make him a criminal man. Lombroso applied the methods of the biological sciences to the study of the individual criminal with the aim of distinguishing different types of delinquents (i.e. lunatic, atavistic, female), or rather, different potential offenders. In fact, if it is possible to positively identify a dangerous subject by simply looking at his organic features, it is not necessary for him to commit a crime before being convicted, but it is much more useful and risk-free to prevent the offence by eliminating or imprisoning the 'born criminal' as soon as possible (Gibson 2002, 2013; Guarnieri 2013; Rafter 2006). Ferri's thesis starts from this point, but is developed further. According to him, there is no free will involved in committing a crime, because a criminal is totally conditioned in his actions by three types of factors: anthropological (man's heredity, emotional temperament), physical (i.e. geography, atmospheric conditions), and social (economics, environment, childhood surroundings, idleness, education, and so forth). Man becomes a criminal due to his physical stigmata, but

above all else due to the social conditions of his life. Accordingly, because the anti-social conduct of criminality is the effect of discoverable and already-known causes, if society's real interest is to remove those causes or diminish their influence as rapidly as possible and devote all energies to social defence, then the character of punishment must be radically changed.

All of the principles of the Classical School of criminal law, which are summarized in the pamphlet *On Crime and Punishment* and written into many penal codes and constitutions, were completely overturned by criminological theories. Those theories state the following: the criminal system primarily attends not to individual rights and liberties, but to social safety and defence; crime is not a juridical abstraction, but a natural fact committed by a concrete man; and a criminal is not morally responsible for his actions because free will does not exist and, consequently, criminal penalties ought to be imposed based on individual criminals' dangerousness rather than their guilt. The purpose of punishment is future-oriented, not past-oriented: rather than being retributive, punishment is imposed as a means of correction of the criminal's antisocial character and prevention of future offences and recidivism.

The core problem raised by criminology, in which jurists, legislators, and judges were simultaneously involved, was the relationship among the aim of individualized treatments for offenders, the notion of individual responsibility, the principle of legality, and the rule of law. As the notion of social dangerousness took the place of criminal liability, the very idea of punishment shifted from repression to prevention. The reasons for this change are found not only in the different strategy adopted by states to govern and control more complex societies, but also in the rise of faith in sociology and psychology as scientific means to understand, classify, and predict every human behaviour. The belief in the possibility of recognizing a criminal type before the criminal's misconduct, together with confidence in the rehabilitative ideal, endangered the retributive principle. It is important to emphasize the connection between the preventive pattern, rehabilitation, and the individualization of punishment: the more faltering the trust in the deterrent efficacy of punishment, the more popular the idea of individualized treatment.

The metaphor of the legislator as a physician whose main effort is preventive hygiene rather than the search for therapy became the recurrent strategy of the new penology, aiming to both overturn

the retributive principle and replace the idea of fixed, predetermined sentences with the notion of sentences that were individualized and indeterminate. Just as a physician cannot foresee with certainty when the patient will be cured, so is it also impossible for a judge to predict when a criminal or dangerous subject will be definitively rehabilitated. The new challenge was not how to improve the prison system to protect society by reducing recidivism, but how to realize social defence—an overall policy of preventive measures that resulted in a scientific approach to the social, psychological, educational, and economic causes of crime.

The individualization of punishment became the keynote of Progressive-Era reformers in both the United States and Europe and was also considered one of the cardinal principles of the criminal law system in both regions until the second half of the twentieth century, even though the meaning of this formula changed through a slow but remarkable legal interpretation that has gradually voided its original revolutionary goal. Even if interpreted in different ways, the common idea shared since the 1880s by prison reformers, exponents of the new criminological science, and a large proportion of the public claimed the necessity of a radical rejection of the liberal criminal system based on a combination of deterrence, retribution, and reform through a firmly individualistic approach. The main focus shifted from crime as an abstract entity to criminals as natural, social human beings immersed in a complex network of environmental, social, and economic conditions that affected their behaviour. As a consequence, the abstract notion of uniform and predetermined 'punishment' was to be replaced by the idea of individual treatment, always customized to the personal character, psychology, and overall social conditions of the criminal, who was primarily regarded as a person suffering from a disease.

2.3 Different Sorts of Individualization

The momentous innovations introduced by the individualization principle were part of the broader impact of criminology on penal jurisprudence at the end of the nineteenth century. At stake were the old paradigms and philosophical foundations of the liberal doctrine grounded on the theories of Beccaria (and, later, Karl von Birkmeyer, Francesco Carrara, Faustin Hélie and Adolphe Chauveau, and Carl Joseph Anton Mittermaier, among others).

The primary idea of the classical doctrine is that all men are equal before the law and that the same crime should be punished with the same penalty according to the degree of guilt. Criminology and penology, the new disciplines that studied the basic problems of criminal law with a scientific, experimental approach, suggest the opposite point of view. They seek to overcome the doctrines of free will, moral responsibility, and proportionate criminal penalties. Punishment, as Gabriel Tarde puts it, has four different purposes, which correspond to four historical phases of legal evolution: it is a retributive means, working as social vengeance and reparation for an offence; it is an exemplary intimidation deterrent to others; it is a method of reforming criminals; and, finally, it is an instrument of social protection. The new rationale of criminal law, as stated in 1882 by Franz von Liszt at his Marburg Programme, is wholly oriented towards a system of punishment that, with the primary purpose of rehabilitating offenders, simultaneously offers the best social defence through the control or neutralization of incorrigible offenders.

Let us provide just a few examples of the international prominence of the new individualization dogma. In his seminal book *L'individualisation de la peine* (*The Individualisation of Punishment*) (first edition 1898, second edition 1908, translated into English in 1911), Raymond Saleilles wrote that 'the entire province of criminal law' had to be viewed from a new perspective, because 'a comprehensive and constructive survey of the data, together with an exposition of principles, must be directed to the critical problem of criminology, which is the problem of individualisation of punishment' (1911: 4). Similarly, when in 1911 the six members of the Committee on Translations of the American Institute of Criminal Law and Criminology drew up its 'General Introduction' to *The Modern Criminal Science Series*, they stated that 'the great truth of the present and the future, for criminal science, is the individualization of penal treatment' (Wigmore et al. 1911: vii). In the same year, Roscoe Pound, in his 'Introduction to the English version' of Saleilles's book, emphasized that 'what we have to achieve in modern criminal law is a *system* of individualization' (Pound 1911: xvii).[4] In 1912, the Italian jurist Pasquale Arena (1912: 29), professor at the University of Naples, observed that

[4] Emphasis in original.

prison legislation worldwide was oriented, albeit in an irregular and fragmentary way, towards the individualization principle. But what was the significance of the notion of individualization? And how exactly did it affect the criminal law system? Answers to these questions, which the legal doctrine of the nineteenth and twentieth centuries perceived to be pivotal, can be given only through a historical analysis of the concept of individualization, historicizing it so as to recognize its different connotations and implications.

The individualization of punishment can be divided into three types—legal, judicial, and administrative—according to Saleilles's well-known distinction (Saleilles 1911). Each form was enacted in different countries and legal orders on the basis of peculiar constitutional rules, distinctive legal traditions and reasoning, and openness to or fear of reforms. The US sociologist Maurice Parmelee (1908: 144) noted that 'different sorts of individualization are being practised [*sic*] from different points of view. As a matter of fact most, if not all, the schools of today advocate individualization, though for varying reasons.' The new scientific school advocated individualization because of criminals' anthropological characteristics, and for the sake of social defence, other schools advocated it for reforming criminals. Even the Classical School tempered the rigidity of its doctrine with a soft individualization by admitting extenuating circumstances and cases of diminished responsibility. Therefore, if the essence of the principle could be summarized as 'the process of adjusting a penalty to the character of a criminal' (Parmelee 1908: 144), then both its concrete application and its goals varied significantly in different contexts and periods.

The 'move from individualism to individualisation' and the shift 'from the forms of legal prohibition and penalty to a new mode of normalisation' (Garland 1985a: 28, 29), with their criticism of liberal states' dogmas of moral guilt and equality of punishment for identical crimes, had spread internationally by the end of the nineteenth century. The scientific study of the criminal and the individualization of punishment also became the ideals of the US penal reform movement. US jurists and reformers suggested and experimented with new methods of punishment to fit each type of criminal and, at the same time, to offer the most protection to society (e.g. suspended sentences, parole, probation, indeterminate sentences, and juvenile courts). Widespread discontent with the inefficaciousness of fixed and determined punishment and

popular dissatisfaction with the administration of criminal justice, together with faith in the new progressive methods of criminology, increased the pressure to rethink the tenets of the criminal jurisprudence.

Even though the most radical demands put forward by reformers, such as the entirely deterministic theory of crime and the absolute indeterminate sentence, were rejected and never enacted by any system, European and US jurisprudence was nevertheless conditioned by the trend of the modern criminological school 'to limit the sometimes excessive predominance of individualism and re-establish the equilibrium between the social and individual elements' (Ferri 1917: 19) and the consequent transformation of criminal policy 'because our ideas, inherited from the last century, are characteristically humane and stress the individual life, while the times demand greater regard for the general security' (Pound 1929b: 197–8). The widespread call for the individualization of punishment went out in both the Old and the New Worlds during the Progressive Era and survived the rise and fall of the Positivist School of Criminology, changing its meaning from personalized treatment for the purpose of rehabilitating an offender to measures intended to provide the most secure society, but gradually gaining rank as an unquestionable foundation of Western criminal law. Thus, by the 1930s, the claim for 'individualization', which was *ab origine* so revolutionary and in such conflict with classical retributive tenets of the criminal law, had already been absorbed into the system, strengthening instead of subverting it.

2.4 Positivist Criminology and Criminalization Process

The theoretical struggle over individualization confronts adherents to the classical, positivist, and eclectic schools, opening up a prolific field for comparison to international scholars, first from Europe and the United States and later from Latin America and even China. The international aspect of penological discourse is certainly a condition that is a prerequisite to historicizing the notion of individualization, analysing its developments, and understanding the cultural and political reasons for its different applications. Although the global movement of scientific positivism undeniably affects the choices of national lawmakers, it

nonetheless does not entail a real uniformity in all legal orders. The preference for the legal, judicial, or administrative individualization of punishment, together with methods of concretely applying it and the definitions of its limits and counterbalances, rely on how jurists and legislators are influenced by the legal culture to which they belong. All of its variations depend on how the rule of law and the *Rechtsstaat* have patterned various tenets of criminal law in different ways.

Therefore, it is necessary to investigate the cultural phenomenon that has allowed individualization to emerge as a crosswise theme. The rise of legal comparison, international prison congresses, congresses of criminal anthropology, and new institutes for studying criminal law across national borders, simultaneously represent the conditions for developing a transnational idea of individualization and an opportunity to reaffirm national distinctiveness. The science of criminology reveals new perspectives on comparative law, which is no longer limited to the simple juxtaposition of provisions, but is oriented towards planning a common framework for progressive criminal law. This is because the scientific approach to the study of criminals and the factors affecting delinquency tends to minimize the differences among common epistemological rules. Sociology, psychology, statistics, psychiatry, anthropology, and biology, all of which are essential tools for understanding individuals and, therefore, for individualizing punishment, have no national boundaries.

Clearly, a crucial role in this process is played by the relationship between the individual and society, which was described by Foucault in terms of disciplinary power. Political sovereignty focuses on individuals and their bodies, subjugating them to forms of discipline and control so as to foster a mutual adaptation of somatic individuality to state power. Within the disciplinary paradigm, which surely also encompasses the criminological discourse on punishment, the personality, which was formerly hidden behind post-revolutionary egalitarian rhetoric, is now exalted. This is because discipline is the new form of power and has the individual as target, goal, interlocutor, and term of comparison within the power relationship (Foucault 2008). This thesis, however, does not allow for the recognition of the specific characteristics of the juridical individualization, its supporting or contrasting arguments, or its distinctive applications.

It is worth analysing the peculiar impact that the criminological movement for punishment 'tailored' to the delinquent had on each legal order—that is, on procedural measures, applicative rules, and interpretations of constitutional provisions. The notion of *criminalization* suggested by Nicola Lacey can profitably be used to investigate the transformations in criminal law in the late nineteenth and early twentieth centuries. Indeed, this method not only allows us to consider the relationship between criminology and legal history as a coherent and organic research theme, but also enhances the historicization of legal concepts (and rules and principles) as a necessary resource to understand the complexity of the phenomenon under consideration. Only such an approach, combining the general history of an idea with an analysis of its specific translations into law, seems suitable to reconstruct the importance of the debate over individualization in the process of formation and differentiation of penal orders in Europe and the United States.

2.4.1 Historicizing individualization

The historical dimension of the criminalization process is analysed here through the lens of the individualization of punishment. Among the fields affected by the reform movement, this study explores how the idea of punishment—that is, its rationale, scope, proportioning, and execution—has been reconceptualized under the pressure of criminological theories. The penal systems of modern constitutional democracies could not achieve the rehabilitative purpose of punishment without a margin of flexibility in considering the offender's character and life circumstances. However, the notion of individualization is not and has never been univocal, but, rather, it has taken on different meanings in light of the penal philosophies and legal frameworks in which it has been introduced and applied.

Although individualization is one of the most important legacies of the criminalization process that began at the end of the nineteenth century, it has been hotly disputed by scholars in international congresses, parliamentary debates, and specialized literature, for at least sixty years. Indeed, the individualization of punishment involves abandoning the criterion of having a rigid proportion between crime and penalty fixed by the law, questioning the legitimacy of the principle of legality, rethinking

the role and discretionary power of the judge, changing some evidentiary rules, and creating new administrative bodies for the sentencing phase of criminal proceedings. The liberal scheme of fixed penalties, abstractly provided by the legislator and proportional to the seriousness of an offence—a system that is retributive, deterrent, applied on an egalitarian basis, and decided by a judge—is radically questioned and criticized due to its rationality and efficacy.

Plainly, there is a heterogeneous mixture of reasons for this reconceptualization of punishment, including both the humanitarian conviction that all criminals can be rehabilitated and the utilitarian goal of social defence. Moreover, it is grounded on the premises of the knowability and scientific predictability of human behaviours thanks to the heuristic tools of extra-legal disciplines such as psychiatry, psychology, sociology, statistics, and so on. The effect of its fallout on the classical penal pattern is, however, disruptive: all dissatisfactions with the criminal system, from growing levels of criminality to recidivism rates, are related to sentencing. Consequently, the liberal foundations of punishment, such as legality, proportionality, retributivism, and separation of powers, are disputed. The study of the notion of individualization and its historicization therefore provides an illuminating perspective for investigating the impact of criminology on different legal orders, because it sheds light on the constitutional frameworks of different states, political strategies that attempt to create an idea of 'antisocial otherness', rehabilitative utopia, projected and tested prison reforms, and public opinion on the purpose of punishment.

The principle of legality, the rule of law and the *Rechtsstaat* cannot be considered as static, invariable notions or meta-historical conceptions, but they take on new significance according to the different periods and different historical contexts in which they are applied and considered. As with the criminalization process or, more specifically, the individualization principle, they are reconceptualized in relation to the new purposes of criminal policy, new tendencies in legal reasoning, and the influence of extra-legal knowledge (Dubber 2013; Farmer 1997: 1–56; Lacey 2007b, 2013). Thinking about the individualization of punishment using the approach of the 'historical analysis of law' (Costa 2012: 21–9; Dubber 1998a; Dubber and Farmer 2007) allows us to comparatively trace how

individualization has gradually shaped different penal systems and led the European and US sentencing models to such different outcomes. The analysis of a single law should be related to the broader legal order, and normative data should be read in the light of cultural and political data. The criminalization process, in fact, cannot be dealt with exclusively from an internal, normativistic point of view for two reasons: first, because historical research cannot settle for a simple, normative record; and, second, because the very identity of criminology refers to a complex network of knowledge that assumes crime to be a social phenomenon. Although the transformations of punishment between the nineteenth and twentieth centuries cannot disregard, e.g., either the influence of Durkheim on European culture or the reaction of public opinion and lawmakers to statistics about prison populations, the distinctiveness of legal history, characterized by the uniqueness of its subject (law as a legal science), its language, and its sources, surely is not challenged by the interdisciplinary approach (Sbriccoli 2009b).

2.4.2 The penal reform movement and legal comparison

Criminological positivism (or 'penal modernism'), which involves both scientific and sociological positivism, causes different changes in national legal systems according to how those systems react to reformative claims. The same theoretical premise—that is, the principle of social defence—has given rise to different measures in many countries and regions (e.g. Europe, the United States, the United Kingdom, Latin America, and even China), with each measure tailoring its specific response to the need for modernization in the area of criminal justice. Indeed, it is only by historicizing the notion of individualization that it is possible to analyse its peculiarities in different contexts, its constitutional legitimacy in different legal orders, and its consistency with diverse legal traditions and cultures. The scope of the research field must be continually increased and decreased, moving from a global to a local perspective and vice versa: it must be increased because the debate on individualized penalties is absolutely transnational, but it must also be decreased and specified because the principle of individualization is applied differently by national laws.

The way in which each state faces the issue of the character and purpose of punishment is necessarily influenced by the international circulation of reformist ideas, but also depends on how these impulses have been taken into consideration by local jurists and implemented by local legislators. Indeed, from the mid 1800s onwards, the theme of prison reform became, as Dikötter puts it (2002: 5), a revealing sign of both a state's level of modernization and the efficacy of its welfare policy, both of which operate 'within a global frame of reference in which emulation and competition led to ever shifting standards, innovations and expectations'. The same can be said of the more general subject of the criminalization process. In addition, the history of individualization, as the history of the prison reform movement that represents its more pragmatic face, can be usefully considered a *global history*, where the comparative approach emphasizes how 'common knowledge is appropriated and transformed by very distinct local styles of expression dependent on the political, economic, social and cultural variables of particular institutions and local conditions' (Dikötter 2002: 6).

The individualization principle, because of its transnational diffusion and its variable meanings in different countries, or, in Peter Burke's words (2009), because of its *cultural translation* by different legal systems, can be studied using the heuristic tools of *global legal history* (Duve 2012). This approach involves a relativization of the importance of the Italian (and more generally, European) Positivist School. If the theses of Lobroso, Ferri, Garofalo, Liszt, or Prins did have a worldwide echo, stimulating adherents and fostering the criminological wave of the late nineteenth century, it is also true that a Eurocentric perspective, based on patterns of the reception of laws or legal transplants, would result in a historical simplification without either an ability to account for the complexity of the multifaceted reform movements or noticing how the same theory can be suited for manifold and not always coherent uses, interpretations, and applications. If the social and cultural history methods adopted by global studies and area studies (Aguirre and Salvatore 2001; Manning 2003: 145–73) are applied to the legal history of individualization, it is possible to grasp the different cultural, economic, and sociopolitical reasons that have legitimized the principle in each context. This way, in addition to illuminating the peculiarity of the US progressive movement compared with that of Europe as a

characteristic of global criminological reformism, even the success of the Positivist School in African colonies, India, Latin America, and China can be more correctly described—as by Salvatore and Aguirre—as a specific *adaptation* rather than as a passive *adoption* (Salvatore and Aguirre 1996).[5]

Since individualization is one of the primary factors leading to the classification of offenders in conformity with their temibility, its application postulates criminal policy choices which depend on the patterns of citizenship and deviance adopted by a state at any given time. As Buffington argues, the disciplinary function of prison, described by Foucault as a typical trait of penal modernity, takes on specific connotations outside both the area of industrialization and the developing market-economy in Europe and the United States. In some Latin American countries, e.g., the rethinking of criminality in light of scientific positivism is explicable in terms of its status as an instrument of liberation rather than repression (Buffington 2000). The historical understanding of criminology's contribution to the transformation of criminal law requires an analysis of locally defined social processes such as: the identification and racial selection of the members of a community; the integration or exclusion of immigrants; discrimination between urban and rural populations; the lack of a systematic jurisprudence in criminal law and the absence of a consolidated Classical School against which the Positivist School could oppose; and the formation and classification of a new disciplined working class (e.g. Aguirre 1996; Caimari 2000; Rotondo 2014; Salvatore 1992, 2010: ch. 5; Sontag 2015b). The priorities of criminology—its methods and purposes—change according to the more-urgent

[5] Luis Jimenez De Asúa (1918: 69), e.g., noted that among the codification drafts in Argentina (1891, 1906, 1917), Cuba (1908), and Costa Rica (1910), no one was completely inspired either by the principles of the European criminal policy or by those of the US penal and prison reform. Sontag's critical analysis of the project of a 'criminological code' made in 1893 by the Brazilian jurist João Vieira de Araújo, an adherent to the Italian Positivist School, shows that the tension between the effort of Brazilian legal culture (but we could say Latin American, or, so to say, peripheral criminology compared to the European and US criminologies) to be included in the international criminological movement did not coincide with a corresponding will of transposition (Sontag 2015a, 2015b). Salvatore (2010) argues that the disciplinary strategy of Argentinian positivists to transform offenders into honest workers was embedded in measures that were the outcome of the intersection of European criminological theories and disciplinary practices adopted in US penitentiaries.

social problems to be addressed: demographic and economic fluctuations, the social effects of scientific and technological modernization, nation-building processes, and ideas of membership and otherness.

Although cultural history studies have shown how the characteristics of Western criminology change when it appears in other contexts, this research explores the differences between European and US criminology, analysing the tensions of Western penology in the nineteenth and twentieth centuries. It is indeed true that the ideas of continental scientific positivism or the US prison reform movement conform to the cultural contexts into which they are imported. However, it is equally unquestionable that both the theoretical impulses for and practical experimentations with new punitive methods have their origin and frame of reference in the debate dominated by the European and US schools, which are too often considered as only slightly different undercurrents of an almost homogeneous programme.[6]

Penal modernism, however, takes on distinctive characteristics even when it is not coming into contact with very distant cultural experiences, because even within Western criminalization, it is possible to recognize peculiar identities, dissimilar sensibilities, and non-uniform goals. The legal-historical comparison sheds light on the origins of and subsequent semantic deviations from the notion of individualization from a perspective that is both synchronic and diachronic, contributing to an explanation of why the European and US penal systems are so different today. The first tentative proposals and later enactment of the indeterminate sentence system in the United States, together with European states' corresponding refusal to adopt the same measure, give useful insights into the different convictions regarding the purpose of punishment and the contrasting sensibilities regarding guarantees of individual rights, separation of powers, ideas of penal legality, and procedural patterns. These divergences, which mark the beginning of an increasingly sharp diversification between the European and US criminal justice systems, have their origin in the reform movement of the Progressive Era and are still reflected in the culture of the criminal law today.

[6] For a sample of the European doctrine's influence on the Latin American penal reform movement, see Bandeira (1911); and Loreto (1902).

The dynamics characterizing the transformations of US criminal justice—from the prison reform movement of the late 1870s, to the faith in the rehabilitative ideal at the turn of the twentieth century, to the culturally more sophisticated analysis of the first decades of the twentieth century, to the disillusion with correctionalism after the Second World War—have developed differently in Europe. The causes of the US exceptionalism compared to the European penal systems—America's high incarceration rate, its return to strict retributivism, and its general harshening of sanctions (Melossi 2001; Simon 2007; Tonry 2010; Tonry and Frase 2001; Whitman 2005a)—can all be partially explained through a historical comparative investigation of the criminalization process (following Lacey's notion) between the nineteenth and twentieth centuries.

2.4.3 Global and national unity and diversity

Widening the view beyond national borders, on the one hand, the global extent of the criminological movement and the homologation of the debated subject matters, the arguments, and the solutions proposed come to light. On the other hand, the peculiarities of each legal order are more clearly identifiable. The research focus must continually be enlarged and restricted: if we observe the phenomenon from a great distance, it is possible to recognize the uniform characteristics and standardizing push of the reform movement, but if we bring the lens closer to the subject and examine how each system institutionalizes the same purposes, then national differences emerge. Nonetheless, with regard to this particular subject, a constant overlapping of viewpoints is absolutely necessary: global and local viewpoints are both required in a debate that develops at international congresses and through comparative studies, but is then concretized at the national level. Unity and diversity represent the premises of criminology because criminology is founded on universal scientific criteria, but is also different in the context of each penal system (Emsley 2005; Morrison 2003; Shafir 2014).

Let us start from unity. A comparative history of criminology would emphasize the spread of common knowledge in the mid to late nineteenth century, driven by the opinion that the application of a scientific method to the study of criminals should have led to a uniform analysis of the causes of crime and, therefore, to

the adoption of similar measures of social control. The medicalization of offenders levels every institutional difference. Because diagnoses and prognoses of dangerousness are always grounded on the same parameters, national rules providing criteria for both criminal liability and different punishments lose significance in the face of the psychological, biological, and sociological study of criminal types. Reformers, thus, call for an abdication of legal science in favour of criminological science. Many statements have provocatively declared the end or the bankruptcy of criminal law (see, e.g., Dorado Montero 1912: 67; Hafter 1925a: 237; Puglia 1882a: 13). The construction of crime not as a legal problem, but as a social, biological, psychiatric, and an anthropological matter, not only aims to cast off the primacy of criminal law epistemology, but also seeks a radical abolition of the criminal law itself due to its marginalization prompted by such new knowledge.

The methodological revolution aims to marginalize the centrality of the legal discourse for the comprehension of (and the fight against) criminality, and it surely represents one of the most innovative and debated characteristics of the new criminology, which pushes towards a global transformation. Sharing the same criteria, language, experimentations, purposes, and possible outcomes, the criminological analysis lives alongside legal techniques and reveals a universal belief, by virtue of which both disciplinary and geographical boundaries are destined to fall. The continuous comparison of punitive models is, thus, a constitutive quality of the international penological credo. In addition, it elects its prophets and arranges its methods to spread its tenets globally (e.g. through the use of congresses, books, and journals). The exportation and hybridization of legal-criminological measures are considered to be natural consequences of the success of an experimental method. One example of such an experiment involves the popular Elmira Reformatory in the US state of New York. This has been visited by many European observers who have come away appreciating its function and hoping to reproduce its methods at home (Conti and Prins 1911).[7]

[7] A second example is the debate on a Belgian law introducing conditional sentences (Law 31, May 1888), which occurred at the Brussels session of the IUPL in August of 1889; see *Bulletin de l'Union Internationale de Droit Pénal* (1889: 23 ff.), with reports by Prins (28–33) and Lammasch (34–43).

This historiographical approach, emphasizing the scientific unity and the convergence of punitive mechanisms, grasps the centrality of the individualization problem in its international dimension, but it permits neither the verification of its concrete implementation in each legal order nor an explanation of the reasons for its different applications. Indeed, even though the theoretical principles of individualization are shared by jurists from different countries, their interpretations shape and institutionalize the individualization notion in different ways. Without shifting the lens to the particular, local dimension, it would be impossible to explain why the United States has convincingly adopted the indeterminate sentence system, whereas many European countries have preferred to endorse the double-track system. Moreover, without attention to the particular, local dimension, the core importance of the debates on the role of the judiciary in sentencing and the judicialization of security measures would be unrecognizable.

Drawing attention to the uniformity of modern criminological theories prevents recognition of the uniqueness of each legal system in applying new ideas and poses a reductive risk of overlooking the autonomy of the legal dimension and its reaction to the inputs of scientific positivism. Some rules (e.g. the social factors of delinquency) are accepted even if their revolutionary value is mitigated, because they are juridicized within schemes, rules, languages, and discourses that are traditional and coherent with the tenets of the legal (not merely criminological) culture. To be clearer, the Foucauldian theses on how the psychiatric power and disciplinary tools to govern individuals have changed criminal law depict a fundamental portrait of the general historical conditions of legal knowledge at the end of the nineteenth century. However, they also risk offering a too-simplistic interpretation of the legal mechanisms affected by criminology (Garland 1993: 158–75, 2013; Ward 2008). Therefore, the historical-comparative research on the individualization of punishment and the effects of criminology on punitive frameworks should combine the global and local perspectives, searching for diversity within a spectrum of sociological and scientific theories that aspire to define universal truths. In this way, not only 'the temptation to speak about a uniform modernity' (Whitman 2005c: 18) is avoided, but also, as James Whitman suggests, the study of comparative criminology remains

less isolated from the study of comparative criminal law (Mueller and Le Poole-Griffiths 1969: 9).

Without an understanding of the international extent of this theme, it is surely not possible to trace the history of provisions enacted in accordance with, or contrary to, its general coordinates. For example, the technically sophisticated discipline of the security measures adopted by the Italian Penal Code of 1930 represents the final step of a highly controversial debate, which began at the end of the previous century, on the issue of taking preventive measures against dangerous subjects, and should be analysed in relation to other provisions such as the English Prevention of Crime Act of 1908 or the Norwegian Penal Code of 1902. Nevertheless, the criminalization process largely depends also on the historical events of each state, on those states' criminal policy choices, and on how constitutions—written or unwritten—govern the rights of the individual, the state's power to punish, and the distribution of powers and functions in the administration of justice. Furthermore, the criminalization process depends on the influence of legal traditions rooted in the mentality of both operators (judges, lawyers, and scholars) and apparatuses (prison administration). The history of the punitive strategies is, as Michael Tonry (2010: 93, 91) suggests, a circular history that begins in each country, then moves to a general level involving a search for global standards and, finally, returns to local explanations.

The historical analysis of the individualization movement, therefore, not only ought to follow the different trajectories and distinct genealogies of criminology according to the path dependency concept—because its characteristics (its methods, theoretical premises, and scope) cannot be attributed to a uniform scheme, nor do they always converge on the same outcomes (Karstedt 2002: 18, 2007: 57–9)—but also requires a comparison of the varying configurations and unique characteristics of the substantive and procedural criminal law in each legal system.

2.5 From the Safeguard of Individual Rights to Social Defence

The causes of the process that led to the separation between the US and European penal systems, together with the arguments used by

jurists and courts to substantiate that process, reflect many of the turn-of-the-century transformations in criminal law. The forms of individualization and preventive detention institutionalize penal policies, strategies of deviance control, and options, all of which shift the purpose of punishment from retribution to prevention, from suffering for an illegal act towards controlling the criminals' dangerousness to society.

In both the US indeterminate sentencing and the European system of security measures, which—as we shall see—aim to make sentences better adjusted to the offenders' rehabilitative needs and to better guarantee the defence of society, the principle of legality undergoes sweeping transformations and reductions. The need to historicize the abstract fixity of the formula *nullum crimen nulla poena sine lege* is now widely recognized by both legal historians and criminal law scholars.[8] However, it is worth noting that the reformers' theses, and particularly the individualization criterion, deeply affect the notion of legality, disassembling legality into the two parts of *nullum crimen* and *nulla poena*. *Nullum crimen* is re-conceptualized in light of the social dangerousness paradigm and is reformulated as *nulla poena sine crimine*. *Nulla poena* is abandoned so as to maximize the individualization of each sentence and tailor sentences to the variable needs of both offenders and society.

Even without achieving its ambitious goals (the deterministic theory of criminal liability is not accepted, or only in a very limited way, and so the retributive scope of punishment is never completely abandoned), criminological positivism undermines the certitudes of liberal criminal law, unveils its hypocrisies, and criticizes its inefficiencies. The arguments most frequently used by reformers in their dismantling discourses about the old justice system are directed against the futility of short-term prison sentences, the old system's ineffectiveness in reducing recidivism (Marchetti 2007), its rehabilitative failures, the injustice of its abstract equality in proportional sanctions, and its detrimental prejudice against judicial discretion, originally inherited from the anti-jurisprudential culture of the Enlightenment, but now completely groundless. The blows of criminology endanger

[8] Beyond the monographic issue of the *Quaderni fiorentini* 2007 focusing on the principle of legality, see also Martyn et al. (2013).

nineteenth-century legality because both the legal culture and social needs that existed at the turn of the century no longer correspond to the liberal 'legal project' shaped by Beccaria and Bentham (Costa 1974: 357–78). The architecture of the criminal law, as built by the Classical School, is essentially individualistic and is formally oriented towards protecting individual freedom and safeguarding defendants against possible abuses by state officials. However, the Positivist School seeks a different balance between the social and individual elements of criminal law. The liberal foundations of criminal law are undermined not only by the attack of the new school, but more generally, by the transformations of the political and institutional frameworks, the change of mentality that caused the new movement, and the rethinking of the constitutional fundamentals inherent in the state's right to punish.

'Criminal law springs from policy and goes back to policy', noted with great realism the Spanish criminologist Quintiliano Saldaña (1923: 67), because what is usually called criminal law is nothing more than 'criminal policy limited by legal norms'. The lively international debate on the individualization of punishment therefore depicts different political and constitutional models of balancing public authority and individual rights, societal interests, and individual interests. The new limits of legality, the procedural rules, and the agencies responsible for sentencing all reflect how US constitutional power or the continental *Rechtsstaat* incorporate criminological ideas into their legal systems.

2.6 Conclusions

The rise of criminology, the demand for penological reforms, the asserted centrality of an individual criminal and his or her dangerousness, and the rationale of social defence deeply transformed the character of the liberal criminal law system. One of the fields most affected by the new criminology and penology between the late nineteenth and early twentieth centuries was sentencing. The philosophical foundation, purpose, and mode of executing sentences were reconsidered based on the individualization of punishment principle. In Europe and the United States, the notion of individualization of punishment played a determining role in the criminalization process, and it functioned as both a symbolic ideal

for which to aim and a pragmatic criterion for determining the sentences imposed.

In this chapter, I make a case for historicizing the individualization of punishment principle. I argue that a historical analysis of the subject can shed light on certain particularities of the penal reform movement and interpret penological transformations relative to different constitutional frameworks. In particular, the way in which the individualization principle was institutionalized and theoretically justified in different legal orders reflected the dissimilar ideas of the rule of law and *Rechtsstaat*, as well as their distinct origins and historical trajectories. This approach is based on one premise and on two considerations. The premise is that, despite its varied manifestations, conceptual differences, and local variations, criminology's growth as a new science rests on a common key feature that may be summarized as the 'scientific paradigm'. From the 1870s to the 1920s, the criminal law field was dominated by the conviction that contributions by new disciplines, such as criminal anthropology, craniology, sociology, psychiatry, psychology, and statistics, could revolutionize the traditional, liberal scheme based on free will and the primacy of abstract law. Substituting the study of an individual criminal for an abstract definition of crime is a direct consequence of this new epistemology and, most importantly, this change was professed as global and was not limited by local particularities because the scientific knowledge on which it was based did not distinguish between place and institutional or political system.

Nonetheless, the global trait of criminology and penology must also be analysed in a local dimension, which is the first consideration. The historical development of penal modernism in different areas and countries, with its geographical and institutional variations, is a combination of multiple factors and interests, among which the dynamic of path dependence is remarkable. Legal traditions and cultures as well as specific economic conditions, labour markets, and social integration influence the way in which individualization of punishment is applied and implemented. The second consideration relates to the importance of international debate on issues raised by criminological reformism. Problems and proposals have always been addressed not simply as national choices, but also as part of a transnational reform movement that gained ground through international congresses

and associations, comparative studies, reviews, and translations of ground-breaking books written by adherents to the modern school of criminal law. Ideas and legal patterns have circulated across national boundaries and the Atlantic, taking different forms based on local particularities.

3

The Origins of Different Penological Identities

'Italy thought up the new criminal law; the United States realised it. The theory was born Latin; its practice is Anglo-Saxon.' With these concise words, spoken in 1913, the Italo-Argentinian psychiatrist and criminologist José Ingenieros depicts one of the primary characteristics of the criminalization process and makes the reasons for an indispensable comparison absolutely clear. There is indeed a deep, structural divide between the European and US penal reform movements: the first is theoretical, based on a critique of classical liberal dogmas and on proposing new theories of criminal responsibility, crime, and punishment; the second is the pragmatic outcome of the prison reform movement, intended to solve the prison system's concrete problems and failures and based on a method of continuous trial and error. The European movement is full of philosophical and sociological studies (from Spencer to Durkheim, from Tarde to Comte) and sets out to be, first and foremost, a doctrinal alternative to current legal thought with the purpose of modifying concrete punitive methods only after winning the cultural struggle against the old school. The US movement experiences emergencies and intuitions and seeks swift and effective solutions to tangible exigencies such as the high recidivism rate, the ineffectiveness of retributive sentences, and the moral degeneration of detainees. The first movement is guided by academics and intellectuals; the second movement is in the hands of prison wardens, prison officers, prison chaplains, and philanthropic agencies. The first movement spreads its positivist credo through pamphlets, books, and journals intended to convert the elites and change public opinion; the second movement convenes prison congresses to address the administration of penal institutions and compare experiences.

This methodological contraposition characterizes the individualization movement from its initial phases. Figuratively, it is something like a river, which originates from different springs on either side of the Atlantic, which later run the same course made of legal comparison, translations and reviews, entanglements, and the hybridization of punishing patterns, and finally the two go their separate ways again downstream. Nevertheless, there is a genetic diversity that significantly differentiates all of the following pathways of the reform movement and highlights, to a great extent, the cultural distance that divides the continental criminologists and US criminal law scholars on certain crucial subjects.

This book is based on the premise that the 'criminological wave' (the 1880s to the 1930s) was not completely uniform, but in its variety reflected differences between the US and European legal cultures, their philosophical and constitutional bases for punishment, and their notions of the *nullum crimen nulla poena* principle. At the end of the nineteenth century, both the European and US criminal systems 'reached a point where the apparently firm foundations of criminal law appeared to quake' (Aschaffenburg 1913: 322): penal doctrine, penology, and criminology looked to comparative legal studies in search of common solutions. However, the different means used by the European and US systems to pursue the individualization of punishment and adopt preventive detention had different effects on those systems' punishment rationales and the functioning of their principles of legality.

Section 3.1 examines the difference between the US pragmatic penology and the European theoretical penology. Section 3.2 looks at the circulation of ideas and legal frameworks between Europe and the United States. Section 3.3 focuses on the role played by legal comparison in spreading criminological ideas and creating a new penology, by analysing the contribution of the International Union of Penal Law and the American Institute of Criminal Law and Criminology. Section 3.4 considers how different reformers (Liszt, Saleilles and Cuche, Pound, and Ferri and Puglia) used and interpreted the history of criminal law.

3.1 US Pragmatism versus European Doctrinarism

Is it possible to talk about a single European penological identity and a single US penological identity? Are there not deep variations from state to state, from school to school? Even if legislative

differences and local peculiarities are undeniable, the international debate on individualization emphasizes consciousness of the two groups' distinctive identities. If we look at the legal discourses of the Progressive Era, simply because new principles invoked constitutional fundamentals and philosophical justifications of the state's power/right to punish, uniquely national characteristics were overshadowed, whereas the contraposition between the continental and US methods of individualization was emphasized.

In his report to the 1894 session of the IUPL, which was held in Antwerp, Prins contrasted the US indeterminate sentence laws on the grounds that they went too far and were contrary to the spirit of the modern public law, according to which all citizens enjoy the fundamental safeguard represented by the judge's duty to give a sentence determined by the law. The continental idea of indeterminateness is the exact opposite and represents the antithesis of what happens at the reformatory in Elmira. Indeed, whereas the US reform concerns selected criminals—first offenders aged between 16 and 30 are subjected to a rehabilitative treatment—the European notion of indefinite punishment is a matter of social protection from persistent offenders (Prins 1896: 77). Similarly, at the 1925 London International Prison Congress, the Austrian criminal law scholar Wenzel Gleispach (later an ideologue of the Nazi criminal law) simply stated that there were two manners of conceiving and applying criminal law: one was the US manner, which always dealt with individual transformation and was totally optimistic; the other was the continental manner, which was instead pessimistic, because it mainly took into account incorrigible delinquents (*Actes du Londres…Procès-verbaux des séances* 1927: 114). These are only two of the many examples of a general, common opinion. Under the surface of this dualism are two contrasting visions of how the criminal law system could be reformed by criminology and two different perspectives on the basis, purposes, and aims of criminal law. In brief, this contrast could be summarized as a methodological divergence (US pragmatism versus European doctrinarism) from the origins of the reform movement, the consequences of which are the different interpretation of the individualization principle and the radical division between indeterminate sentencing in the United States and the dual-track system in Europe. But how has this dichotomy grown?

Since the early 1880s, both US and European criminologists have been completely aware of the need for an open comparison

and a mutual exchange of knowledge. Criminal law systems must be adjusted to the more complex societies of today and require both social security and rehabilitation. This is a crucial time for peno-criminological studies, because there is a broad desire to hybridize punitive models and to examine different approaches to crime and criminals. 'The European criminologists…have worked for the most part purely as scientific investigators', notes British physician Havelock Ellis, whereas 'the founders of Elmira, on the other hand, seem to have been guided purely by practical and social considerations, and to have had no knowledge of the scientific movement that was arising in Europe. In the future, there is now good reason to hope, these two currents of scientific advances and practical social progress will be united' (1891: iv).

The writings of the European jurists, above all the jurist of the Italian Positivist School of criminal law, exert a great influence on US criminology, which perceives the continental doctrines as desirable theoretical support, 'the formal justification, and eventually the guide' (Ellis 1891: iv) for legitimizing the experimental prison reforms enacted in many states of the Union. Although US criminologists insist on the originality and autonomy of their reform movement, originating from a pragmatic approach and always inclined to find practical solutions to concrete problems, it is undeniable that European penal positivism exerted a great influence on the US experience, particularly from the 1880s onwards. If, indeed, it is true that Brockway's ideas began to circulate even before the publication of Lombroso's *The Delinquent Man* in 1876 and the proliferation of studies on criminal anthropology and criminal sociology in the United States, the frequency with which European scholars are quoted or referred to in the US literature and jurisprudence on the new penology proves the great relevance of European culture to the US system.

Conversely, European criminal law scholars view US pragmatic innovations with increasing interest, in search of practical confirmations of the feasibility and efficacy of their abstract proposals. In those countries, where 'the practical phase is stronger and the academic traditions are least deadening', Ferri writes in the 1917 'Preface' to the English translation of his *Criminal Sociology*, 'we observe for some years back a continuous work of partial reforms, of penal legislation, which, in evident contradiction with the philosophical premises of the traditional doctrines, are nevertheless the recognition, although not confessed, of the new

doctrine of criminology' (1917: xli–xlii). The United States followed this new path with much conviction, as shown by, e.g., the introduction of special courts for juvenile offenders, conditional sentences and probation, and the incarceration of dangerous criminals for indeterminate periods of time. 'All these applications and reforms', underlines Ferri (1917: xliii), 'are practical', whereas *Criminal Sociology* takes a theoretical approach to the same problems and offers, therefore, 'a logical and rational demonstration', not by means of an abstract philosophical formula, 'but with the scientific method of observation and positive induction'.

3.2 Legal Transfer and US Eagerness for Scientific Criminology

Although both the international success of criminal anthropology and the influence exerted abroad by the Lombrosian theories and the Italian Positivist School are well known to legal historians, it is still important to study how the process of legal transfer worked and in which forms the 'marriage of convenience' between US pragmatism and European doctrinarism took place. Maurice Parmelee represents a clear example of the impact of the Italian school on US penal reformism: his book *The Principles of Anthropology and Sociology in Their Relations to Criminal Procedure* is, in fact, strongly influenced by the theses of Lombroso, Ferri, and Garofalo, the founding fathers of the Italian school. In his 'Introduction', he stresses the need for the US reformatory movement, which successfully introduced to criminal procedure 'many practical reforms ... almost entirely empirical in their character' and oriented to the 'reformation of the criminal', to use the work of the continental criminologists 'as the scientific basis of our study' (Parmelee 1908: 6), because he deems it 'very essential that these reforms should be studied in the light of this new science of criminology, and that they should be given a sound scientific basis. European science and American practical reform should be brought together.' Criminal anthropology and sociology have undermined confidence in the strict application of abstractly fixed penalties, replacing 'the rigid regulation of the law by more flexible and scientific standards which will permit of the individualisation of punishment' (Parmelee 1908: 4). However, the new criminological science, rather than being limited to tentative reforms, instead encompasses a complex network of

knowledge and theories combining normative traits with socio-political interpretations.

In 1908, Parmelee adhered to the theoretical apparatus of the Positivist School: the rejection of free will as the basis of criminal liability, the substitution of the notion of moral responsibility by the idea of social dangerousness, the analysis of the objective and subjective factors of criminality, the principle of social defence, and the individualization of punishment. Parmelee pointed out the strong tendency, then emerging in every country, towards the individualization of punishment, to the extent that 'it will be one of the guiding principles in the treatment of criminals' and was definitively replacing the criterion of fixed sentences. However, in the United States, the individualization of punishment developed in a different way than in Europe, with a much more marked and experimental character. In the United States, the changes were guided by the purpose of reforming criminals and inspired by humanitarian ideals and religious zeal oriented towards the moral regeneration of offenders. Above all, in the United States, private agencies, not the state, were the real engine of the reforms (see Henderson 1883: iii). This point neatly differentiates the US movement from the European one: whereas in Europe the administration of criminal justice involves public institutions and authorities in all of its phases, in the United States, many innovations have been adopted only after testing by private institutions. The involvement of private agencies has been fruitful in terms of convenience and flexibility, because, on the one side, their involvement promotes popular opinion in favour of more lenient and rehabilitative punishments; and on the other side, their involvement allows the state to implement only those measures that are proven effective.

The US movement, nevertheless, has its limits, because it 'has not been inspired by scientific ideas, consequently it has not been governed by science' (Parmelee 1908: 143; see also Cantor 1936: 35). The rationalization and theoretical legitimization of European scientific criminology culminate in a sort of 'statalization' of punishment. The rise of criminology and penology is, on the one hand, the cultural premise of a system of treating offenders that is scientifically based and not left to philanthropic initiatives; on the other hand, it is the way by which the public authority regains its power to administer punishment and defines its own penal policies. Therefore, to find guiding criteria and applicative rules, US criminologists become open to legal comparison as a

rich wealth of ideas, arguments, reasoning, and technical notions. For US progressives, the texts of European criminologists become landmarks of the process of law reception: the suggestions, opinions, and classifications of continental jurists are disclosed to US scholars. Reforms that already exist in the United States (such as indeterminate sentences and parole) are compared to more or less similar European measures (e.g. conditional liberation) and are considered against the general principle of individualization that orients substantive and procedural law towards the new horizon of social defence.

The call to adopt a new penal code based on modern penology, which was the key target of the European Positivist School, attests to the influence of Italian (and, more generally, continental) criminology on the US reform movement. Before Parmelee tackled the problem in his *Principles*, Gino Charles Speranza (1902: 15), an Italian-American lawyer and journalist, initially very progressive on juvenile reforms and later, in the 1920s, a proponent of more conservative and radically White Anglo-Saxon Protestant (WASP) positions on immigration, theorizes the characteristics of a federal penal code animated by a 'modern spirit'. He bitterly criticized the then-proposed penal code debated at the Congress in 1902, because it reflected old, traditional doctrines, 'tak[ing] practically no cognizance of the progress made in penologic science', and confining itself to a 'conservatism which is stagnation' (Speranza 1902: 12, 15). To Speranza, it was 'an old Code with a new coat of whitewash to make it look new' (1902: 15), with no scientific ambitions and absolutely impermeable to the modern approach of the international debate on the criminal law.

As the US reformers clearly note, since the end of the nineteenth century, they have looked to European doctrines to find a theoretical basis for their pragmatic approach and, correspondingly, European jurists are interested in US prison reforms. The founding of the International Association of Criminal Law in 1889 and the American Institute of Criminal Law and Criminology in 1910, the Modern Criminal Science Series published by the Institute, the reviews of many European criminological books by US journals, the International Prison Congresses,[1] International

[1] London 1872, Rome 1885, St Petersburg 1890, Paris 1895, Brussels 1900, Budapest 1905, Washington 1910, London 1925, Prague 1930, Berlin 1935, The Hague 1950.

Congresses of Criminal Anthropology,[2] sessions of the IUPL and of the *Société générale des prisons*, all signify a mutual, reciprocal influence between US and European criminologists and criminal law scholars.

3.3 Legal Comparison to Design the Criminal Law of the Future

Jurists and intellectuals on both sides of the Atlantic perceive the crucial importance of legal comparison as a fundamental resource for the progress of criminal science and penal policies. Criminology, founded on universal scientific criteria, fosters the sharing of projects, ideas, and goals and laid the foundations for a supranational reformative movement that between the nineteenth and twentieth centuries became the frame that made it possible to read every country's doctrinal tendencies and legislative innovations. Thus, not only does the need for an encounter between pragmatism and doctrinarism grow, but the approach to comparative studies also changes, both in Europe and in the United States. Comparative studies are no longer a matter of comparison among different national legislations simply to emphasize similarities or differences: it is a matter of reconceptualizing the foundations of criminal law within shareable conditions and of inventing new spaces and occasions for debating future perspectives on crime, criminals, and punishment.

Even if it is divided by different approaches and tendencies, criminological positivism has a common cultural basis, shares uniform methods, and aims for similar goals. Rather than being an elitist intellectual exercise, comparison therefore represents the very essence of penal reformism. Two cultural undertakings reflect this fact: the foundation of the IUPL (*Internationale Kriminalistische Vereinigung*) in 1889 by the Dutch Gerard Anton van Hamel, the Belgian Adolphe Prins, and the German Franz von Liszt; and the subsequent foundation of the American Institute of Criminal Law and Criminology in 1910, on the initiative of John Henry Wigmore, dean of Northwestern University.

[2] Rome 1885, Paris 1889, Brussels 1892, Geneva 1896, Amsterdam 1901, Turin 1906, Cologne 1911, Budapest 1914; see Kesper-Biermann and Overath (2007).

3.3.1 The International Union of Penal Law and La législation pénale comparée

In his farewell message to celebrate twenty-five years of the IUPL, van Hamel reviews the reasons and intellectual affinities that led him, together with Prins and Liszt, to found the Union. While working on the broad judicial discretion under the Dutch penal code to decide criminal sentences (van Hamel 1887), van Hamel was struck by the convergence of viewpoints between Liszt's 'Marburg programme' on goal-oriented punishment and Prins's analysis of the causes of crime (Prins 1886). The common underlying theme of their studies and methodologies was the contrast between realism and dogmatism (van Hamel 1914; Liszt 1914). Accordingly, the statute of the IUPL, after expressing its choice for an integrated approach to both the study of criminality and the means to contrast the criminal laws from both legal and social points of view, summarizes the Association's nine-point manifesto.[3] Those points include the following: an explicit reference to the importance of anthropological and sociological studies (art. II.2); a declaration that the state, in contrasting criminality, can resort not only to punishment, but also to preventive measures (art. II.3); the essential distinction between occasional and habitual offenders (art. II.4); the irrationality of the separation between verdict and execution of the sentence (art. II.5); the substitution of short prison sentences with alternative measures (art. II.7); the proportionality of long prison sentences not only to the gravity of the facts and the criminals' moral liability, but also to criminals' progress during the sentencing phase (art. II.8); and, finally, the possibility of providing incorrigible, habitual criminals with special treatment in order to render them inoffensive for as long as possible (art. II.9).

The activity of the IUPL is a symbol of the criminology-inspired reform movement. All of the jurists who work for the re-modernization of criminal law systems in different countries join it: they belong to different schools and have different methodologies, but are united by the spirit that drives the progressive cultural challenge of the Association (Bellmann 1994; Radzinowicz 1991). Both the *Proceedings* of the sessions of the Association and the

[3] The original Statute is in *Bulletin de l'Union Internationale de Droit Pénal* (1889: 1–6).

publishing venture of *La législation pénale comparée* give a new shape to legal comparison in the criminal law and are preferential channels to divulge and discuss all of the projects and problems of the criminal law that are 'under construction', such as juvenile delinquency, recidivism, prison works, habitual offenders, probation, dangerousness, etc.

In the introductory essay of the first volume of *La législation pénale comparée*, Liszt explains that comparison does not simply compare one piece of legislation to another, nor does it simply highlight the similarities and differences of different normative systems (Liszt 1894: XIX). A truly scientific comparison of legislation needs something new, which the German professor summarizes in three points. The first point is the study of the factors that, behind the always-changing face of the law, have caused and determined its evolution and development, with specific causal and teleological considerations based on legal history and ethnology. Second, research that is oriented towards 'a new law of the future' needs an analysis of both the present and the past. Its purpose is to identify a wealth of principles acceptable in all countries and valuable for drafting uniform codifications grounded on new criminal policies, using legal comparison as a tool to bring order to confusion, unity to plurality (Liszt 1894: XX). Third, legal comparison should not aim simply to find the law most suitable for a particular purpose, but should also further legal science. Liszt firmly believes that penal legislation needs a solid legal doctrine that has a duty to investigate the mutual influence of theories and notions beyond national borders using an historical-dogmatic approach.

As Liszt notes, during the nineteenth century, it was indisputable that the scientific knowledge of every national law could be obtained only through comparative studies (1894: XXIII). This consciousness of the vital role of legal comparison is certainly one of the most important effects of the impact of criminology on modern criminal law, which implies a constant programmatic discussion about measures to be adopted and a comparative analysis of which provisions have worked better and where. Even though each piece of penal legislation bears a national imprint because of the characteristics of the state and people that it affects, it nevertheless has a scientific basis; moreover, the legal science, which has a duty to provide those foundations, cannot be limited within national borders. Therefore, Liszt holds that the IUPL must be

absolutely international in order to make progress in each nation's law available to all other countries (Liszt 1899: 367). Both social defence and the individualization principle call for a view that continuously switches from the general to the particular, from the outside to the inside of a specific normative order: this is a distinctive trait of penal positivism, because, as Montague Crackanthorpe puts it (1901: 17), 'the policy of splendid isolation is as foolish in criminology as it is in the conduct of foreign affairs'.

In 1911, van Hamel paints a positive picture of the IUPL's first twenty years. The doctrinal consensus on the need to study crime as a natural and social complex phenomenon rather than as an abstract entity, which has taken shape among criminologists and criminal law scholars, 'is due in no small part to the cooperation which the International Union has gradually secured from scholars of differing minds and views' (van Hamel 1911: 23). Speaking to a US audience, the Dutch jurist stresses the peculiarities of the European experience together with the great effort made by the IUPL to turn the discipline into the realism supported by the new school. The need for a scientific association to make legal scientists and the public aware of the practical problems in administering criminal justice may seem strange to US readers, 'but', van Hamel notes (1911: 23), 'they will have to remember this: it has always been one of the most beneficent characteristics of the Anglo-Saxon penal jurisprudence, that it kept away from purely theoretical reasoning and was influenced mostly by realistic views'.

The IUPL played a proactive role in developing and improving comprehensive reforms. European criminal-law jurists have debated for years about problems that are evident to any US scholar, and on many issues (e.g. rehabilitative treatment, parole, and probation), the US experience has influenced European thought and practice. Van Hamel, nevertheless, insists that the IUPL has two original characteristics: first, the choice to devote itself to the systematic study of crime and criminals as 'social phenomena'; and, second, the fact that it has forced the legal profession to recognize the importance of this approach in a way that is different from the clear-cut separation between sociology and law that characterized US culture, at least until Wigmore founded the American Institute of Criminal Law and Criminology.

3.3.2 The American Institute of Criminal Law and Criminology

The *National Conference on Criminal Law and Criminology*, organized in Chicago in 1909 by John Henry Wigmore, dean of Northwestern University, to celebrate the fiftieth anniversary of Northwestern's law school, birthed the *American Institute of Criminal Law and Criminology* and its *Journal* (Devroye 2010). The reasons for the overall scientific project of the Institute are to be found partly in the cultural climate and partly in the conditions of the US criminal justice system at the beginning of the twentieth century. Since the 1870s, many reforms had been carried out in different fields of criminal law and prison organization with the strong support of the public, but the system still lacked a general scientific basis to encourage its organic modernization as a whole, including criminal procedure and sentencing. The time was ripe for a fruitful collaboration among lawyers, scientists, academics, and legal practitioners, taking as a model the European experience where, thanks to the Positivist School and the activity of the IUPL, the same type of collaboration had effected a radical change of the discipline.

Scientification and legal comparison then became not only a programmatic target, but also a new methodological approach for both the Institute and the *Journal*. As James W. Garner (1910a: 3) put it in the 'Editorial' that appeared in the *Journal*'s first issue, the cultural challenge consisted in marking 'a new era in the history of American criminal jurisprudence' based on the 'common understanding' of scientists and jurists, observing how Europe had developed the reformative potential of criminology as a science (Kellor 1899). The nationalistic claim of US 'practical genius'—stressed in 1904 by Frederick Howard Wines (1904: 3)—'unfettered by precedent and traditions' and therefore much more free 'to adopt and realize conceptions formulated by leaders of thought in the Old World', gave way to a general openness to the theoretical breadth of continental criminology.

Legal comparison satisfies the US criminal justice system's need for change. Being inadequate on the repressive side and ineffective on the preventive side, it searches for reforms grounded neither on the will of far-sighted prison wardens nor on experimental criminological studies, but on the deep scientific study of the causal and sociological factors related to crime and criminals (Speranza

1900). The new consciousness on both sides of the Atlantic of the fruitfulness of legal transplant and the hybridization of punitive models arises out of the continuing internationalization of the debate on criminal law and criminology. There is a global tendency to compare different penological measures, to share ideas and solutions, and to take part in a sort of 'modernizing wave' that transcends national boundaries.[4]

3.3.3 Journal of the American Institute of Criminal Law and Criminology

In *Journal of the American Institute of Criminal Law and Criminology*, the productive confluence of different criminological methods, penological theories, and reforms are conceived of and planned (Gilmore 1912). As editor-in-chief, James W. Garner wrote in his first 'Editorial' that the purpose of the journal was to fill the gap in the English literature on criminology, which lacked specific publications that dealt thoroughly with the new discipline. The considerable arousal of US interest in criminology between the nineteenth and twentieth centuries is evidenced as much by innovative research as by the 'destructive criticism of antiquated methods and the constructive proposals of reform' (Garner 1910b: 6), all tendencies to which the *Journal* wished to give voice.[5]

The eclectic curiosity of the *Journal*'s editorial board was shown by the heterogeneity of the foreign authors' contributions and by the variety of its reviews, and its international and comparative

[4] To give comparative tools to the US legal science, Wigmore drew up a selected bibliography of writings that should be bought by the Gary Library of Law at the Northwestern University as a first reference list for all of the Chicago conference attendees. The 'assembly' of the library perfectly reflected his cultural undertaking (Wigmore 1909: vi).

[5] The programme of the *Journal* was to tackle methodological and theoretical problems, such as, e.g., the causes of crime and the more effective preventive methods on the basis of European positivism, the treatment of offenders, the comparison of different international experiences in dealing with criminals, and a comprehensive analysis of the US criminal law system. The brief manifesto made clear that one of the main targets of the Institute was to find remedies for the 'popular dissatisfaction with the administration of the criminal law'—clearly described by Pound (1906)—by reconsidering continental theories. Gault, Garner, Keedy, and Wigmore (1925: 388) recalled how in the United States 'the inspiration of the Italian criminal law scholars had a great influence for the foundation of the *Journal of the Institute*'.

openness was made clear by the publication (and when necessary, the translation) of articles written by some of the most influential European jurists (Artmann 1911; Battaglini 1911; Ottolenghi 1913) and summaries of international congresses (Conti and Prins 1911; Gault 1912; Ruggles-Brise 1911a). The *Journal*'s editors were so firmly persuaded that the US criminal system could be reformed only through a careful consideration of comparative legislations and doctrines that they made every effort to diffuse criminological knowledge among scholars, judges, lawyers, and members of legislative committees. The section 'Book reviews and notes' revealed an almost exclusive focus on the Italian, German, and French criminological literature, which was commented on, criticized, and compared to US legal science so as to identify the most suitable proposals for reforming the US criminal justice system.

The second pillar of the comparative undertaking of the Institute was the translation into English of the books of the leading European criminologists and the creation of the *Modern Criminal Science Series*.[6] In the programmatic 'General Introduction', the six members of the Committee on Translation expressed the firm belief that the boundaries of criminal science were broader than the traditional boundaries of criminal law. Just as medicine abandoned old assumptions for an experimental method, which led it to recognize the causes of disease and ameliorative therapies following a progressive approach to the 'individualization of disease', so modern criminal science recognized that crime, as a disease, has different natural causes and consequently that 'penal or remedial treatment cannot possibly be indiscriminate and machine-like', but must be adjusted to the factors of delinquency and to each individual offender. 'Thus—they continue—the great truth of the present and the future, for criminal science, is the individualization of penal treatment' (Wigmore at al. 1911: vii–ix). This confidence in

[6] The Committee on Translation, presided over by Wigmore, selected nine books to be translated and drew up a 'General Introduction' for all the volumes of the Series; a member of the Institute wrote the 'Introduction to the English version' of each book. On the importance of the Series for spreading European ideas and methodologies in the United States, see Petit (2007); and also Mueller (1969: 78–81). The Series, published by Little, Brown & Co., in Boston, includes: De Quirós (1911); Gross (1911); Lombroso (1911); Saleilles (1911); Tarde (1912); Aschaffenburg (1913); Garofalo (1914); Bonger (1916); and Ferri (1917).

the success of the individualization principle required, however, an overall rethinking of the discipline that could be achieved only by looking to European doctrine.

In fact, whereas in Europe this revolution had been realized for at least forty years, with a vivid interdisciplinary cooperation among law and other sciences, in the United States 'the public in general and the legal profession in particular remained either ignorant of the entire subject or indifferent to the entire scientific movement', and these circumstances 'ha[ve] blocked the way to progress in administration' (Wigmore at al. 1911: ix). The field of work of the Institute was, then, determined by the need to make those with strictly legal expertise open to other knowledge, so as to make the administration of criminal justice correspond more closely to the modern transformations of a complex society. According to Quincy Myers (1917: xxxvi) in his 'Introduction' to Ferri's *Criminal Sociology*, 'in our complex civilization and in the face of the swift changes in our social order', judges 'cannot give the attention which individual cases ought to receive for lack both of time and opportunity, and this work, if done at all, as it must be, must be done by others'. The popular belief that criminals must be treated, not punished, implies that courts' decisions cannot be inspired only by a 'merely legislative empiricism', but also ought to rely on 'scientific deduction from reliable sources of information'. The administration of justice, it is better to say, is no longer 'exclusively a legal science', but a complex task in which criminology plays a relevant role (Myers 1917: xxxvi).

The goal of the Series is, therefore, to make individualization a matter of interest and discussion even in the United States, filling the theoretical gap with European legal science and stimulating the progress of the US reform movement.

3.4 Rereading the Past to Change the Future

All reformers share the conviction that individualization embodies a shift from the classical notion of punishment and a complete break with the previous manner of thinking about criminals and sanctions. The strength of the progressive movement largely rests on its ability to clearly mark the difference from the past. However, 'the penological past' is not a uniform entity, and it has been interpreted in many ways. The novelty of criminology can be read as a radical revolution, as a progressive evolution, or as gradual

improvement in continuity with tradition. For reformers, rereading the history of criminal law and penal philosophy is a necessary premise for clarifying their theories. The most extreme positivists, such as Ferri and Puglia, consider the previous view of punishment a phase of the evolutionary process to be overcome. More moderate thinkers, such as Liszt, Saleilles, and Cuche, seek a compromise between old and new ideas, whereas in Pound's opinion, the necessary transformations in the administration of criminal justice cannot be achieved in opposition to (or out of) tradition.

3.4.1 Von Liszt's history of the 'social character of punishment'

In his Marburg speech, Liszt (1905a: 132) theorized a compromise between evolutionism and absolutism that, on the one hand, defends the metaphysical foundation of chastisement as an impulsive reaction of society to those behaviours that disturb individual or collective living conditions; and, on the other hand, 'prevents metaphysical speculations from exerting their influence on the empirical configuration of punishment'. His theory is based on a historical interpretation according to which punishment shifts from its primitive notion of 'instinctive action' (a spontaneous reaction typical of an original pre-state era) to an objectification of penalties. In this latter notion, punishment is transformed into a juridical reaction oriented towards a goal and realized by the legal order through its bodies and procedures. In universal history, Liszt finds traces of a coherent development of the 'social character of punishment', a historical path leading from the age of the family or community vengeance to the era of deportation of a community member to the time of state penalties (Liszt 1905a: 150, 1909: 494–5; see also Hein 2001: 123–40; Vormbaum 2009: 123–8). The third stage, rather than contradicting the first two, indicates a natural progression: primitive punishment, which was not determined by any purpose but had a social character, was the necessary premise for the modern idea of juridical punishment that should be, in Liszt's view, functional and goal-oriented. Moving forward in the direction that history has already shown, it is possible to reconcile the metaphysical idea of punishment with the idea of scope.

What matters most, as Liszt asserts, is that 'no valid criterion for the measure of punishment can be inferred from the metaphysical principle of punishment on which all of the absolutist theories are

grounded' (1905a: 157). This measure must be found through the positivist method with the help of statistics, criminal anthropology, and sociology. Therefore, the aim of punishment will change based on different types of criminals: first-time offenders should be reintegrated, occasional delinquents should be intimidated, and unreformable criminals should be neutralized (Naucke 2000). The future of punishment, writes Liszt in 1909, when his ideas have already pervaded the penological debate, lies entirely on its rationalization as a social means of exclusion from society or re-adaptation to society of different types of criminals (Liszt 1909).

3.4.2 The social history of crime in Saleilles and Cuche

In Saleilles's seminal book on individualization, there is a deep socio-historical survey of the concept of punishment. The stages of steady penological progress are: private vengeance; *wergild* or man price; the subjective notion elaborated by canonical law of punishment adjusted to the seriousness of the act and based on the correspondence between individual freedom and responsibility; and, finally, the theories of the Classical and Positivist Schools of criminology.

The French author was an advocate of penological reforms, but, coherently with his view of *méthode historique*, he did not suggest any revolutionary changes. New theories about the social causes of crime cannot take the place of individual responsibility entirely because free will has been a principle of criminal law throughout its historical development, from medieval times onwards. Due to the enormous input of canon law and the Enlightenment, the results of such slow and difficult progress in juridical thought must form the basis of public punishment. There is no reason to forget the great heritage of the past and to project an entirely different system of penal responsibility. Not everything in the previous criminal law must be rejected. 'Let us be careful', Saleilles continued (1911: 51), 'not to substitute for the classic system, which has had its day, a "subjectivism" that would make it possible for a judge to sentence the gallows for slight offences or to secure immunity or confinement in an asylum for capital crimes'. New principles of criminology must be depurated of excess and forced to coexist with traditional doctrine to facilitate the development of individual self-determination and social order in modern society. From a Catholic and metaphysical point of view, penal reform cannot delete the

past, and it should be collocated within a broader history in which the leading actor remains (and will always be) a human being possessed of free will. In Saleilles's opinion (1911: 51): 'History gives no support to rigid fatalism. It is a living determinism in which we form the decisive factors.' In contrast with the evolutionist and deterministic theories of positivist criminology, Saleilles considered universal history as well as a criminal's individual history not as hetero-directed, but rather the result of free choices that in the future might (and should) be oriented towards the collective interest.

The history of criminal law is closely interwoven with the purpose of punishment, particularly if what has been suggested, as in the case of Paul Cuche (1905: 3), is more a social history of punishment than a history of penal institutions. For simplicity, the evolution of penal institutions has usually been described as a process with the same characteristics and the same phases everywhere, as a sequence of vengeance, expiation, intimidation, and correction that is, according to Cuche, an overly schematic survey of the social function of punishment. It represents a historical reconstruction with clear outlines and harmonious lines that is nevertheless 'completely fictional' (Cuche 1905: 6). Social matters such as punishment are more complex, and two or more purposes are often pursued at the same time. As vengeance and expiation were combined in the past, now moral and utilitarian reactions are mingled together.

3.4.3 Pound's historical compromise between progress and tradition

Roscoe Pound made a different use of legal history. The starting point of his various essays about criminal justice was the inefficacy of its administration. Pound used a historical interpretation to grasp the reasons behind this condition and to find a solution, because the diagnosis of the faults of the criminal system 'lies in our social, political, and legal history and has to do with settled frames of mind and received attitudes toward the legal order' (Pound 1929b: 204). The main topic of criminal jurisprudence, namely, the relationship between the protection of the individual and of society, changed in the twentieth century, and attention shifted to general security (Pound 1930: 176). This historical progression with industrialization and urbanization modified the qualities of criminal justice, and

it imposed a programme to improve the administration of justice. There is always, in Pound's suggestion, a comparison between the past and present, always an 'originally', a 'pioneer America' set in opposition to a 'now', a 'today', a 'nowadays' (Pound 1929b: 167–215). However, this contraposition, which informs us about the development and progressiveness of the American criminal system and explains its new aims, does not imply a demand to absolutely delete the American empirical approach to penal problems. The pioneer tradition seems to be a key concept in Pound's works; out of respect for this past, he finds 'a workable balance between the general security and the individual life' (Pound 1929b: 214).

This interpretation of legal history, with its realistic adherence to the needs of society, seems to play a mediating role between the two extremes of individualism and socialism, both of which are old-fashioned ideas. Pound sought a historicist compromise (Green 1995: 1965–83) that could achieve the three main aims of a programme of improvement for criminal justice: preventive justice; a system of individualized treatment for offenders; and a readjustment of US legally received ideals regarding the balance between general security and individual lives. The achievement of these special ends was possible, in Pound's opinion, due to the respect that existed for the traditional US spirit of law, which should be developed and improved where obsolete, but which could not be rejected entirely because of its wealth of guaranties and because there is still a 'kernel of truth in these traditional legal theories' (Pound 1921: 15; see also Pound 1909: 282–3).

3.4.4 The radical evolutionism of Italian positivists

The history of criminal law is, for the advocates of the Positivist School of criminology, useful for marking the shift from the 'epoch of the rebirth of criminal law', initiated by Beccaria and the French Revolution, to the 'modern epoch' characterized by scientific positivism (Puglia 1882b: 219). Adherence to an evolutionary notion of history led Ferri and Puglia to recognize the past contribution of the Classical School in overcoming medieval judicial discretion by decreeing, at the same time, its end to give way to the new school. The Positivist School, as Ferri wrote (1917: 8–9), 'makes no pretension to destroy all that has been done hitherto in either science or practice: on the contrary, it shows a progressive evolution of this very same criminal science'. The proposed renovation, which

would render penal justice truly humane, aims not to oppose the past, but to move beyond it because progressive evolution cannot be stopped at the theories of Beccaria, Feuerbach, and Carrara. Penal and economic individualist currents 'conferred great blessings on humanity, but each, today, has finished its glorious course, attained and, it may be, exceeded their purpose' (Ferri 1917: 16). From an evolutionary perspective, the history of criminal law is an argument employed to prove that the abstract study of crime as a juridical entity is not useless, but it is surely not sufficient. The new school represents 'an ulterior development of the classical school founded by Beccaria', claiming the 'undeniable right of modifying ideas which the progress of the natural sciences has shown to be out of harmony with the reality of facts' (Ferri 1917: 18, 19).

The criminalization process and the individualization movement follow different trajectories determined by multiple factors, which are political, institutional, juridical, and, not least, cultural. Each position, to be strengthened, requires a legitimizing discourse that cannot forgo historical and historiographical interpretation. The various ways of reading and interpreting the past can help to reinforce respect for tradition or, vice versa, to favour radical reformation.

3.5 Conclusions

The legal space of criminology and penology has surely been global in its scientific premises and aspirations, and legal entanglements were the engine of the reform movement, but the 'cultural translation' and legal transfer processes entailed local adjustments. Prison experiments, such as the Elmira penitentiary, and new sentencing rules, such as conditional release or suspension of sentence, have been discussed in international congresses and applied in different states. However, each adoption implied an 'adaptation' (Salvatore and Aguirre 1996) as a 'functionalization' to the context (political, cultural, and institutional) of the receiving country (Sontag 2015b).

Based on this methodological approach, in this chapter I suggest three key points for a historical analysis of criminology and penology between the nineteenth and twentieth centuries. The first is formation of two different penological identities, one in Europe and one in the United States. Despite legislative variations from state to state, jurists, reformers, and criminologists repeatedly and

explicitly expressed an awareness of two diverse ways to comprehend individualization of punishment and, more broadly, criminological reforms. The second point is a fundamental use of legal comparison as a programmatic instrument for designing criminal law in the future. The International Penal and Penitentiary Commission, the International Union of Criminal Law, the *Société générale des prisons et de legislation criminelle*, and the American Institute of Criminal Law and Criminology, as well as their journals, bulletins, books, and proceedings, place comparison at the core of their activities and embrace it as a strategy to plan and facilitate more effective liberal penal system reforms. The third point refers to the varied 'use' of criminal law history by penal reformers. Each reformer's position provided a different interpretation of the past as a validating discourse to lay a foundation for a designed change for 'criminal law in formation'.

The methodological considerations summarized here are applied in the following chapter to the indeterminate sentencing problem, which was considered a crucial subject of the criminological movement and an effective tool for individualization of punishment.

4

The Struggle over the Indeterminacy of Punishment in the United States (1870s to 1900s)

Since the end of the nineteenth century, the indeterminate sentence has been considered the most effective and extreme method of individualization. First introduced in the United States in the 1870s, it is a legal institution according to which the duration of detention should be determined neither by abstract law nor by a court decision, but ought to be (at least relatively) indefinite or, at most, fixed by a court within wide limits so to allow an administrative body to decide on a case-by-case basis when a prisoner is rehabilitated and can be freed, first on parole and then without restrictions. Beyond the different terminologies that have been applied to this institution (punishment or segregation *a tempo indefinito* in Italy, *peine indetérminée* in France, *Unbestimmte Verurteilung* in Germany), its core idea refers to a penological model, radically different from the classical liberal model, which divides the verdict and the execution of the sentence into two different phases governed by completely distinct logics, people, and competences. The idea that the time required to reform a criminal cannot be fixed in advance implies the abandonment of both the legality and the judicial adjudication of punishment, delegating decisions concerning the length and conditions of imprisonment to administrative agencies.

The problems related to this punitive method are so important that indeterminate sentencing has become one of the most controversial themes among international scholars and the object of many congress resolutions, scientific publications, draft bills, and provisions to be implemented. Moreover, in the arguments used in favour of or against the idea of indeterminateness, it is possible to recognize the rise of a conceptual divide between US and European penologies. The importance of this dispute is not limited to the matter of measuring punishment severity, but

involves a comprehensive rethinking of the scope and rationale of punishment as well as a reshaping of the balance between the three branches of government in relation to punitive power. US and European reformers were aware of the ambiguous nature of indefinite punishment and of its inherent risks, but they developed opposing arguments to support or contest the implementation of the system. After an initial debate and oscillating adjudications, US reformers (Brockway, Wines, Barrows, Lewis) succeeded in replacing fixed punishment with indefinite sentencing for most offences (except for capital crimes), mainly because they were able to persuade both judges and public opinion that the new method was the best means not only to reform the offender, but also to provide an effective social defence (see section 4.1). Section 4.2 focuses on the rise of the rehabilitative ideal in the United States, analysing its double rationale of reformation and elimination, its constitutional ambivalence, and the courts' emphasis on the purpose of rehabiliation. What can be called the 'golden age' of US indeterminate sentencing lasted from the 1870s to the 1910s. In the late 1910s and 1920s, some criticisms emerged referring mostly to practical mistakes and inefficiencies in the application of the new method, rather than to its theoretical consistency and legitimacy (section 4.3).

4.1 Brockway and the Origins of Indeterminate Sentencing

The National Congress on Penitentiary and Reformatory Discipline, held in Cincinnati in 1870, represented a pivotal stage in the US progressive penological movement. In a programmatic speech aimed at framing the prison system of the future, the superintendent of the Detroit House of Correction, Zebulon Brockway, suggested substituting the principle of indeterminate sentencing for the ruinous retributive penal system based on fixed penalties. If reformation of the offender was the new foundation of criminal law, prison sentences should have the possibility of affecting the character of the culprit and modifying his or her behaviour. Thus, segregation should not be too short, because it did not rehabilitate the prisoner, or too long, because it caused in the detainee a feeling of vengeance upon the justice system and discouraged his or her correction. Punishment, in Brockway's opinion (1871: 54), should be indeterminate; namely, all the convicts should be 'committed

to the custody of the board of guardians, until, in their judgment, they may be returned to society with ordinary safety and in accordance with their own highest welfare'.

The board of guardians becomes the key group to which the state delegates both the treatment and the resocialization of the criminal. Lacking in judicial competency, its variegated composition makes the prison board a body not strictly rooted in juridical knowledge, but rather open to extra-legal expertise. Amongst its members there should be 'a physician, an educator, a judge well versed in moral, as well as legal, science, a mechanic, a manufacturer, a merchant or financier, an editor or man of letters, a man specially distinguished for his "common sense" and independence of character, a matronly mother of sound sense and a woman zealous for the rights of her sex' (Brockway 1871: 47). Neither paid nor elected, the members of the board should be independent from external influences and should be provided with sufficient power to administer the sentencing phase, as well as to decide whether and when prisoners should be released or their parole revoked.

In fifteen points, Brockway (1871: 55–6) summarized the advantages of the indeterminate sentence, proposing a set of arguments destined to stimulate the US and international debate on penal reform through the 1930s. Brockway's proposal is known, but it is worth outlining his main ideas. The system of indeterminate sentence: (1) 'supplants the law of force with the law of love', making the state and its apparatus no longer the governor, but the guardian; (2) 'secures certainty of restraint and continued treatment', thus preventing crime better than severity; (3) 'makes possible the arrest and right training' of first offenders, whose character is still reformable; (4) utilizes the love of liberty or the desire of the prisoner to be released for reformatory ends; (5) 'puts the personal interest of the prisoner plainly in line with obedience to rules'; (6) provides curative treatment apt to manipulate the character of the offender; (7) secures the cooperation of the prisoner for his or her rehabilitation; (8) 'places the responsibility of fixing the period of imprisonment and the amount of restraint on a responsible head, known to the public, easily reached and reviewed, instead of leaving it to the whim of officers elected by the popular vote, who (as a rule) have neither time nor opportunity to know what is best in the case'; (9) does not remove the power to decide the length of imprisonment from the judiciary, but furnishes the advice of experts in the examination and treatment of the prisoner;

(10) removes the decision on the duration of detention away from the trial 'with its excitements, its prejudices, and any influence of popular clamor' and provides the opportunity to judge the real character of the prisoner; (11) makes possible the speedy correction of first offenders; (12) 'accomplishes the return of reformed persons to society at the right moment'; but (13) also allows for control of the dangerous prisoner and his or her ungovernable impulses for the prisoner's whole life; (14) is constitutional; and (15) 'is quite indispensable to the ideal of a *true prison system*'.

These points sketch both the most innovative traits and the contradictions of the indefinite sentence. In very simple words, without technicalities and on the basis of his personal experience, Brockway, by emphasizing the reformatory potential of the new method and by concealing its repressive risks, plotted the route of a reform destined to change deeply the US criminal system, the procedural rules, and the distribution of powers. After a draft bill, which was never enacted, to introduce the indeterminate sentence in the state of Michigan in 1870 to 1871, the first enactment of Brockway's system occurred at the Elmira Reformatory in New York State in April 1877. When he was appointed director of the new institution, Brockway initially pressed lawmakers for the adoption of an absolute indeterminate sentence with neither a minimum nor a maximum term. However, realizing that such a revolutionary request would have been rejected by both politicians and public opinion, he successfully suggested adopting the more moderate model of the relatively indeterminate sentence, with the maximum defined by the law, but with the provision that 'the term of such imprisonment of any person so convicted and sentenced shall be terminated by the managers of the reformatory'. The Elmira system rapidly became the model of the reformatory sentence (Pisciotta 1994: ch. 1; Walker 1980: 96–9), applicable not only to juvenile delinquents and first offenders aged between sixteen and thirty sent to reformatories, but gradually also to criminals sent to penitentiaries for more serious offences, except for habitual offenders, those who had to serve life sentences, and those sentenced to death (Spalding 1895).

Although Brockway's key idea, that the duration of punishment should not be determined in advance, was not a complete novelty in nineteenth-century discourses on prison reform,[1] his theory of

[1] As Brockway (1912: 134) and Wines (1919: 199–234) admitted, there were some precedents: the proposals of the Dublin bishop Whateley in 1832;

applying the indefinite sentence as a broader view of criminal law that was oriented mainly towards the goals of rehabilitation and social defence was certainly original and more consequential. As Brockway explained in his report at Cincinnati, the principle of indeterminate sentencing, far from constituting new experimentation with punitive methods, implied the embracing of a penological project completely different from the traditional, a break with the classical principles of criminal law, and the endorsement of modern criminological theories. In fact, as Wines argued (1919: 216), the indeterminate sentence system 'is merely a tool'; it is valueless if skilled people do not properly implement it, and 'it has in itself no reformatory power; it is a dead thing'. The true power lies entirely with the reformatory agencies, which, through labour, education, and religion, foster the rehabilitation of the convict much more than the classical system with its fixed penalties.

4.2 The Exaltation of the Rehabilitative Ideal in the United States

The model ushered in at Elmira and soon introduced in many other states was a new penal system grounded in the 'substitution of imprisonment for reformation for imprisonment for retribution' (Spalding 1899: 12–13). The proposed change, even if it was 'not likely to find much support with the authorities of our time' (Davitt 1894: 876), seemed to be more effective for the correction of criminals. The causes of the demand for reform must be found in the failures of definite sentences and, more broadly, in the new standpoint of penology influenced by determinism, criminal anthropology, and sociological positivism. The Elmira Reformatory rapidly became a symbol, internationally celebrated (e.g. Passez 1885) or criticized (e.g. Da 1886) by reformers. As the first concrete realization of the reformatory sentence, it represented a watershed

the mark-system introduced by Maconochie in the penal settlement of Norfalk Island in 1840 (Morris 2002); the progressive classification of the prisoners and the tickets-of-leave method used by Walter Crofton (director of the Irish prison system from 1854) to foster a gradual reintegration of the offender into society; the statements in favour of indeterminate sentences of Matthew Davenport Hill, criminal judge in Birmingham between 1850 and 1878; the emphasis given by Bonneville de Marsangy on the reformation of the offender as the main target of punishment; and, finally, the model of prison administration of Montesinos in Valenica.

between old penology and new criminology. 'This marked an epoch', noted Wines with nationalistic pride, 'the turning-point in the history of prison, not only in America, but, as I believe, in the civilized world. It was the birthday of the new criminology' (1904: 10).

The campaign for indefinite sentencing thus turned into an icon of progressive claims for the radical renovation of criminal law, the origins of which are in the United States, but which is destined to encompass the entire West. The first laws that implemented partial experimentation with *reformatory imprisonment*, combining science and humanity, were 'but the beginnings of a revolution which is destined radically to change men's habits of thought concerning crime and the attitude of society towards criminals, to rewrite from end to end every penal code in Christendom, and to modify and ennoble the fundamental law of every state' (Lewis 1899: 26–7). The leading advocates of this method emphasized the radical novelty of its punitive philosophy more than the means of its practical application (Spalding 1899: 13; see also Warner 1899: 219). The key and most revolutionary idea was that of individualization, that is, of a punishment adjusted not to the crime, but to the criminal. The convict should be detained not because of what he or she has done, but because of what type of person he or she is. The committed crime reveals that the offender is unsuited for freedom, but it does not allow for the identification of his or her character, nor can it provide the measure of the punitive reaction. If the retributive fixed punishment was past oriented, 'under the indeterminate sentence the attention of the prisoner and of the state is fixed upon the future' (Spalding 1899: 13; see also Lewis 1899: 20): on the offender's aptitude to be physically, mentally, morally, and spiritually regenerated.

The relationship between the state and the criminal citizen, Spalding notes, is *perpetual* and cannot cease with the expiation of a determined penalty as if it were a repaid debt. Conversely, it is necessary to control throughout the prison term when the convict will be truly capable of re-entering society with no danger. Therefore, no judge is competent to decide in advance the duration of punishment, and overall knowledge of the detainees, upon which their liberation depends, ought to reside only in prison authorities, who periodically verify their behaviour. The new method, by appealing to the prisoner's desire for freedom and by replicating inside the reformatory the natural living conditions

of a free community (jobs, recreational activities, celebrations), encourages the criminal's spontaneous cooperation and self-discipline. The prisoner is repeatedly depicted as the 'arbiter of his own fate' (Lewis 1899: 19) who 'controls his own destiny' (Follett 1899: 23) because the duration of his incarceration depends not upon abstract criteria of penal proportion, nor upon the decisions of others (the judge, the prison warden), but entirely upon his or her goodwill.

4.2.1 Reformation and elimination: The double soul of the reformatory system

The emphasis is very much on the rehabilitative efficacy of indeterminate sentences, on the direct participation of the prisoner in his or her own re-education, and on general confidence in the possibility for almost all offenders to be re-socialized (Buck 1895). The rhetoric supporting the implementation of indeterminate sentence laws has been based on the inefficacy and irrationality of retributivism, which has proven to be incapable of reducing crime and reforming offenders as well as inadequate to protect society. In contrast, humanitarianism and the consistency of the new measure with the purpose of an individualized penal justice have been emphasized. In their battle against the ideas of the past to determine the criminal law of the future, reformers seem to overlook the more contradictory features of indefinite punishment. However, the double soul of the reformatory sentence—that is, its double expediency in reforming reformable offenders and in perpetually eliminating more dangerous criminals, its combination of 'benevolent reform' and 'benevolent repression' (Pisciotta 1994)—was clear from the beginning (Lewis 1899: 28; Warner 1899: 221).

If the rehabilitative ideal and the participation of prisoners in their reformation give criminals who can be redeemed the keys to their cells, they also condemn to indefinite segregation habitual and professional offenders and those who are irredeemable due to their organic degeneration. The success of the indeterminate sentence relies on the capacity of humanitarian and repressive arguments to hold the support of both public opinion and lawmakers. The philanthropic face of reform cannot dispense with its securitarian correspondent if it wants to be accepted in the US system. In this manner, the claims against the classical penal system can be handled in both directions, either by stressing the

damaging propensity of the classic system to nurture crime via short-term prison sentences for occasional offenders or by emphasizing its deleterious ineptitude in contrasting professional delinquency. This new method is still not universally adopted, as Lewis noted (1899: 28), due to 'all the forces of a narrow and timid conservatism' and 'perverse custom and traditional prejudice' which prevent people from understanding the reformatory system as a whole. To achieve their target, reformers must eradicate fallacious convictions and persuade people that the new penology is more useful and more reasonable because true progress in penitentiary institutions and penal culture is impossible 'until public opinion rises to a broad appreciation of the problem, and, with the full courage of its convictions, demands their incorporation into the law of the land' (Lewis 1899: 27).

At the end of the nineteenth century, the proposed indeterminate sentence faced many opponents. Criminals were resistant to reform; this included both simple law-breakers who feared the discretion given to prison officials charged with controlling their destinies and professional delinquents who would be indefinitely detained.[2] Lawyers, too, were reluctant because they feared losing profits. Others were afraid of a great inequality in punishment for the same offence, but, in Wines's opinion (1895: 16; see also Dale 2011: ch. 4), they were not aware that due to the varieties of penal codes from state to state and the possibility of weighing different aggravating or mitigating circumstances, the classical system of fixed penalties had already caused 'inequality and apparent inequity in the distribution of punishment' to the point that detention was 'largely the result of prejudice, caprice or accident'. Sentimentalists considered the measure too severe, but, according to Warner (1899: 223), they did not understand that it was crueller to release a prisoner who was not yet reformed than to give the convict 'the key to the house in which he is confined'. Those who considered this method too lenient and favourable to the criminal also raised protests, but reformers responded that they did not ponder the utilitarian side because 'reformation, when possible is vastly more profitable than restraint' (Lewis 1899: 23; Smith 1901; Spalding 1892; Wines 1892).

[2] The point of view of the detainees was expressed in the article 'The Indeterminate Sentence' written by A Prisoner, published in September 1911 in the 'Atlantic Monthly' (pp. 330–2), and then re-published in Bacon (1917: 267–9): the author stressed the prison officials' lack of criminological training.

However, even greater obstruction came from those who raised constitutional doubts about the competence and constitutional legitimacy of the prison boards to which all of the sentencing phase decisions were delegated. These two criticisms hit the weakest points of the indeterminate sentence principle: they questioned not only the formality with which punishment was determined, but also the body charged to decide, its adequate expertise, and the impartiality of its decisions. Finally, these criticisms denied the possibility of understanding the human soul and recognizing an offender's character. The advocates of indeterminateness responded that, even if there could be errors, a decision made by experts after careful consideration and long study of the prisoner's character was surely more reliable than any court's sentence based only on trial evidence (Wines 1895: 25). The crucial problem, which was destined not to be resolved quickly but to worsen over the twentieth century and cause the decline of indeterminate sentencing, was the difficulty in organizing 'the machinery for its proper administration' (Wines 1895: 25).

'Political influence and instability of administration' were the two original evils that obstructed the achievements of US reformism, clearly pinpointed in 1877 by Enoch Cobb Wines, secretary of the National Prison Association (1879: 55). The source of chronic vice in the administration of penal justice in the United States was the connection between prison issues and political machinery, namely, the penitentiary spoils system, which barred at the local level the increase in skilled and qualified personnel to be employed in custodial institutions due to their expertise rather than due to their affinity with the most recently elected politician. In this unaccountable mixture of prison affairs and political interests, Wines (1879: 55; see also Ruggles-Brise 1899: 8) recognized the great divide between the US and European prison systems, the latter of which was 'not burdened with this weight nor impeded by this obstruction', and he predicted the possible cause of the reform movement's failure: 'under such a system—that is to say a system of political appointments—the whole theory of our penal and penitentiary legislation becomes well-nigh a nullity'. Although some isolated abuses could be remedied with the help of philanthropy, 'broad, thorough, systematic, and, above all, permanent reform is impossible'. The hope that a body of prison administrators would be gradually trained in criminological matters so that they would be able to apply the reformatory method correctly gradually gave

way to less optimistic and more realistic thoughts about the limits of a penal system that, for its physiological functioning, presupposed the constant cooperation of experts in non-legal disciplines, which are themselves continually evolving.

The constitutional problem of indeterminate sentence laws moves the debate from the field of theoretical proposals and practical experimentations to the legal field of the legitimacy of the legislative acts enacted to implement the rehabilitative principle. The two discourses overlap in the courts' decisions, showing how the impetuous course of the individualization principle has already altered even the rigid boundaries of law.

4.2.2 The questionable constitutionality of the indeterminate sentence laws

The radical changes implemented in the US penal system by parole and indeterminate sentencing laws are evidenced by the disputes over their constitutionality. Before being generally accepted and held consistent with both the federal and the state constitutions, the legitimacy of the new sentencing pattern was firmly criticized (Gatens 1917; Lindsey 1925a: 40–52; Zalman 1977: 51–62). The severity of the doctrinal and judicial quarrel provides evidence of the relevance of the reform, which deeply affected the balance of power, the distribution of competencies, and the individual guarantees provided for by these constitutions. Indeed, the kernel of criminal law was questioned and reshaped by acts and cases that, in adherence with the rehabilitative ideal and relying on the trustworthiness of the criminological sciences, created new bodies, assigned tasks, and appointed powers that were not constitutionally regulated. At the beginning of the twentieth century, the arguments of the opponents of this de facto revolution, which was brought about by the courts rather than by the proper procedures for constitutional amendments and justified by the need to adjust traditional institutions to the modern culture of punishment, resembled lost rear-guard battles. Effectively, as we shall see, some of the critiques against the indeterminate principle turned out to be prophetic regarding the practical defects of the system, and they reappeared in the 1920s and 1930s.

The powers given to the board of control (or board of prisons) to decide the duration of detention within the broad boundaries provided by the law and to release prisoners on parole represent,

at the same time, the essence of indeterminate sentence laws and their most controversial point. Because the board charged to execute a sentence with plain discretion is not provided for by the constitution, its prerogatives are considered by some courts to be a clear violation of the tripartite genius of the US institutions of government and an infringement of the separation of powers. In *People v. Cummings* (88 Mich. 249 (1891)), the Supreme Court of Michigan found the indeterminate sentence law (Act 228, 1889) unconstitutional due to the power given to the board of control. Whether it was interpreted as a power of absolute discharge from imprisonment or as conditional release upon parole, this prerogative was unconstitutional because it was an unlawful exertion of the judicial power to determine the term of imprisonment or of the pardoning power constitutionally vested in the state governor.

Justice Morse, the drafter of the ruling, emphasized that the breaking of the rigid boundaries between powers could jeopardize individual rights: 'it is in the power of the Legislature to fix all punishment for crime' and to provide for a minimum and a maximum penalty within which the courts will be given discretion to decide, but it is unquestionable that this discretion cannot be delegated to any other person or body because 'to do so would imperil the liberties of the citizen by putting his punishment for wrongs committed into the arbitrary power of unauthorized persons, without any right of remedy in the courts' (*People v. Cummings* 1891: 252–3). When the convict, whose reform is the target of the so-called humanitarians, 'enters the prison, he becomes the servant and slave of the prison board'. Given that the board's decision is neither reviewable nor appealable, their discretion becomes a 'despotic power' (*People v. Cummings* 1891: 254, 256). The act neither provided for clear requisites nor specified conditions for parole, leaving it all to the board's discretion. Moreover, should the board decide to revoke parole for any violation, the law did not provide for any type of judicial review consistent with the due process clause (fair hearing, counsel).[3] It was argued by the court that the new method

[3] On this point the court relied on *People v. Moore*, 62 Mich. 496 (1886): 500; see also Weihofen (1939). According to Justice Grant's dissenting opinion, neither the board's decision to release the prisoner on parole could be considered a judicial act, nor was the decision to revoke the parole due to any violation of its conditions judicial, because the prisoner himself had accepted these conditions and to be controlled (*People v. Cummings* 1891: 265–6).

was more despotic and arbitrary than the former good-time law, according to which the reduction of the sentence was not left to a discretionary decision, but was predetermined by strict and equal rules. The indeterminate sentence law, therefore, was considered 'not only unconstitutional but also wrong in theory and dangerous in practice' (*People v. Cummings* 1891: 261).

Other courts declared indeterminate sentencing laws unconstitutional on the basis that prison commissioners would encroach on executive competencies, being the granting of parole equivalent to 'a partial conditional pardon'.[4] Whereas the decisions that declared indeterminate sentence laws unconstitutional because they are *ex post facto* did not question the essence of the reform,[5] decisions that were grounded on the violation of separation of powers struck at the core of the new method. According to this minority opinion, the reformatory sentencing system jeopardized the traditional institutional balances as well as individual safeguards. One of the few authors who openly denounced these laws was James M. Kerr, a conservative jurist who sought to demolish the deceptive humanitarian façade of the indefinite sentence. The 'prevailing fad' of determinism and substitution of treatment for retribution as the unique purpose of punishment were, in his opinion, 'in utter ignorance of or in total disregard of the nature and history of man in the past and in the present' (Kerr 1921a: 725). The reforms of Progressivism tended to forsake the convictions of the past to adhere to new unproven doctrines, 'to break away from the wholesome ideals and splendid traditions of our country and institutions; ignore the fundamental law, substitute individual opinion and judgement for the organic law of the land' (Kerr 1921a: 731).

Loyal to the tripartite division of power and to the traditional prerogatives allocated for the definition, application, and execution of punishment, Kerr upheld the reasoning of the more traditionalist courts and considered the indeterminate sentence absolutely unconstitutional. The powers given to the board of prisons should be clearly defined by the law itself to be not considered a delegation

[4] See, e.g., *State ex rel. Bishop v. State Board of Correction*, 16 Utah 478 (1898); *Fite, Superintendent of County Workhouse, v. State*, 114 Tenn. 646 (1905); *In Re. Conditional Discharge of Convicts*, 73 Vt. 414 (1901): 429; *Ex parte Ridley*, 106 P. 549 (1910).

[5] See, e.g., *The State of Kansas v. John Tyree*, 70 Kan. 203 (1904): 207.

of legislative power, but such a definition was exactly what the spirit of the reform wanted to prevent. The experts, it was claimed, ought to be vested with the discretion that was formerly given to the judge. Even the pardoning power, Kerr argued (1921a: 741), was delegated to a body not provided for by the constitution, opening the door 'to abuse by ignorant and irresponsible persons—probably appointed to pay a "political debt", not responsible to the people; and also to abuse by corrupt and corrupting influences'. Indefinite punishment and parole, the most important reforms for the rehabilitation of the offender, were viewed by Kerr as the main causes of the 'present riot of crime in our community and state' and were therefore regarded as unconstitutional and 'contrary to sound public policy' (Kerr 1921b: 239, 1921c). Comparison with the English common law judge could not justify the adoption of parole in the US legal order because the genius of US institutions, shaped in a written constitution, was different from that of the United Kingdom. The US judges do not represent the king's authority, but the sovereignty of the people, and they can therefore wield only those powers that the people have delegated to them by means of the fundamental law. Neither the forced interpretations, grounded on unconvincing historical precedents, nor the courts' decisions upholding the constitutionality of the new provisions could, in Kerr's opinion, modify or redistribute the competencies conferred by the constitution (Kerr 1921b: 247).

A strong conservative, Kerr considered the progressives 'ignorant humanitarians, silly sentimentalists and visionary Utopians' (Kerr 1921c: 524): they were iconoclasts dangerous to US society because by demolishing legal traditions, modifying the constitutional equilibrium, and criticizing the certainty of retributive punishment, they represented a menace to the social order. The reactionary tone, the stubborn loyalty to the rigid partitions of the restrictively interpreted constitution, and the incomprehension of both the shortcomings of the traditional system and the merits of the opposing proposals make Kerr's position isolated and outdated. In his total refusal of any penological change as well as in his unconditional aversion to any criminological proposal, he struck at the heart of the contradictions of the individualization movement. The criticisms against correctionalism that, with more awareness and with the disillusion caused by the failure of penal experimentation, would arise in the 1970s had already been sketched out in the 1920s.

4.2.3 Evolutionary interpretations and 'emphasis upon reformation'

Despite opposing arguments, prevailing jurisprudence has upheld indeterminate sentence laws by virtue of flexible evolutionary interpretations of the fundamental law and by reasons grounded in the acknowledgement of individualization as the new criterion to which the penal system should be adapted. It is worth emphasizing that the thin divide between the legitimacy and illegitimacy of new laws is plotted by adherence to or rejection of the reformative spirit rather than by the soundness of the technical legal reasoning. The more that public opinion and legal culture are persuaded that punishment can no longer be retributive, but should aim to re-socialize the offender, the more the fixed penalties system turns out to be ineffective and obsolete; the more the state takes on the responsibility of granting both individual rehabilitation and social security via penal welfarism, the more individualizing policies become necessary.

In 1885, the Supreme Court of Ohio upheld an indefinite sentence law by denying any interference of the prison board with either judicial functions or the executive power to pardon or commute sentences. On the one hand, the new act represented 'the exercise of that guardianship and power of discipline which is vested in the state to be exercised through the legislative department for the safe keeping, proper punishment, and welfare of the prisoner'.[6] On the other hand, release on parole could not be considered parallel with conditional pardon, but was rather a mitigation of punishment because the offender remained in legal custody, under the control of the board and subject at any time to be taken back within the prison. Even the Supreme Court in 1902 upheld the Illinois indeterminate sentence law, by which the board of parole was vested with new power, because this provision did not violate the Fourteenth Amendment and because each state has the power to decide its own configuration of competencies. Indeed, the separation of powers, according to Story's *Commentaries*, upon which the court relied, must be read 'in a limited sense': it does not mean that the three branches must be 'wholly and entirely separate and distinct' without any mutual connection. Its true meaning is that 'the whole power of one of

[6] *State v. Peters*, 4 N. E. 81, 87 (1885).

these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution' (Story 1905: 393; quoted in *Dreyer v. Illinois*, 187 U. S. 71 (1902): 84).

Using broader reasoning, the Supreme Court of Tennessee in 1914 rejected claims of unconstitutionality of the indeterminate sentence law. The contested act did not impair the right to trial by jury because the decision of the appropriate punishment belonged solely to the legislature and not to the jury. Nor was there a violation of due process of law because the act was the law of the land, public and general. By providing for only a relatively (and not absolutely) indeterminate sentence, the act was not considered illegitimate. Within these legislative limits, the powers conferred on the board were 'not judicial in their nature, but only administrative'. Even if they implied the exercise of judgment and discretion, it was 'essential that such powers be vested in administrative officers, to a limited extent, at least, otherwise they cannot discharge any of their duties' (*Woods v. State*, 130 Tenn. 100 (1914): 108–9). The key problem was that of the legal limits to the discretion of the administrative body. According to the court, the act not only provided for the minimum punishment, but also presented the criteria for deciding parole, such as the history of the prisoner and the likelihood of his or her re-socialization. Thus, there was no delegation of legislative power to the board, which is 'only one of a series of agencies for the execution of the judgement' (*Woods v. State* (1914): 112). The court's reasoning was based on the belief that sentencing is a complex process requiring the involvement of different persons with specialized roles and skills.

'It is now pretty generally agreed that reformation is the end to be attained by imprisonment. This result cannot be reached unless the prisoner's will be enlisted in his own moral rehabilitation, nor unless he be given an opportunity to exercise his volition, and to maintain himself' (*Woods v. State* (1914): 113–14). It is worth emphasizing this passage because it shows how the purpose, functioning, and constitutionality of the board of prisons could be explained only from the new finalistic perspective of punishment. The reform of the prisoner requires an evolutionary interpretation of the constitution, not to change it completely, but to modify it to be consistent with the modern rehabilitative goal. Stating that federal courts do not have the power to suspend sentences

because it would be an infringement of the executive branch[7] 'is to adopt a strict, scholastic, and impractical view of the Constitution' (*Suspension of Sentence* (1917): 371). Indeed, an evolutionary and non-mechanical reading of the constitution cannot be insensitive to the 'radical change of attitude' of penal law due to the advent of criminology. The guidance and the assistance of the prisoner 'towards a new citizenship' are embedded in reforming measures such as indeterminate sentences, suspended sentences, and parole. Therefore, it would be a 'calamity if such beneficent ends should be defeated because of some supposed conflict with constitution' (*Woods v. State* (1914): 114).

At any rate, the rehabilitative ideal imposed by Progressivism coerced judges into forced interpretations in a challenging effort to reconcile constitutional stringency with the flexibility required by modern penology. Effectively, the individualization of punishment is 'impracticable for any court'. It cannot be administered by the lawmaker or the governor, but only through the agency of the board whose powers 'while neither judicial, legislative, nor executive... belong to that great residuum of governmental authority, the police power, to be made effective, as is often the case, through administrative agencies' (*Woods v. State* (1914): 114).

The key to understanding these decisions lies in the ingenuous optimism in the re-socializing potential of the indefinite sentence together with unconditioned and total faith in its virtuous mechanism of a positive stimulus for the prisoner. The artificial constitutionality of the measure rests exclusively on the utility of its purpose, which, as 'generally recognized by the courts and by modern penology is to mitigate the punishment' (*In re Lee*, 177 Cal. 690 (1918): 692). Indeterminate sentence laws put into practice criminological theories and 'place emphasis upon the reformation of the offender' (*In re Lee* (1918): 693). The rulings of the courts, following completely the theses of the advocates of indeterminateness, adopted the humanitarian perspective, the correctionalist inclination, and confidence in the possibility that every criminal could be reformed (Wines 1892: 5). In light of these theses, the traditional retributive philosophy was abandoned in favour of correctionalism, but this change also overlooked the more securitarian and repressive characteristics of the reformatory system: the provision

[7] See *Ex parte United States*, 242 U. S. 27 (1916).

of indefinitely prolonged detention for those prisoners considered unreformable and the margin of unchecked discretion left to the prison administration.

4.3 Indeterminate Sentence and Social Defence

At the beginning of the twentieth century, in the United States, the inexpediency of fixed punishment was widely recognized, and the prevailing decisions of the courts upholding indeterminate sentence and parole represented a further development of the criminological reform process that was consistent with the rise of the general welfare state and penal modernism (Zalman 1977: 79–83). Riding the wave of this apparently relentless and civilizing transformation, almost all of the states of the Union (thirty-seven in 1922; thirty-nine in 1937) implemented reformatory systems in different forms (Lindsey 1925b; James 1934; *Indeterminate Sentence Laws* 1937). When the battle to convince lawmakers and public opinion of the feasibility of progressive ideas was won, the main challenge, which turned out to be the more difficult one, was how to make this new model of justice work properly. Indeed, the great revolution of indeterminacy implied remarkable changes in criminal procedures and, above all, in the administration of the sentencing phase, with the creation of new boards, competencies, and systems of gathering and verifying all of the information about prisoners. If it was relatively easy to enact indeterminate sentence and parole laws, it was, conversely, 'a far more complex and difficult thing to secure the introduction of the reformatory plan and methods in all prisons' (Lindsey 1925c: 72). It was necessary to build a machinery able to give a concrete shape to the overall rehabilitative ideal—that is, a system of controls, education, job training, study of criminal psychology, gradual reintegration of prisoners into society, and continuous monitoring of their treatment during and after conditional release.

When, at the beginning of the twentieth century, reformers switched their attention from the projecting phase to its realization, their approach became less triumphalist and more critical. The problems of the reformatory system emerged, and its contradictions and inefficiencies rose to the surface. In assessing the functioning of the indeterminate sentence and in analysing its outcomes and its achieved or disappointed expectations, realism interchanged with disillusion. The fundamental choice for the reformatory

sentence was never questioned, but reformers began considering objectively whether it was more convenient to stick with the claim for indefinite punishment and invest resources to complete its implementation or whether it was more expedient to settle for parole, which grants the same advantages with fewer theoretical and practical difficulties. The shift from rhetoric to reality emphasized the less humanitarian and more governmentality-oriented facets of individualization and particularly of indeterminateness (see Friedman 1993: 61; Pisciotta 1994: 59). To persuade those people who were more sceptical about penological reformism, the social defence argument prevailed over the idea of rehabilitation, and the end of punishment was regarded 'neither as reparation nor as reformation, but as the protection of society' (Schlingheyde 1919: 133).

4.3.1 In search of new legitimating discourses for indeterminacy

There were many factors that determined this change in perspective, such as the comparison with European criminology, the contributions of which were influential in shifting the penological standpoint towards social defence, and, from 1910 onwards, the research activity of the American Institute of Criminal Law and Criminology. Another key factor was the rise of hereditarian criminology and eugenics, which contributed to defining the notion of the mentally defective offender whom the penal system could not reform, but could only neutralize, even by means of eugenic measures. Eugenic prison science, which also characterized Elmira's new approach to crime control in the first two decades of the twentieth century (Pisciotta 1994: ch. 5), accorded the reform movement an even stronger and revitalized legitimization in a period of racism, xenophobia, and anxieties for the 'race suicide' because of mass immigration (Leonard 2005: 209–12; Pifferi 2012: 263–73; Ross 1901, 1914) and the demographic increment of the poor class (Thompson 1917). In the US Progressive Era, Galtonian eugenics (Galton 1904) influenced social and economic reforms (Leonard 2003), and eugenic jurisprudence contributed to the rise of penal modernism (Willrich 1998), the spread of criminal anthropology (Rafter 1992: 539–41), and, in particular, the adoption of indeterminate sentence laws in certain states (Jenkins 1984: 71–2). However, as Pratt (1997: 49–51) noted, 'eugenics

strategies themselves went beyond the limits of what would be allowable under such a programme of government', because 'in addition to the way its strategies offended prevailing penal sensitivities, eugenics also seemed too deterministic' by too much emphasis on hereditary rather than social factors (see, e.g., Stevens 1915). Therefore, when the sociological approach prevailed over the biological one, especially by the 1920s thanks to the contributions of the anthropologist Franz Boas (1911), who emphasized the role played by culture instead of evolution and heredity in explaining human behaviour, and the Chicago School, sterilization of criminals and other eugenicist proposals gradually declined (Willrich 1998: 103–9). Moreover, outside the United States, the adoption of eugenic methods such as castration and sterilization against dangerous and deviant criminals were rejected until the Nazi law of 1933.

This represents another ground for the divide between European and US penologies. Conti, for instance, in his report on the visit to US penitentiaries on the occasion of the 1910 Washington Congress (Conti and Prins 1911: 205), severely criticizes the 1907 Indiana Law (the first in the United States) authorizing vasectomy 'to prevent procreation of confirmed criminals, idiots, imbeciles and rapists', because 'in our own opinion, it is not to be conceded that the state, in the name of race-purity, has the right to take away a person's virility, and prevent him from procreation'. According to Conti, the state can segregate and neutralize 'by way of punishment or self-protection' whoever has a harmful influence on society, 'but it may not injure or nullify his very personality'. Similarly, Battaglini (1914: 13) attacks the US 'practice of sterilization' mainly for three reasons: first, 'the doubt as to the transmissibility, by inheritance, of moral and hence of criminal characteristics'; second, the lack of any reliable criterion to diagnose corrigibility or incorrigibility and, thus, the danger of applying extreme remedies 'where the criminality is of a transitory sort'; finally, 'the practice is not one that should be tolerated in what we conceive to be the liberal state'. By conceiving eugenics as 'that science which looks to the amelioration of the physical and mental qualities of the race, by the employment of all those means which *experimental investigation* has demonstrated most fit' (Battaglini 1914: 13),[8] Battaglini argues that the US indeterminate sentence system is the

[8] Emphasis in the original.

best eugenic measure. For all of these reasons, 'when considering measures of social protection against those criminals who were now thought to be "dangerous", the surgical implications of the eugenics programme were overridden' (Pratt 1997: 51).[9]

It is no surprise that the advocates of indeterminate sentencing continued to argue for its complete realization. The strategy to convince its opponents emphasized that with the new method, not only was the prisoner more likely to be reformed, but society was more protected. Only by extending the reformatory system to all offenders, by transforming all prisons and penitentiaries 'into true reformatories' (Smith 1907: 735), and by improving criminological knowledge could the shortcomings of indeterminacy be corrected to achieve either real reformation of criminals or their definite elimination from the social body. According to Wines (1904: 12), the theoretical roots of the indeterminate principle do not lie in the influence on US reformism of European criminology (which was 'too little known, and had made no serious impression, in America, at the date of the creation of the Elmira institution'), but rather in the progressive substitution of social self-defence for retribution as the foundation of criminal law.

Although this assertion of cultural self-reliance can be questioned, it is true that social self-defence has thoroughly reshaped the legitimacy, purpose, and limits of punitive power. At the turn of the century, the penological belief was that 'whatever is essential for the protection of social order and security is lawful, whether it be the redemption of the offender, his incapacitation for evil, or his extermination' (Wines 1904: 13). Whatever goes beyond these boundaries (i.e. social protection and security) is ethically and legally unjustified. If the criminal can be reformed, he or she has the right to be treated until his or her correction is achieved, but criminals who are unreformable and dangerous forfeit their right to liberty, and the right of the society to be protected prevails as long as the offender represents a social menace. Clearly, the core of the reform rests, first, on the methods provided by the new sciences (such as psychology, criminal anthropology, and sociology) for recognizing the criminal's personality and, second, on

[9] On eugenics in US penology and on its differences compared to the European approach, see also Garland (1985a: 130–58). On the relationship between eugenics, criminal biology and sterilization in Germany from the early nineteenth century to Nazism, see Simon (1999); and Wetzell (2000: chs 5–7).

the competence and expertise of prison officials in employing this knowledge correctly. The correct functioning of the reformatory system, however, is the more difficult challenge because it depends on a combination of law and science, and 'it is revolution by means of evolution' (Wines 1904: 14).

In Wines's view (1904: 15), the indeterminacy of punishment is a necessary implication of modern penal philosophy in both its directions of positive reformation and negative neutralization. If it has not yet accomplished its reasonable expectations, the cause is not the method itself, but rather its incomplete application. Some failures have occurred because the indeterminate sentence laws have been drawn incorrectly, because the courts 'are not all…in sympathy with the new legislation, the right men have not been assigned to the charge of these prisons', or simply because such an important reform requires more time for its realization. Even Brockway, in 1907, was afraid that incomplete legislation and defective application in prison could discredit his 'invention' in the eyes of public opinion and criminologists and prevent its realization. In his opinion (Brockway 1907: 867), the indeterminate sentence system is a 'trinal unity', that is, a threefold entity formed by 'restraint, reformation, conditional and then absolute release', none of which can be removed or replaced without destroying the entire structure. If the required means or the necessary competencies for combining the three pillars of the reform are lacking, it might not produce the expected outcomes. According to the superintendent of Elmira, there was not an inherent deficiency in the institution that he designed in 1870, but any inefficiency of the system was 'primarily attributable to limitations of the present law' (Brockway 1907: 867), which was only a 'timid and halting approach to the ideal indeterminate sentence' (Brockway 1907: 868). Confronted with the first signs of crisis regarding reform, its most fervent supporters reintroduced Brockway's original proposal of an absolute indeterminate sentence without a legal limit as the only manner to complete the process already begun and to achieve a truly reformatory prison system (Brockway 1907: 869; see also Butler 1916: 893).

In the same year, Eugene Smith, president of the New York Prison Association, considered the indeterminate sentence principle to be an irreversible breakthrough that was destined for even wider implementation. The 'present need', he added, 'is rather for discrimination and caution in its application'. In some states, the

adoption of this method, which was applied to offenders sentenced to any type of prison, was 'premature and ill-judged' and occurred 'in disregard or in ignorance' of both the essence of indefinite punishment and the essential conditions of its success. Again, it was the wrong application of the method rather than its intrinsic shortcomings that produced a 'feeling of discouragement at the results accomplished and tend[ed] to undermine public confidence in the efficiency of the sentence itself' (Smith 1907: 731).

Smith, like Brockway, was afraid of losing the fundamental confidence of public opinion in the rehabilitative ideal, which had been gained with difficulty by reformers at the expense of classical retributivism. For reformers, false moves in the concrete application of the principle risked thwarting all of the efforts made in previous decades and leading to the definitive defeat of correctionalism.

4.3.2 The disillusion with the methods of application of indeterminate sentences

When the Institute founded by Wigmore started its survey of US criminal justice and sought possible ways to improve its administration, indeterminate sentencing and parole were immediately analysed carefully with the creation of the apposite Committee F, chaired first by Albert Hall and then by Edwin Abbott and Edward Lindsey.

Aware of its crucial cultural role in consolidating this punitive method, Committee F operated 'as a commission not only to investigate, but to begin work at home in the way of doing something toward the enactment of a law for reform in the treatment of prisoners and developing efficient methods for its execution' (Hall 1912: 832), and it actively cooperated in framing Minnesota's indeterminate sentence act in 1911. When the committee started gathering data on the application of the laws, comparing the differences in the methods for granting parole from board to board and analysing statistics, the functioning of the indefinite sentence seemed anything but positive. The abstract rationality of the measure corresponded neither to improvement of its applicative means nor to the gradual standardization of techniques. The rule was still appreciated 'as a marked advance in penal administration', but 'the means and methods of its introduction and application remain[ed] the immediate and pressing problem' (Hall 1912: 838; see also Lindsey 1925c: 96). In 1912, Edwin Abbott (1912: 544),

after gathering and analysing information about the great varieties of rules governing the functioning of indeterminate sentences and parole in different states, continued to endorse the implementation of the rehabilitative ideal, but he emphasized the need for uniformity among the existing statutes and practices as the most vital priority (see Abbott 1913–14).

The report of the New York Prison Association in 1916 raised doubts about the work of the board of prisons and about the capability of its members to manage appropriately the broad discretion given to them by the new punitive methods. The modern conception of parole, it was argued in the report, implied an in-depth study of each individual case to verify whether and when the prisoner could be released. Therefore, 'it is a most serious thing if, in departing from the traditional definite sentence in favor of an indeterminate sentence, that sentence becomes synonymous with a general shortening of terms of imprisonment, unless such shortening of terms of imprisonment be wholly on the basis of adequate and scientific study of each case that is presented to the Board' (*Prison Progress* 1917: 73). In examining statistics, the report noted that it seemed that release on parole was almost automatically granted after the minimum term of detention without any real evaluation of the dangerousness of the detainee, thus transforming the system by mechanical and unjustified reductions of sentences. Exactly because the board was given such a highly responsible task, its members must be selected carefully, not for their political connections, but only for their expertise, and they should be given all possible information about the convict's background and life conditions that would be useful in understanding his or her criminological profile (see Cass 1921: 11).

In 1917, Edward Lindsey (1917: 491–8; see also 1925c: 88) noted that in many indeterminate sentence laws, the powers of the boards were not clearly defined, the criteria according to which they could recommend the release of the prisoner were only vaguely indicated, and the conditions of parole were not specified at all, but were left entirely to the discretion of the commissioners. However, a comparative survey of the application of the indeterminate sentence system in the United States undertaken by the Institute offered a different picture from that presented by the New York Prison Association report. Notably, the charge of excessive leniency levelled against the new method had no correspondence with the gathered data, which showed, conversely, that criminals sentenced

with indefinite punishment were held in custody for longer periods than those sentenced with fixed penalties (Lindsey 1922: 539, 1925c: 96; Butler 1908: 85; see also Dershowitz 1974: 303–4).[10] If it is true that the promises of the first reformers were not fulfilled, it is equally clear that any final judgement about indeterminacy could not be made until the correct method for its application was introduced and reliable nationwide statistics on its execution were collected. There was still a lack of reliable knowledge about the varying results of indefinite sentencing, and before proceeding with other abstract reasoning, Lindsey argued (1922: 541), 'it is time to suspend theoretical discussion and undertake detailed observation of the operation and results of the statutes we have'.

4.3.3 The rise of critiques against the new system

After the first half century of indeterminate sentence, the judgment did not seem completely positive either for the strengthening of its theoretical premises or for its empirical achievements. First, the key idea of an absolute indeterminate sentence, sponsored by the more relentless advocates of the measure, was no longer convincing. It was doubtful whether the reformation of offenders was better achieved by a system in which the prisoners were aware that their destiny depended completely on the prison officials' discretion (Lindsey 1922: 541). Second, it did not seem convenient to abandon the aims of retribution and deterrence completely. Indeed, punishment, in adherence to Durkheim's theses, was still profoundly perceived by the majority of people as a natural reaction of the legal order to crime: 'it accords with the moral sentiments of the great mass of people, including criminals themselves' (Lindsey 1922: 538). In a society in which punishment was seen as the necessary and fair consequence of crime, public morality was satisfied with the application of the sentence, and there was a consequential benefit for law-abiding citizens.

It is no surprise that dissatisfaction with the concrete workings of indeterminate sentence laws, due to the inappropriateness of the rehabilitative methods applied, the lack of knowledge of the parole boards, and the disillusion with the rehabilitative ideal

[10] Moreover, despite the good purposes, 'America's adult reformatories were ineffective and brutal prisons' (Pisciotta 1994: 103), which often failed to change the inmates into obedient and law-abiding citizens and workers.

among public opinion, received a further boost in this phase from European theories, which were highly critical of the indefinite sentence and were much more inclined to support fixed punishment combined with conditional release.

Between the 1920s and 1930s, the US reformatory movement seems to have exhausted the revolutionary enthusiasm of its origins. Although the legislative scenario seemed to testify to the success of the reformatory sentence, the applicative problems, the organizational deficiencies, and the administrative weaknesses of the treatment measures rose to the surface with increasing clarity and frequency, with no remedy theoretically devised or normatively provided. Many studies of the reformatory system continued to argue for the indeterminate sentence together with parole as the best method in the abstract, although they openly conceded, in its concrete enforcement, the inefficiencies, inconsistencies, oppositions in social belief, and failures of these measures. Let us examine a few examples. In 1928, a survey of the functioning of indeterminate sentence and parole in Illinois reaffirmed the advisability of reinforcing these methods; nevertheless, the study deplored the general distrust of parole boards due to their political conditionings, the deficiencies of their personnel and incompetence of the commissioners, and the inadequacy of detention centres (Bruce et al. 1928: 255, 260). The conclusions of the analysis were not so different from those that already characterized the contradictory discourses about reform by the beginning of the century and anticipated the reasons for its crisis. A few years later, the same arguments could be read in another report of the New York Prison Association (Wright 1936: 79–80).

Clearly, the rhetoric advocating for indeterminate sentencing had to react to the criticisms from different directions, employing more suitable arguments from time to time. To those who accused this method of being too cruel because it risked making the convict into an indefinite slave in the hands of the prison administrators, the reformist rhetoric responded by showing the statistics on increased conditional release on parole and emphasizing the achieved rehabilitation. Conversely, to those who openly criticized the excessive leniency of this model, the progressive discourse replied by exalting the major securitarian expediency of indefinite detention (see Bruce et al. 1928: 254).

The reforms introduced between the nineteenth and twentieth centuries in the name of individualization of punishment

developed in two different directions: the reformation of the offender; and the protection of society. The former characterized the first phase, whereas the latter prevailed from the first decade of the twentieth century because it was more comprehensive and included both rehabilitation, if possible, and permanent exclusion from society, if more convenient (see Norrie 1993: 215). The legitimacy of the state in imprisoning a criminal rests on the same foundation as the power to hospitalize a person with an infectious disease or to institutionalize a violent person with a mental illness in an asylum. Both the rationale guiding the action of the public power and the goal to be achieved are the same: the protection of the public. As Eugene Smith put it (1917: 254), the substitution of social protection for retribution clearly 'involves a revolutionary upheaval of its entire structure relating to penalties'. The main attention is shifted from the type of pain that the criminal may suffer in prison to expiate his responsibility to the type of treatment more suitable for 'the protection and well-being of the community'.

The indeterminate sentence is a device that, conceived 'in recognition of the principle of public protection as opposed to that of retribution' (Smith 1917: 255), coherently reflects the dual soul of the modern idea of punishment (i.e. reform and social defence). Indeed, if it emphasizes, on one side, the offender's potential to be rehabilitated, 'there is another side . . . often overlooked both by its advocates and its opponents' because 'it not only frees the man who deserves his freedom, but it continues to keep in prison the man who should not be permitted to return to society' (Schlingheyde 1919: 133, 134; see also Barnes 1926: 27). The contrast of this neutralization argument with faith in the possibility of reform for all criminals, as well as the manifest failure of treatment methods that are revealed to be incapable of rendering the prisoner less dangerous, seem not to have discouraged the advocates of indeterminate sentencing.

Even the observation that the indeterminate sentence has caused an average increase in the duration of detention is not perceived as a defeat of the rehabilitative ideal, nor is it considered prejudicial to the criminal's individual rights. To curb objections to indeterminacy mostly based on factual failures, US reformers have attempted to reassure public opinion and opponents by emphasizing the advisability of the new system to combat criminality due to more effective special prevention, which opens the door to the possible perpetual exclusion of dangerous criminals from society.

4.4 Conclusions

US criminological Progressivism, from the 1870 congress in Cincinnati through to the 1920s, followed a path that led to the theoretical recognition and enactment of indeterminate sentencing laws. This process was not always coherent, was forced to co-exist with unresolved contradictions, was required to increasingly shift the original humanitarian rationale of the reform towards a more reassuring logic of social defence and, finally, accepted the gap between the expected revolution and experimental failures.

The righteousness of the reform was never questioned, even in the 1910s and 1920s, when indeterminate sentence laws were criticized for a lack of uniform and scientific criteria for carrying out the new measure and prison boards were attacked based on their arbitrary methods and the spoils system they used to choose their members. Indefinite punishment, which was first used experimentally in certain penitentiaries and was later theorized as a general sentencing method and legitimized by courts, represents the core of the reformatory system and epitomizes the idea of individualization of punishment in the United States. In the international criminological scenario, this penological technique established itself as a peculiar characteristic of the US legal order, against which the European penology had to measure itself.

5

The Concept of Indeterminate Sentence in the European Criminal Law Doctrine

The indeterminate sentence represents a 'gift' from US to European scholars. However, as an example of where penal correctionalism can lead and of the consequences of taking the individualization of punishment seriously, indefinite detention also signals the limits of the reform movement's acceptability in European legal culture. Its confrontation with the US punitive system forces European scholars to rethink the scope of modern penology, reshaping the boundaries of the new criminal law in accordance with core constitutional values.

Indeterminate sentencing is a divisive subject, and the European legal culture is divided between its firm advocates and strong opponents: it is alternatively considered as the natural, progressive outcome of modern notions of crime and punishment destined to prevail everywhere (Lacoste 1909: 93) and as the spectre of a regression to forms of backward, arbitrary justice. The recurring discourses used by European jurists against indeterminate sentencing usually follow two arguments: first, they emphasize that the measure is in sharp contrast to the European tradition and legal history; second, they claim that the same goal can be better achieved using different instruments, such as conditional liberation, which are more consistent with the European legal tradition. On the one hand, Brockway's model is indeed considered to conflict with liberal achievements in diminishing administrative discretionary powers when freedom and individual rights are at stake. On the other hand, the proposal to make the execution of a sentence more flexible and adjusted to the offender's personality, his resocialization, or dangerousness is accepted, albeit in forms less radical than the indeterminate sentencing, such as conditional

liberation and, subsequently, preventive measures only for dangerous and 'abnormal' offenders.

The European trajectory of the indeterminacy principle was mainly determined by theoretical conflicts between conservative jurists, moderate reformers, and radical criminologists. The dispute took the form of a discussion on the rationale of punishment, in which disciplines other than law, such as psychiatry, medicine, and sociology, played a crucial role. This chapter examines the roots and outcomes of these discourses in the last two decades of the nineteenth century. Section 5.1 examines the origin and peculiarities of European penology, emphasizing the centrality of social security in reformers' discourses. Section 5.2 analyses the Stockholm Congress of 1878 and the theorization of a limited individualization. Section 5.3 describes the emergence of a European alternative to the US system, characterized by an indefinite supplementary detention for incorrigible offenders to be decided by a judge. Sections 5.4 and 5.5 examine the sociological retributivism of Durkheim and Tarde and its impact on the penological debate of the late nineteenth and early twentieth centuries. Section 5.6 examines the consolidation of a Janus-faced notion of indefinite sentence in Europe, as reformative and/or security detention, between the 1890s and the 1910s. Section 5.7 focuses on the conceptual effort to distinguish normal and abnormal offenders, because only to the latter category should preventive detention be applied.

5.1 The Origin of a Genetic European Identity in Penology

The idea of indefinite punishment started to circulate in the European legal culture in the 1880s, prompted by Italian, French, and German scholars. The formulation of the indeterminate sentencing proposal postulated building a completely renewed penology grounded on the theories of modern criminological reformism. A real rethinking of the sentencing phase, which is only the final step of the complex state machinery of punishment, indeed implies a transformation of the entire conceptual apparatus upon which punishment is founded and legitimized, encompassing the scope of the criminal law, the notion of crime, and the criteria for liability.

Jurists, physicians, and psychiatrists considered the choice of indefinite punishment as the logical consequence of a criminal law system whose rationale should shift from repression to prevention. Preventive detention, whose length cannot be determined in advance but should necessarily be indefinite and flexible, was not simply an experimental method to better re-educate the offender, but resulted from the theorization of a penal system that rested on determinism, social defence, and dangerousness of the individual criminal.

5.1.1 Garofalo and the positivist criterion of punitiveness

In 1880, Garofalo worked out a first, summary programme of the new criminal law, no longer rooted in the illusory idealism of the liberal credo, but based on a naturalistic and scientific-experimental basis. The logical consequence of his articulated theoretical edifice was the possibility of imposing indefinite sentences on some categories of criminals. After noting the failure of both the substantive and procedural criminal law based on retributive justice, rooted on the foundations of free will and uniformity of sanctions, the Neapolitan professor proposed abandoning the classical criterion of responsibility, whose fallacy had been proven by experimental sciences, and to replace it with what he defined as the 'temibility criterion'. Garofalo (1880: 33) also stated that free will, widely considered as the core element of individual criminal responsibility, 'eludes us, it disappears, it vanishes in front of us'. The index of temibility was the new positivist criterion of penality, based on a notion of future social danger measuring both the degree of community fear caused by the crime and the likelihood of recidivism (Garofalo 1880: 50).

This principle, which in Garofalo's opinion (1880: 52) would 'radically transform the legislation', should also determine punishment, which has to be coherently adjusted to the temiblity of the offenders and exclusively targeted to the public interest of prevention. Therefore, the sentence must be adjusted according to a double indicator, considering both the seriousness of the offence (very serious, serious, or petty) and the type of offender (hardened, habitual, or not habitual). Petty offenders should not be sent to prison, whereas undeterrable delinquents, such as habitual and professional criminals, should be punished more severely.

Garofalo, like many criminal law scholars at the end of the nineteenth century, thought that the efficacy of criminal justice relies on its capacity to prevent recidivism. As a consequence, he sought to find 'types of punishment that make relapse absolutely impossible, i.e., methods to render the criminal harmless' (Garofalo 1880: 73). However, he did not fail to admit that even more persistent offenders can be reformed: for them, instead of perpetual detention, he suggested imposing imprisonment for an indefinite time in workhouses using the Irish method. According to Garofalo, this 'ticket of leave' method, based on 'marks' earned for industriousness and good behaviour and the use of progressive phases from solitary confinement to conditional release, should not be applied to determinate sentences, as in the past, but to 'unlimited sentences', so as to assure that only prisoners considered to be truly 'corrected and intimidated' would be released, while incorrigible prisoners would be perpetually neutralized (Garofalo 1880: 74, 75–6).[1]

In 1868, French physician Prosper Despine (1868: 388) suggested punishing those offenders lacking in moral sense and free will not with the usual punishment, but instead with a 'moral treatment' intended to change their egoism to good character. So as not to be considered an 'enthusiastic and blinded utopian', Despine clarified that this method, based on modern psychology, had already been successfully applied in some juvenile penitentiaries. According to him (Despine 1868: 389), even adults—both criminals and individuals who, even though they have not committed any crimes, show a kind of inclination to criminality—should be 'separated from society and sent to a special asylum' for moral treatment. This 'sequestration' should not be perceived by the detainees as a form of expiation, punishment, or vengeance, and its methods should be exclusively tailored to both their moral correction and social security. The time to achieve a convict's complete moralization could not be decided in advance, because they

[1] Garofalo (1880: 86) admitted the death penalty on the basis of general deterrence in some cases of aggravated homicide. In his later book *Criminology* (1914: 410–12; Italian 1st edn 1885), he suggested absolute elimination through capital punishment for murderers and relative elimination for criminals of the other classes: internment in an overseas penal colony for life for habitual or professional thieves; internment for an indeterminate period for thieves who are recidivists but not professionals; and confinement for an indeterminate period in an asylum for insane persons and victims of chronic alcoholism.

should be detained and treated until their true rehabilitation has been achieved.

Modern psychology's scientific contribution leans towards a complete abandonment of the classical notion of retribution and forces in favour of considering the criminal as a morally insane individual, governed by deviant desires, who must be treated rather than punished, moralized rather than sentenced. In Despine's opinion (1868: 391), the measures that should be adopted in these 'asylums' for the reconstruction of convicts' moral sense are based on control and motivation: it is the task of the supervisory staff to study the detainees' characters and help them to develop their morality 'by inculcating the idea of order and imposing the habit of and passion for labour'. Clearly, the European narrative on indeterminate sentencing is influenced, in its very origins, by what we can summarize as the Foucauldian theme of governmentality: the ideas that individuals ought to be controlled and disciplined, that deviant citizens should be corrected through education, and that offenders should be subject to the treatment of their heterogeneous inclinations and required to work rather than being punished.

Even though the discourse is then brought within the boundaries of legal reasoning and is translated into laws, rules, and institutions, the essence of the change in punitive methods has cultural roots, which cannot be considered only from the normative perspective (Chauvaud 2000; Dinges 1994; Foucault 1978, 2008). The subject of punishment, with all of its philosophical and political implications, seems to be at the crossroads of legal and experimental science, between law and psychiatry: the different approaches influence each other, are interlinked, and collide until together they shape a new form of justice, swinging between punishment and treatment, rehabilitation and elimination, prevention and repression.

5.1.2 Psychiatry, determinism, and the need for social protection

In 1880, the same year as Garofalo's work *Di un criterio positivo della penalità*, the German eminent psychiatrist Emil Kraepelin published *Die Abschaffung des Strafmaßes* (*The Abolition of Punishments. A Proposal to Reform the Present Criminal Justice*), in which he, too, rejected the retributive theories and endorsed social defence as the proper scope of criminal justice (Wetzell 2000: 42–6, 2004: 65–8). He also claimed that the duration of

detention should no longer be decided by judges. If, indeed, punishments are to be considered as instruments of education and correction intended to reform offenders and neutralize their dangerousness, it is illogical to believe that the necessary and sufficient duration of the deprivation of liberty to achieve this goal can be decided either in the abstract by the law or by the judge at the time of the verdict. Rather, this task should be entrusted to prison officials responsible for executing the sentence and experts in psychology, psychiatry, and criminology with the ability to study the convict's conditions and character through a long, continuous observation. Two years later, the German judge Anton Willert wrote an essay in defence of Kraepelin's proposal based on the 'social protection' theory (*Schutztheorie*).[2] According to Willert, given that punishment is simply a mechanism to protect society against the danger of potential criminal behaviours, it must be applied only as long as that danger exists and never beyond it.

The likelihood that a judge will hand down an appropriate sentence, an idea advocated by classical theorists, is a fallacy, as proven by the fact that the verdict represents a final decision. 'The trial builds an apparently conciliatory conclusion', after which the criminal disappears, the jurists' scientific interest in him ceases, and he is free to return to society to commit other crimes as soon as he is released (Willert 1882: 484–5). Referring to the well-known parallel between physicians and judges, Willert compared determinate sentencing with a decision to release a patient from hospital before having tested the efficacy of his therapy. For the sake of justice, Willert ironically continues, criminals return to society even if everybody knows they remain dangerous.[3] The 'social protection' theory is the only solution to this problem, because 'the main criterion for the need of penal measures is dangerousness; but the sentence must be adjusted to the personality of the offender, case by case' (Willert 1882: 485).

From the viewpoint of social defence, any decision related to sentencing—that is, if and when a convict should be released—ought to be entrusted to administrative officers who are well trained in criminological knowledge. Even though this expertise

[2] Garofalo (1882), commenting on the system suggested by Kraepelin and Willert, considered their ideas an exaggeration, because they implied the risk of the prison officers' unlimited discretion.

[3] For similar comments, see Liszt (1905b: 153).

is undergoing a progressive evolution and is still not widespread, the need for its improvement does not justify a wholesale rejection of the new method. Willert used the adjective 'pharisaic' when he referred to the position of those who invoke the ghost of administrative discretion in punishment and then grant to the police the power to imprison dangerous criminals who have finished serving their sentences, without any trial and purely on the basis of preventive measures.

Ten years after Brockway's address to the Cincinnati Congress in 1870, the indeterminate sentence idea also started to circulate within European legal culture as part of a systematic project to rebuild the overall criminal law. There are, however, genetic differences between the European and US discourses due to the peculiarities that characterized the European discourse from its very beginning. The European approach, indeed, is eminently scientific. Whether it originates from a legal perspective, as in Garofalo, or whether it takes psychiatric studies as its basis, as in Kraepelin, the idea to substitute determined sentences with flexible ones took shape at the end of a complex analysis of the legal fundamentals and the neurological and behavioural premises of liability (Klippel 1890). The theoretical foundations of criminological positivism, from which the demand to change punitive techniques arose, are based on close communication between the legal and scientific circuits (e.g. medical, psychiatric, and anthropological fields).

Before adopting the new penology, it is necessary to rethink the principles of criminal responsibility and dangerousness, together with the scope of punishment: unlike the pragmatic US reform, the European indefinite sentence is grounded on a comprehensive cultural project that is in progress. As Ferri states (1882: 68), this idea emerges as 'a notion that may be acceptable and surely is worthy of consideration', not only because it responds to practical demands, but also because it is consistent with a positivist theory of a criminal law that is offender-oriented, not crime-oriented, aimed at social defence and based on the psychiatric research revealing the non-existence of free will and the decisive influence of social and organic factors on human behaviours.

5.1.3 Indeterminacy as a means of social security

Another original characteristic of the European debate on indeterminate sentencing is its close connection to the theory of

social security. If the humanitarian argument was given significant weight by the first US reformers to persuade the public and the courts of the advantages of the new method, by contrast in Europe the rhetoric in support of the new type of sentence used the leverage of the way in which it increased public safety by eliminating dangerous offenders from society. The rehabilitative feature of preventive detention, with its image of the convict who is responsible for the keys to his own prison, is not emphasized—at least in the first instance; rather, coherent with the retributive thesis, the collective benefits granted by the incapacitation of habitual and professional criminals are highlighted (Freudenthal 1908: 276). The purpose of indefinite punishment, as the German jurist Berthold Freudenthal explains (1908: 268), is to transform the enemy of society and the state, the parasite, into a useful individual and citizen. If transforming this enemy into a law-abiding citizen is the primary scope of the indeterminate punishment, its secondary aim is to neutralize the offender (*Unschädlichmachung*), and the third goal is that of general deterrence achieved through the threat and application of long-term detention (Freudenthal 1908: 269).

From the very beginning of the European cultural journey towards indeterminate sentencing, therefore, it has been possible to single out some unique traits that also characterize the later developments of the institution, its progress, and its transformations. The idea that a flexible mechanism of detention and exclusion beyond the classical notion of punishment is necessary for the class of criminals labelled as dangerous and persistent is bound to have, as we shall see, not only long-running success, but also a remarkable impact on Europe's institutionalization of the dual-track system. The debate that for more than fifty years has involved legal science on the one side of the Atlantic, as opposed to what happens on the other side, bears the imprints of a different cultural, political, and legal identity, which is properly formed via its contraposition to the 'other' model.

5.2 The Strict Legality of Sentencing and Individualization 'as Far as Possible'

The international theoretical dispute about indeterminate sentence is a complex laboratory of ideas, draft bills, and congress resolutions, which, although not legally binding, represents eloquent

testimony about the prevailing scientific stances. Indeed, all of the delegates to international congresses belong to the cultural, political, and academic *élite* of each state and most of them actively contribute to the law-making process in their home countries. The issue at stake does not address the problem of the concrete execution of sentences exclusively; rather, it concerns in a broader sense the conflicting philosophies of punishment, the balance of powers between the judiciary and the executive branches of government, and the individual rights of both criminal defendants and convicts.[4]

At the 1878 International Penitentiary Congress held in Stockholm, the subject of the indeterminate sentence was not tackled directly, but the related problems of the normative definition of the sentencing methods and arbitrary powers left to prison administration were discussed.[5] There were two opposing positions: the first sought a sentencing phase strictly regulated by the law; whereas the second called for a wider discretion to be given to prison wardens. The first opinion arose out of a rigidly retributivist and afflictive perspective on punishment, which considers the uniformity of sentences consequent to formal legal equality as a non-negotiable aspect of modernity. It is the result of pure liberal thought, perfectly expressed in the writings of the renowned Italian jurist Francesco Carrara. In 1863, the Tuscan criminal law professor firmly rejected the principle of moral correction as a basis for punishment. The infliction of punishment is 'the firm and inescapable consequence of every crime', and, consequently, it must be certain, 'unavoidable and cannot depend on future circumstances' such as the offender's correction (Carrara 1870a: 196).

Carrara (1870a: 203; see also Colao 2010) was not only afraid of the possible 'supervision of conscience' by public authorities which, by ascertaining the offender's true rehabilitation, could become 'tyrants of the citizens' religious beliefs and political opinions'. He also considered the correction of the convict merely as a consequential effect of punishment, which could never forget 'the primitive foundation of its legitimacy, i.e. the defence of the

[4] The theme was widely investigated by comparative studies such as De Asúa (1913); Freudenthal (1908); and Lacoste (1909).

[5] For the discussion on the first Question of the first Section, see *Le Congrès ... de Stockholm* (1879: 109–38).

law; and its peculiar purpose, i.e. the restoration of peace among honest people'. Indeed, the possibility of stopping the sentence as soon as the offender is corrected nullifies the defence of the law and removes certainty from punishment, which is its most effective element. Even provisional release is, from Carrara's perspective of absolute justice, 'full of perils for the social peace' (Carrara 1870a: 213, 1870b).

Although, at the time of the Stockholm Congress, this traditional classical standpoint seemed, as the Danish delegate Goos stated (*Le Congrès…de Stockholm* 1879: 114), 'completely opposed to the purpose of the prison reform movement', it was still the prevalent opinion. Among others, the Belgian delegate Thonissen, a consistent champion of liberal legalism, confirmed that if the nature and duration of sentence were not carefully determined by the legislature, there would be the risk of 'bringing discretion and inequality into a sphere where equality should reign above justice and uniformity should be granted before executive power' (*Le Congrès…de Stockholm* 1879: 120–1). Inequality in the application of punishment would indeed be 'the overt and outrageous denial of the fundamentals of modern public law' (*Le Congrès…de Stockholm* 1879 (Thonissen): 122; see also Schönmeyer at 134), grounded on the absolute primacy of the law, the separation of powers, and the firm defence of formal equality.

If the modern goal of punishment is rehabilitation of the offender—counter argued Goos, the other Belgian Berden, the Dutch Pols, and the Italian Canonico—it is necessary to go beyond this traditional scheme, reach a rational compromise, and find more flexible solutions that take into account the individual offenders to be corrected. 'First of all', Goos claimed, 'it is necessary to individualise. Saying individualisation is like saying discretionary power, because without this type of power it is impossible to individualise' (*Le Congrès…de Stockholm* 1879: 114). For all reformers, the individualization principle cannot coexist with the idea of the strict legality of punishment and, therefore, it is necessary to adjust the pure Enlightenment approach to the modern penological convictions. If, as they claim, the essence of the law as a safeguard lies in limiting despotic power, lawmakers cannot confine themselves to fixing general universal rules for sentencing, but delegate the task of individualizing to the prison administration.

The general assembly of the congress finally adopted a compromise resolution.[6] It was just a modest recognition of the practical and theoretical consequences of the individualization principle, far from what advocates of the indeterminate sentence claimed in the United States at that time. The report of Enoch Cobb Wines, one of the US delegates at the Stockholm congress, openly advanced more innovative reforms than those passed by the congress, such as indefinite sentences. The European doctrine, instead, continued to have confidence in the traditional purpose of punishment, retributive and proportioned to the crime, even when it supported the introduction of conditional release. This measure, indeed—as the French magistrate Bonneville de Marsangy argued (1878: 557)—is 'sort of half-way' between granting the pardon and serving the sentence: the conditional release, 'far from weakening the repression, fortifies it; far from being an expense for the State, it allows to cut costs', instead of dismantling the prison system, reinforces the ideas of discipline and correction, and, finally, as the punishment itself, 'has the merit to be rooted in the more indisputable principles of reason and justice'.

Only the prospect of overcoming the strict legality of a punishment rigidly defined within legislative borders puzzled the European criminal law science and provoked strong opposition. Reforming the principle of legality, the core of the liberal criminal system, crashed against the unquestionable ideals of legal liberalism achieved through the Enlightenment, because it evoked the reappearance of the executive's authoritarian power in opposition to which all modern public law was built. The firm separation of competences, equality before the law, and confidence in the symbolic, educational value of uniformity in punishment were still considered untouchable tenets. The Congress of Stockholm was still too rooted in the European liberal penal system and the impact of the prison reform movement was not yet supported by

[6] *Le Congrès…de Stockholm* (1879: 637): 'While maintaining uniformity in the mode of applying the punishment, the congress is of the opinion that the administration of the prison should possess a discretionary power within limits determined by the law, to the end that it may, as far as possible, apply the spirit of the general regime to the moral condition of each prisoner.' This resolution is contradictory, as it seeks to make the sentencing flexible according to the characteristics of the offender, but without encroaching on the principle of equality and proportionality.

the arguments of criminology. They were reduced to nothing more than an 'individualization so far as possible'.

5.3 The Theoretical Conflict and the Building of an Alternative

The resolution passed at the 1885 International Prison Congress in Rome concerned the latitude of the powers given to judges in determining punishment, and did not mention indeterminate sentencing. It only provided that, for each crime, the law must determine the maximum limit of the sentence, which cannot be exceeded by the judge's decision, and the minimum could be reduced in the case of mitigating circumstances.[7] This resolution, which in Ferri's words (1900: 841) reflected 'excessive classical individualism', was the result of the prevailing conservative school, whose main exponent at the Rome congress was the Italian criminalist Enrico Pessina (Miletti 2015).

Nevertheless, Gerard van Hamel's report suggests, for the first time, a limited use of the indeterminate sentence, thus introducing the notion to the European theoretical debate. Van Hamel (1887: 100) started from the fundamental conceptual antithesis between the 'principle of revenge' and the 'principle of social defence', which, after the Stockholm congress, aroused much interest thanks to the German jurists' theories, the Italian school of criminal anthropology, and the French law on recidivism (Law 27 March 1885). Both the omnipotence of the judge and the supremacy of the law are, he pinpointed, outdated ideas, because if on the one hand, the courts were to have overly comprehensive power to determine the sentence, there would be inequality, uncertainty, and a risk of discretion about decisions. On the other hand, a too-detailed legislative provision could not do justice to each individual case.

Van Hamel suggests classifying criminals into three categories: habitual irredeemable; habitual redeemable; and occasional. For the irredeemable offender, 'punishment should be indeterminate, i.e., perpetual in principle', and the line between corrigibility and incorrigibility cannot be drawn in advance by the law, but ought to be verified case by case. It is consequently necessary 'to

7 The resolution is in *Actes du Congrès pénitentiaire international de Rome* (1887: 745).

divide the trial into two phases' (van Hamel 1887: 102): the court will decide about the accused's crimes and then the convict will be sent to a special institution for unreformable criminals where he will be under watch and his earlier crimes will be examined. For habitual criminals who can be reformed, he suggests inflicting, after the ordinary punishment, an indeterminate time of detention as a supplemental sanction. Finally, for the occasional offender, the traditional system with fixed penalties proportional to the seriousness of the crime can be retained.

Clearly, this is a nebulous description of the indefinite sentence, based on a complex interaction between legal prescriptions and judicial decisions, with notions and categories only abstractly defined, with too-vague legislative limits on judicial discretion and with a proposed bifurcation of trials without any clear distinction of roles, functions, or powers. In van Hamel's report, we find some of the issues that are later discussed more systematically, such as social protection, the knot of the relationship between the judge's procedural knowledge and the competence of experts in other disciplines, and the possibility of adding (not substituting) indefinite sentences to determinate ones. However, the totality of his proposal seems eccentric and unconvincing. In fact, during the general assembly's discussion, dominated by the thesis and authoritativeness of Pessina, the Dutch professor's report is hardly ever taken into consideration. In his report, Pessina (1887: 111) considered the indeterminate sentence as simply 'an absolute contradiction of the nature and purpose of criminal justice' and strongly criticizes this idea.

The prevailing sentiment is always that punishment must be defined by the law, applied by the judge with the minimum amount of discretion necessary to adjust it to different cases, and proportional to the crime, not tailored to the criminal. Nevertheless, this is a very reductive form of individualization, essentially limited to the judicial balancing of circumstances and to the ability to grant conditional release, forced into an impossible compromise with the classical principles of equality, certitude, objectivity, and proportionality of punishment (Pessina 1887: 111–12). The principle of legality, as Pessina wrote in 1906, rules out every possible form of indefinite detention. Indeed, the formula *nulla poena ultra nec supra legem* implies that the law 'cannot and must not determine all that is related to punishment, but should fix the maximum limit beyond which the social power to punish cannot go'. In individualizing the

punishment, therefore, judges should certainly take into consideration extenuating and aggravating circumstances, both subjective and objective, but always ought to remain within the strict 'boundaries of the legal maximum' (Pessina 1906: 15–16; see also Guidi 1902–05: 387–8).

Van Hamel's report, which was marginalized at the Rome congress, nevertheless opened a new field of discussion among European jurists. The two decades at the turn of the twentieth century were particularly decisive in the formation of a European notion of indefinite sentence distinct from that in the United States. This notion was of a cultural and legislative process that aimed to incorporate the advantages of indeterminacy in the European legal order, but rejected the characteristics of the US indeterminate sentence system which contrasted most sharply with modern European legal history. Indeed, the theoretical basis for the implementation of conditional release and other alternative measures was consolidated in these decades, and it was in discussing this topic that legal science came to define the so-called dual-track system.

The need to differ from the overseas model forces criminologists and scholars engaged in projecting the criminal law of the future to face more problematic questions about indeterminate sentencing in light of the cultural and constitutional features of the *Rechtsstaat*: the outcome will be, as we shall see, the elaboration of a hybrid framework that seems to enshrine some typically liberal guarantees, but still satisfies a logic of pure social defence.

5.3.1 Indeterminate sentences as supplementary punishment

In 1893, Alfred Gautier, criminal law professor at Geneva University, published a long essay analysing the pros and cons of the indeterminate sentence. He did not want to take a stand, because, as he confessed, he was still undecided. Nevertheless, Gautier's work provides a precise description of the contrasting positions at the beginning of the 1890s. The reasons for his scepticism are not theoretical, because for each of those reasons—the emptying of judicial powers, the marked contrast to legal tradition, the risk of discretion, the lack of legal basis, and the uncertainty of the criteria to verify rehabilitation—it is possible to find a convincing counter-argument. Gautier's doubts concern

the workability of the system, with particular reference to three questions: how to choose the members of the prison board; to which class of convicts indeterminate sentences should be applied; and how to determine the length of detention. Having first considered the theoretical possibilities of indeterminate sentence and then realizing its practical unfeasibility, in the end Gautier (1893: 50) took a firmly critical and dispirited position: 'I do believe that the introduction of a punishment not determinate by law is neither desirable nor possible anymore.'

Gautier's article created a great deal of interest. For European penology, it represented a turning point that could have either marked the final rejection of indeterminateness or stimulated its acceptance, albeit in different forms. That same year, the *Revue pénitentiaire* published a comment by Gabriel Vanier on Gautier's essay, which was highly critical of indeterminate sentence. The model of Elmira, Vanier claimed, could not be imported to Europe wholesale because of its exaggerated discretion, the uncertainty in the composition of the board of prison, and the uniformity with which it sanctions different crimes. The French magistrate, on the one hand, firmly rejected any restoration of judicial or administrative discretion, in which he saw 'the reintegration of the ecclesiastic punishment', and on the other hand, convincingly supported 'the old ideas of justice and penal expiation that inspired the ancient laws and have presided over the implementation of the law' (Vanier 1893: 748). The French legal order, he continued, already includes pardons, conditional release, a prison system that aims to correct the detainee, and the *société de patronage*. All of these efforts tend to the public utility, but 'do not replace the foremost right of the society to punish the offender' (Vanier 1893: 749). As Vanier's essay demonstrates, both the idea of retributive justice and the opposition to every form of judicial discretion are deeply rooted ideas in the European legal community.

Also in 1893, the fourth session of the IUPL in Paris addressed the topic of indeterminate sentence in the second question of the programme. Van Hamel presented a new report, which was much clearer than his 1885 report regarding the theoretical foundations of the measure and the propositions for its concrete application. Indeterminate sentences, he stated, ought to be used only with habitual or incorrigible offenders and constitute neither a general method nor one that can be applied only to juvenile delinquents or

first-time offenders, as in the United States. There is an essential difference in the rationale underlying indeterminacy on both sides of the Atlantic. Although US indeterminate sentences are indeed 'in favour of the criminal' and aim to shorten the length of detention, conversely, in Europe, the principle 'of indefinite sentences against dangerous and incorrigible offenders is set up to favour social security' (van Hamel 1894: 290).

Consequently, the US experience should be evaluated with great caution, because if the same measure is used for two different purposes—serving the criminal versus society, or rehabilitating the offender versus guarding public safety—it must be carried out by different actors. The recipients of the treatment and conditions of applicability are different with regard to the corroboration of both the tendency to commit crime and social dangerousness. The Dutch professor considered incorrigible those criminals who, due to their inclination, represent a constant danger to society. The core argument to justify the indeterminate sentence systems, he argued, is related to the answers to two questions: (1) When can these people be released? and (2) Who has the competence to decide when to release the offender, using which procedure (van Hamel 1894: 295)?

Fundamentally, for those categories of criminals, talking about indeterminate sentencing means talking about indefinite imprisonment and absolute vagueness about its duration becomes the rule. There cannot be a maximum limit, as in the United States, because such a limit would nullify the institution of indeterminacy. This way, 'indefinite detention has the character of a supplementary punishment' (*Zusatzstrafe*), conceptually similar to what many laws already provide (e.g. laws providing for workhouses for vagrants and beggars and the French law providing for deportation) (van Hamel 1894: 299). Van Hamel perceived the vital importance of the point, because it provides indeterminateness with new and very useful possibilities of application in a securitarian manner. Indeed, as a supplementary punishment, indeterminate detention clearly and unequivocally assumes the characteristics of a measure of defence (*Verteidigungsmaßregel*), not of rehabilitation. As for its application, to better guarantee individual rights, he stated, 'I would recommend the judicial authority and the ordinary criminal procedure' (van Hamel 1894: 303), and he also suggested the creation of a court of justice to make the decisions consistent with the right to a fair trial.

5.3.2 The defence of judicial sentencing powers

Since its very beginnings, the matter of the prison board's composition has been perceived by European legal scholars as a problem related to judicial safeguards in sentencing. That theme, which has been debated time and time again, is considered not only the core of the reform, but also the main impediment to its practical realization. Without emphasizing the sharp divide with the functions and structure of US prison boards, the indeterminateness principle cannot be accepted in Europe: indeed, in the post-Enlightenment and post-revolutionary European juridical tradition, attributing competences to an administrative body that so deeply infringe on individual freedom represents an insurmountable difficulty. Although the theoretical justifications of indefinite detention can be acknowledged in the light of the social defence, its concrete operation jeopardizes the entire reform project by calling to mind the discretion of the *Ancien Régime*. Beyond the growth of the welfare state's administrative functions between the nineteenth and twentieth centuries—which also influenced individualization methods—the early European debate on the pros and cons of indeterminate sentence already indicated that there was a need to follow a different path from that in the United States. The US reformers' arguments, which advocated the constitutionality of the indeterminate sentence laws with reference to the separation of powers, cannot be reconciled with European legal thought.

The introduction of characteristics of an administrative trial into the sentencing process would be seen as an irrational return to the system that was in place before the French Revolution, which lacked safeguards in precisely the area in which they were needed the most, given their effect on individual freedom. At the Paris session of the IUPL, the primary criticisms of van Hamel's report focused on that point.[8] Moderate reformers, in line with the continental mainstream at the turn of the century, argued that the inalienable guarantees given by the fixed-penalties system were 'one of the greatest achievements of the Revolution' (*Vierte… Vereinigung* 1894 (Bérenger): 334), and stressed the convenience of continuing to use the proven method of conditional release, which permits the

[8] Bérenger asserted that it is impossible to prove the incorrigibility of the offender by watching his or her behaviour in prison. Le Poittevin, professor at the Paris University, insisted that sentencing powers should be given solely

same flexibility without impinging on the determinate sentence system and judicial prerogatives.[9]

The European penal codes—and this is the primary argument—should have already found their peculiar form of individualization through the use of conditional release, compatible with the liberal legal order, modern but not revolutionary, because it permits the consideration of an offender's rehabilitation without dismantling the theoretical apparatus, institutional balances, and sentencing authorities created for the criminal law system of the *Rechtsstaat*. Indeed, as Prins noted (*Mitteilungen* 1894: 333), indeterminate punishment and conditional release rest on two different logics, are not alike, and imply diverse risks: indeterminate sentence delegates the decision about the length of an offender's detention to the discretion of prison officers; conditional release, at most, can allow the early release of an offender who remains un-rehabilitated, and 'that is an infinitely lower damage'. In Prins's report, presented at the following IUPL session in Antwerp in 1894, the direction of European penology seemed to be defined. The Belgian criminologist first explained that the US scheme went 'too far' and was 'contrary to the spirit of the modern public law', according to which the duty of the judge to decide a determinate penalty was 'a safeguard for the freedom of all citizens' (Prins 1896: 77). A parallel to the European experience cannot be drawn, because whereas the US reform was applied to select convicts—that is, first offenders subjected to special educational treatment for their reintegration into society—the indeterminate punishment discussed 'on the continent is exactly the opposite' (Prins 1896: 77). It was neither a matter of social protection nor a matter of re-socializing first offenders, but was rather a matter involving 'social preservation' and persistent criminals, for whom indefinite punishment was 'the antithesis of the system applied at Elmira' (Prins 1896: 77; see also

to judges because praxis has shown the dangers of administrative decisions (*Vierte… Vereinigung* 1894 (Le Poittevin): 328). In a later report presented at the International Congress of Comparative Law held in Paris in 1900, Le Poittevin (1907: 386, 390) stressed the firmness of the principle *nulla poena sine lege* and argued that both judges and prison administrators must operate only within the margins of discretion given by the national law, although in many international congresses leading exponents of criminology and penitentiary science generally theorized the need for a broader judicial or administrative sentencing power.

[9] See, e.g., Russian jurist Foinitzky (*Vierte… Vereinigung* 1894: 328–30) and the French jurist Léveillé (*Vierte… Vereinigung* 1894: 326–7).

Vierte… Vereinigung 1894 (Liszt): 327). Understood in this way, he went on, it was unsurprising that the proposal aroused criticisms and doubts among jurists: it was as though in crossing the Atlantic, the original idea was transformed into something else, had lost its most innovative and useful traits, and no longer held any attraction. According to Prins, the European model, which was clearly explained by van Hamel the year before, granted too many powers to prison wardens and relied upon possibly hypocritical moral reforms in prison.

For this reason, it is much better to resort to conditional release, which has a goal that, compared with indeterminate sentencing, is not to extend a dangerous offender's detention indefinitely, but rather to shorten the detention of a prisoner worthy of indulgence (Prins 1896: 79). Whereas indeterminate sentence requires radical changes to the legal order, conditional liberation offers the possibility of making a penalty more flexible without disrupting the entire system and without abandoning fixed penalties, which remain 'the safeguard of individual freedom' (Prins 1896: 80; see also Gautier 1893: 62–76; Proust 1883). Ongoing changes in much legislation, which tend to introduce supplementary penalties following expiration of the ordinary ones, such as internment in workhouses or asylums for dangerous offenders with the possibility of release through conditional liberation, are the way in which lawmakers defend society from professional delinquents 'without compromising the bases of the modern public law, without extending indefinitely the penal regime' (Prins 1896: 83).[10]

At the end of the nineteenth century, European scholars and legislators drafted different alternatives to detention, with the dual aims of mitigating the severity of penal sanctions and controlling dangerous individuals (Sanchez 2005). Within this framework, the function of the indefinite punishment vanished, because other remedies could achieve the same goal without implying risks or distorting the rules. As Prins put it (1896: 83, 84), 'what is to be

[10] Prins refers to: (1) arts 26 and 27 of the Belgian Law 1891 on repression of vagrancy and beggary, allowing the judge to provide that, in case of condemnation of an offender younger than the age of 18, the convict can be sent to an education institute when he comes of age, after having served the punishment; (2) art. 32 of the Dutch Penal Code allowing the judge the choice to send some convicts to a workhouse; (3) the amendment drafts of the French and Swiss Penal Codes providing the internment in workhouses as supplementary penalty.

introduced into the penal system is not indeterminateness, but diversity. The vice does not stand in the fixity, but rather in the uniformity of penalties.'

The European theoretical debate on indeterminate sentencing characterizing the early 1890s anticipated the typical elements that led to the gradual elaboration of an autonomous penal system, which was reformed compared to the liberal one, but was not in opposition to it. Although the new system was open to the requests of criminological positivism, it never went beyond the boundaries of the principles of legality and the judicial jurisdiction, and was oriented to social defence without abandoning retributivism. The arguments used to shape this identity were different, but converged on some fundamental elements: (1) the theoretical acceptability of the principle of indeterminateness in the abstract, but the acknowledgement of its practical unfeasibility (see, e.g., Altavilla 1915); (2) the difference between the European and US systems; (3) the possibility of imposing indefinite detention not as ordinary punishment, but as a supplementary measure; and (4) the preference for conditional release rather than indeterminate sentence.

A further, relevant contribution to the formation of European penology was provided by sociological studies on the purpose of punishment. Thanks to Durkheim and Tarde, an approach to the problem of criminality different from the approach of the Italian Positivist School was taking shape, particularly in France: with the methods and arguments of sociology, it claimed the 'normality' of crime and the utility of the retributive dimension of punishment.

5.4 The Sociological Retributivism of Durkheim and Tarde

The year 1893 was a crucial time in the European history of indeterminacy. That same year, the sociologist Émile Durkheim published *De la division du travail social* (*The Division of Labor in Society*), which opened new perspectives on criminal law and criminology studies. With regard to Durkheim's complex contribution to the study of criminality (Cladis 1999; Costa 2001: 104–7; Digneffe 2008; Garland 1993: 23–82; Melossi 2002: 73–88), I stress the critical impact of his theory on the debate surrounding the essence of punishment and the admissibility of indefinite segregation. For Durkheim (1968: 108), punishment 'does not serve, or else only serves quite secondarily, in correcting the culpable or in

intimidating possible followers', because 'from this point of view, its efficacy is justly doubtful and, in any case, mediocre'. Instead, 'its true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience'. Durkheim defines crime as 'an act contrary to strong and defined states of the common conscience' (1968: 105), as an action attacking the 'collective body' that 'brings together upright consciences and concentrates them': among the members of the social body, it generates a sentiment of solidarity that finds expression in the repressive law. Punishment, in representing the unanimous disapproval of the criminal act and in giving satisfaction to public resentment, bears witness to collective sentiments, reinforces them, and strengthens both community members' sense of belonging and their social solidarity (see Garland 2012). Punishment, therefore, must consist of pain inflicted on the offender that, instead of being wanton cruelty, is a necessary sign to confirm the communion of spirits and a gesture towards repairing the evil imposed on society by the crime. That is why, Durkheim argues (1968: 108), it is fair to say that the offender must suffer in proportion to the committed crime, and 'why theories which refuse to punishment [sic] any expiatory character appear as so many spirits subversive of the social order'.

The argument made by Durkheim in opposition to the theories of social defence or pure rehabilitation is that punishment 'is above all designed to act on upright people' and not on criminals, because, given that its purpose is to heal the wounds inflicted on our collective sentiments, it 'can fill this role only where these sentiments exist, and commensurately with their vivacity'. This idea of punishment, Durkheim claims, reconciles the two contradictory theories of expiation and social defence: 'it is certain that it functions for the protection of society, but that is because it is expiatory', and as a consequence, to be expiatory it must be painful, not for mystical reasons, but because that is the only way for punishment to produce its socially useful effect (Durkheim 1968: 108–9).[11]

[11] The same year, Édouard Gauckler (1893), at that moment professor at the University of Caen and later at Nancy, also wrote an essay on the sociological meaning of punishment, in which he argued that the current social idea of justice was still based on sentiments and notions of intimidation, vengeance, retribution, responsibility, and expiation. However, unlike Durkheim, he recognized that this traditional and still rooted notion was undergoing a process of transformation, and, as he argued (1893: 479), 'the future of punishment is to become a pure instrument of social defence and reparation more and more rationally adapted to its

Durkheim's theory offered the champions of retributivism strong and unexpected support because it arose from the same sociological knowledge that was criticizing retributivism's very foundations. Again in 1893, soon after the publication of *The Division of Labor in Society*, the *Revue pénitentiaire* published Gabriel Tarde's short contribution on the principle of indeterminacy, reinterpreted according to the Durkheimian view (Tarde 1893).[12] Tarde is firmly opposed to the indeterminate sentence method due to the risks of administrative abuses: it is better to rely on the *jurisprudence du tribunal*, which exercises a type of judicial discretion that is unbiased and passionless, unlike the 'capricious, sometimes irritable, vindictive, passionate' arbitrary power of prison officers (Tarde 1893: 751). Beyond the applicative criteria, Tarde (1893: 753) does not subscribe to the modern purpose of punishment theorized by positivism's adherents—rehabilitation or social defence—and argues that, unlike therapy for a disease, penal sanction ought to be always 'exemplary and deterring'. These two symmetrical principles—that is, social utility and expiation—are unrelated to the problem of indeterminate punishment, except that social utility is intended to have a new meaning. According to Tarde (1893: 754), the purpose of punishment is neither special nor general prevention, but it 'is also made for the larger group of honest people to tighten their union, to certify publicly and fortify the degree of their indignation'.[13] The echo of Durkheim's thought is clear, and in a footnote, Tarde references *The Division of Labor in Society*. Thanks to Durkheim's analysis of the social function of punishment, Tarde's belief in the necessity of a decision sentencing an offender to a determinate penalty is supported. 'It is from the judicial decision that the public disapproval expects its justifications and its proper direction' (Tarde 1893: 755): if a judge were to limit his task to declare the defendant guilty without specifying,

purpose thanks to the application of the outcomes of scientific studies on crime and criminals'.

[12] See also Tarde (1887), in which he reflected upon the affinities and differences between salary and punishment, between variable wage and indeterminate punishment. Just as the worker is given a determined salary and the rule applied is 'same job—same salary', so punishment must be fixed, predetermined, and equally applied according to the kind of offence.

[13] His theory was developed in Tarde (1912: esp. 470); on the conflicting sociological theories of Durkheim and Tarde, see Digneffe (2008: 437–42); and Van Calster and Van Schuilenburg (2010).

through the punishment, the precise amount of societal condemnation, the collective conscience would be unsatisfied.

The correct point of view for analysing both the principle of individualization and that of indeterminate sentence, as Tarde explained in 1899, is to consider the scope of penal sanction: it consists not only of correcting the criminal or of intimidation, but above all, it relies on the answer to 'the genuine need of the public, the need for fixing the popular judgment on a specific point' (*Séance* 1899a (Tarde): 785). Public opinion devolves upon the judge the task of expressing, via the sentence and the infliction of punishment, a judgment with the main purpose not to punish a single criminal act, but rather, and more generally, to satisfy the social need for unity and sureness of values. This is such an intense communitarian need that it becomes a 'political concern', 'a special moral curiosity, a real anxiety of the public conscience', and it is exactly this sentiment to which the determinate sentence, in its traditional form, responds. Prison has such an important communicative value and 'provides such an excellent means of information and measure' that, even when detention is as concretely illusory as in the *Bérenger Laws*, the sentence nonetheless persists in showing the public the extent of the seriousness of the crime and the intensity of its disapprobation (*Séance* 1899a (Tarde): 786). From this sociological perspective, which according to Tarde is not at all peripheral, indefinite sentence 'does not fulfil the purpose of a good sentence': it can be argued, similar to van Hamel, that it is a punishment based both on reformation and social security, 'but it is clear that it does not address the need to satisfy and set public opinion' (*Séance* 1899a (Tarde): 786).

5.5 Durkheimian Echoes in the Criminological Debate

The 1894 IUPL session openly demonstrated that the Durkheimian theses were destined to have a great influence on the European penological debate, using sociological interpretations in a conservative way to defend the retributive pattern. The *Report* presented by Adolphe Prins, e.g., even without explicitly quoting Durkheim, used his arguments to confirm Prins's own opposition to abandoning traditional punishment. Because crime is 'an individual and a social phenomenon' (Prins 1896: 81), the reaction to it should address these two facets of its nature and, consequently, repression

should be a deterrent for both the offender and his possible imitators. The duty of ensuring the exemplarity of penalty can imply the utility of a prolonged detention even for a convict who is already reformed, because—Prins explained—there are many social factors to be considered: e.g. the stir caused by the crime, the consequences of the offender's release into the community where the crime was committed and where memories of the act are still vivid, witnesses' fear of the convict's vengeance, and the feelings of the victim's friends and relatives. According to the prevailing European doctrine, crime is not a personal pathology, and social defence is not accomplished by transforming punishment into an individualized rehabilitative treatment: every crime also represents an upheaval in the social solidarity among community members, a breach of the shared rules of social coexistence, which, to be reconstituted and to reaffirm law-abiding community members' sense of belonging, demands the exemplarity of punishment.

The sociological interpretations of Durkheim and Tarde have reverberated even among US criminologists. Some consider the celebration of the progressive trend of the reformatory system as an extreme simplification of the purpose of punishment: a symbolic portion of the retributive message should be retained, and the collective interest in social defence should counterbalance the reformative tendency to overemphasize rehabilitation. The US sociologist Parmelee, in considering the risks of an exclusively reformation-oriented individualization, is certainly more pragmatic than some of his progressive countrymen who unconditionally advocate the rehabilitative ideal. The penological discourse, as he puts it, should consider a complexity of factors: the reaction of the public, who find it difficult to accept unequal sanctions for identical crimes, the social demand that offenders receive a just punishment that is useful for social cohesion, and the social interest in security, which should always be balanced with the individualistic goal of correcting the criminal. The notion of social defence, in its sociological interpretation, can have a broader perimeter than one solely consisting of individualization, so as to also encompass acts corresponding to the innate retributive inclination, or provisions that, for other political reasons, sacrifice the offender's interest in rehabilitation (Parmelee 1908: 179).

In *Criminology*, published ten years later, Parmelee takes a more moderate position by showing himself to be influenced by European caveats related to individualization. The notion of

dangerousness as a foundation of penal responsibility disappears, similar to the manner in which the deterministic theories are softened in light of the other factors of criminality. Reformers such as Ferri and Garofalo 'have not understood clearly the mental mechanism behind the penal function' (Parmelee 1918: 382). Even though the sentiments of anger, fear, and vengeance that are psychologically related to the idea of crime and punishment are irrational, and lead to provisions that are often ineffective, 'they are inextricable traits in human nature which must always be reckoned with' (Parmelee 1918: 383). It is certainly a task of the social organization to control and educate these collective emotions. The contribution of science has allowed us to mitigate the theory of free will and to modify it in light of the theory of a 'limited moral and penal responsibility' for juveniles, lunatics, inebriates, mental patients, and persons with specific nervous diseases, 'but'—Parmelee concludes (1918: 385)—'it will probably always be impossible to eliminate vengeance entirely from penal treatment'.

5.6 Indefinite Detention as '*Peine de Réforme*' and '*Peine de Sûreté*'

In the two decades between the 1890s and the 1910 Washington International Prison and Penitentiary Congress, the European model of individualization was thoroughly designed. The model was the outcome of a debate that was suspicious of the US prison innovations and gradually elaborated compromise solutions for the conflicting claims of the criminalization process. It is worth stressing that this formation of a European penological identity combined repression and social prevention, free will and determinism, retribution and reformation, and fixity and flexibility of sanction: the theoretical quarrel instigated by the provocative criticisms of criminological positivism inaugurated a reformatory process across Europe, which, without signalling the victory of either the progressives or the conservatives, radically transformed the foundations of the liberal criminal law and laid the basis for erecting a new system. The reasoning of Europe's leading scholars, as well as their attempt to relate applicative methods to the general theories of both criminal and public law, went on to exert a great influence on US penological culture, which, at the turn of the twentieth century, was forced to tackle the practical failures of its reforms, together with rising mistrust of the rehabilitative ideal.

After 1910, the date of both the Washington congress and the Chicago founding of the American Institute of Criminal Law and Criminology, legal comparison seemed to create a sort of backlash: US criminology, which had proudly exported the idea of indeterminate sentencing, began to consider critically the limits of its reforms by adopting many of the European positions. Nevertheless, the ironic remark of the French scholar Jean André Roux is not completely true. Roux (1905: 366), commenting on Liszt's statement that the indeterminate sentence was fated to circle the world, argued that 'indeed, it has done so, and so completely that it has returned to its starting point; it started in Elmira, it has returned there and it did not leave a trace anywhere'. If the growth of a critical approach to the symbolic reformatory of Elmira is indeed unquestionable, it cannot be said that the idea of indeterminacy has died without having any effect and without stimulating important changes.

At the 1899 Paris session of the IUPL, indeterminate sentence was still considered as a crucial topic and was discussed at length. The opinions on the subject merely refined previous arguments. Van Hamel suggested considering indeterminate sentencing from a dual viewpoint: as a '*peine de réforme*' (rehabilitative punishment) intended to achieve the correction of first-time offenders, habitual offenders who have committed petty offences, and juveniles, and as a '*peine de sûreté*' (security punishment), targeting the protection of society against dangerous individuals and intended to be used against abnormal individuals, together with born and incorrigible criminals (*Séance* 1899b: 671–2).

The twofold value of indefinite segregation, rehabilitative for some convicts and incapacitating for others, seems to be a given characteristic of the European culture. Preventive detention can be used as a means of individualization in different directions, conceptually opposed: one is based on the conviction that criminals are reformable, the other is based on the prognosis of their unreformability. The principle of indeterminacy can be applied differently, but its advantages, abstractly considered, are unquestionable.

5.7 Criminalizing Normal and Abnormal Offenders

The slow, progressive and ongoing changes in European legal science, oriented towards accepting indefinite detention only for some selected categories of criminals or dangerous individuals,

often in the form of supplementary detention, can be seen in Prins's gradual recognition of the measure. Although he continued to reject indefinite sentences for 'normal' offenders due to their inconsistency with 'all of the principles of our public law' that aim, in the repressive field, 'at defending individual freedom against any arbitrary power', and although he saw in the new measure a return to the old *lettres de cachet* (Prins 1899: 457–8), the Belgian jurist had a different opinion of social preservation measures (such as *la mise à la disposition du gouvernement*) that were to be adopted against 'abnormals, insane people or mental defectives' (Prins 1899: 459). Among these categories of individuals, the same arbitrary power that cannot be tolerated against honest people becomes unavoidable, because its intention is 'to assess a physical condition', not to punish illegal behaviour freely chosen by 'normal' men and women (Prins 1899: 460). When physiology, psychiatry, and mental medicine recognize in an individual 'the residue of the dangerous classes', and his or her mental disorder is proven, this pathological condition prohibits any resort to traditional prison and makes a determinate sentence totally illogical (Prins 1899: 459).[14]

It is worth noting that the binary scheme that is on the rise even among those who are more sceptical about indeterminate sentencing provides a criminal law for the 'normal' man and one for the 'abnormal' man, one for the honest and one for the dangerous, one for the reformable and one for the lost, one for those who have 'the possession of their whole personality' and one for those who do not (Thiry 1901: 619). For first-class citizens, the rhetoric of liberal guarantees is still obstinately defended by invoking the principles of legality and judicial jurisdiction, by safeguarding individual liberty against any possible discretion of administrative bodies, and by preserving constitutional protections and the citizen's 'right to be punished'. Conversely, those who belong to the second class, are deviant by inclination or acquired habit, suffer from mental abnormality, have dangerous organic constitutions or chronic behavioural disorders, or are defined as 'the weak ones', whose natures do not 'have enough strength to subdue their criminal impulses' (Marri 1897: 480), need a different system based on indeterminate

[14] Cf. also Prins's speech in *Séance* (1899b: 676–9). See, for the Belgian legislation, Danet and Saas (2010); and Mary et al. (2011).

segregation as a tool of social preservation, prolonged control, and incapacitation until their temibility ceases.[15]

The real success of the indeterminate sentence principle in Europe cannot be measured against its formal rejection of the US model, but ought to be recognized in the belief that there are two types of criminals, who correspondingly must be dealt with in radically different ways. Beyond any characteristics of the various schools and beyond the declaration that indefinite detention must be rejected because punishment has to be determined and 'an indeterminate sentence is therefore an absurdity and a contradiction' (Conti 1899: 1121; Rapoport 1904: 772–3), both the legal culture and the public discourse now accept the need to differentiate the criminal law for the 'normal ones' from the criminal law for the 'abnormal ones', and in so doing, they admit that two parallel systems of justice have been adopted (e.g. Ferri 1900; Marri 1897: 482, 485). As demonstrated by Foucault, criminological positivism is defined by the image of a monster formed through a discourse—which is the expression of a power-knowledge—that combines medical knowledge and legal science (Dubber 1998b; Nuzzo 2013; Sharpe 2011). The pathological behaviour of the criminal, explainable in naturalistic and scientific terms, creates a model of deviance, of otherness and of monstrosity, which can be contrasted by the punitive machinery and by the penological discourse only if they modify the liberal paradigm in terms of social defence.

Legal doctrine refines the terminological shades of the notion of punishment: true punishment should still be the classic punishment of the liberal penal codes, retributive against those who consciously break the law and representing a legal reaction to the crime rather than to the criminal. This type of punishment presupposes 'normal and responsible' offenders—that is, citizens for whom the criminal law can, or better yet must, provide a shield against abuses of power with definite safeguards and imperative limits: such citizens are men and women who have broken the law and deserve punishment, but they remain within the 'pact

[15] This opinion laid the groundwork for, e.g., the Italian draft-bill against recidivists (4 February 1899, the so-called Finocchiaro-Aprile project). The project provided indeterminate detention for dangerous criminals without any periodical control or possibility of conditional release, and was therefore criticized by Ferri (1899).

of citizenship' that includes and protects them (Cazzetta 2009; Dubber 1998b). Nevertheless, other means of social defence against abnormal criminals ought to be added to that notion of punishment, which would allow the judge a broader discretion in evaluating the defendants, their motives, and their organic and psychic conditions.[16] Whether indeterminate measures are 'surrogates' and 'supplements' of punishment or forms of treatment rather than of punishment, they become necessary for security reasons. As noted by the Italian criminologist Marri (1897: 486), against the 'uncorrectables' and the 'organically evil natures', 'the word punishment is improperly used; it is neither vengeance, nor expiation, it is seclusion due to the danger that someone else could be infected by their perversity'. Punishment is a type of therapy consisting of indefinite segregation to inculcate into these 'organisms' the habit of labour as the best antidote to crime (Amalfi 1907: 106).

The border is now very fine: normality and abnormality, disease and dangerousness, punishment and treatment merge together and overlap each other. Custody for the purposes of social defence no longer applies only to the indefinite treatment of dangerous mental patients in criminal asylums (Nye 1984), but involves every form of delinquency that is explained in terms of deviance and neurosis. Nevertheless, continental penology steadily continues to refuse indeterminate sentencing as a general principle for ordinary offenders, stressing the difference between the European and US experiences and invoking the storming of the Bastille as the moment that marked the end of any discretion in the administration of punishment. Even among the adherents of the Positivist School, with few exceptions (Olivieri 1899: 135), it seems that the absolutely indeterminate sentences promoted by the more radical US reformers are no longer very convincing (Franchi 1900a: 457). The European penological culture cannot give up the traditional

[16] Wetzell (2000: ch. 3) has shown that the surge of interest in the psychiatric interpretation of the aetiology of crime characterizing the German criminological movement of the late nineteenth to early twentieth century was focused on the issue of diminished responsibility and the treatment of '*minderwertige*' (mentally deficient) offenders, as well as on the definition of '*geistige Minderwertigkeiten*' (mental deficiencies). This debate led reformers to uphold the solution of imprisonment followed by indefinite detention in an asylum for offenders affected by mental disorder.

idea of punishment, abstractly decided by the lawmaker and practically inflicted by the judge through a clear sentence that considers both the past, by granting satisfaction to the public, and the future, by showing citizens a set of values protected by the law.

By putting the theories of Durkheim and Tarde into legal terms, Franchi (1900a: 472) clarifies that 'the political side of penology should never be disregarded'. On the one hand, the proportion between offence and sanction so as to satisfy the community symbolically cannot be the legal order's only concern, but on the other hand, the individualization of punishment cannot completely ignore these social expectations. Franchi, chief editor of *Scuola Positiva di Diritto Criminale*, the journal founded by Ferri, stresses the 'socio-political need not to diminish the judicial decision' because it is both a formal and legal guarantee: if punishment were determined only through an administrative procedure after the verdict and without a fair hearing, it would be 'bare of any legal character' that would have been provided by a judicial decision (Franchi 1900a: 473). Nevertheless, even though this is the general principle of any *Rechtsstaat*, Franchi himself admits that for special categories of criminals (i.e. lunatics, born criminals, incorrigible criminals, habitual offenders, and juveniles), the sentence should determine the nature of punishment, but not its length.

5.8 Conclusions

The struggle over indefinite imprisonment in Europe was primarily theoretical, but cannot be reduced to a merely abstract discussion: it played a crucial role in forming twentieth-century European criminal law. The movement of ideas, the draft bills and the provisions enacted, and the arguments for receiving or rejecting the US model have all characterized the gradual construction of a European penological identity that is distinct from the US one.

The philosophical basis of the determinate sentence system was questioned from both legal and medical perspectives, and reformers undermined the correctness of retributivism. However, liberal jurisprudence, by firmly reacting against the introduction of US-like indeterminate sentencing, laid the groundwork for the elaboration of a new, peculiar dual system that combined retributivism and social defence. The gradual change of opinion by van Hamel and Prins on this point is symptomatic of a theoretical convergence: the Dutch and Belgian reformers, co-founders with Liszt

of the IUPL and both committed to modernizing criminal law, originally had opposite views on indeterminacy, whereby the first was enthusiastic and the second was sceptical. Nonetheless, just as van Hamel recognized the risks of unlimited administrative discretion in sentencing, even Prins later admitted that for incorrigible and abnormal criminals, a form of indefinite detention should be introduced. The idea of a dual punitive system that retained the rationale of retribution and repression but also embraced the preventive goal of social defence seemed to be a sound compromise and turned out to be the right strategy to win conservative liberal scholars over to the cause of preventive detention.

Under the influence of Durkheim's and Tarde's arguments in support of sociological retributivism, European penology and criminology started to consider repression and prevention not as either-or options, but as complementary methods.

6

The Formation of the European Dual-Track System

Let us now substantiate the theoretical and legislative formation of the dual-track system in Europe at the turn of the twentieth century. The first part of the chapter (section 6.1) focuses on the Prison Congress of Brussels held in 1900, where a specific question on indeterminate sentencing was discussed. After decades of confrontation, the congress represented the occasion for many prominent criminalists to make their point on such a critical issue. All of the different positions were clearly expressed, and, what matters most, beyond the strongest supporters (e.g. the US delegate Samuel Barrows) and the firmest opponents (e.g. the Italian Enrico Pessina) of indeterminate sentencing, some influential jurists (such as Saleilles, Gauckler, and Ruggles-Brise) considered preventive detention a supplementary measure for specific classes of offenders, thus combining retributivism with social defence. The second part of the chapter (section 6.2) addresses the first European draft bills and legislation that gradually implemented the dual-track system. Among these regulations, the Swiss draft bill made a remarkable impact on the fin-de-siècle scenario due to the calibre of its author, Carl Stooss, who was dogmatically one the most sophisticated advocates of the measures of security. His theoretical arguments will be analysed in section 6.3.

The last part of the chapter (sections 6.4 and 6.5) analyses the Washington International Prison Congress of 1910, in which the contraposition between European and US penology became more radical and manifest. Perhaps due to the significant participation of US reformers, who hosted the congress, the debate over indeterminacy took on an unusually animated tone that clearly showed the centrality of the problem for the criminological movement, as well as the unbridgeable distance between the US reformatory system and the European dual-track system.

6.1 The European Sense of Indeterminacy at the Brussels Congress of 1900

At the Sixth International Prison Congress, held in Brussels in August 1900, twenty-nine governments were officially represented by eighty-five delegates. They discussed, together with the other 310 members of the congress, sixteen questions divided into four sections (penal legislation, penitentiary institutions, preventive institutions, questions relative to children and minors), on which 175 preliminary reports had been written. All international prison congresses, as the Belgian Minister van den Heuvel said in his welcome address, aim at bringing about universal prison reform, but the meeting in Brussels 'at the close of the century has the special task of trying to report what has been done in the last hundred years' and represents an opportunity to consider the effects of proposed reforms in punitive and preventive methods (Barrows 1903: 14).

The fourth question of the penal legislation section asked whether there were classes of delinquents to whom the indeterminate sentence might be applied and how that measure could be realized. Notwithstanding the strong position of US representatives in support of the indeterminate sentence system,[1] Samuel Barrows (1903: 35), commissioner for the United States on the International Prison Commission, remained sceptical about its acceptance 'by a body so justly and cautiously conservative as the International Prison Congress'. As he remarked, 'the traditional theory of a definite penalty for every offense against the criminal code is so strongly intrenched in statute and practice that to dislodge it is something like the task of removing Gibraltar'. Therefore, the indefinite sentence was 'far from realisation at present', both in Europe and in the United States (Barrows 1903: 35). However, despite Barrows's caution regarding the recognition of the principle, the Brussels congress not only revealed how deep the roots of indefinite sentencing already were on both sides of the Atlantic, but also disclosed the conceptual divide between US and European penology about indeterminacy.

[1] Reports were written by Samuel Barrows, Warren Spalding, Martin Dewey Follett, and R. W. McClaughry; another one was written by the American Jurists Association; at the assembly debate, Follett, Michael Heymann, Simeon Baldwin, and Barrows all took part.

6.1.1 Distinguishing between retributive and reformative measures: Saleilles and Gauckler

Saleilles's report exemplifies the gradual change in the view of European penal jurisprudence about the indeterminate sentence. The French jurist first presented three important arguments that could hinder the reception of the measure: the execution of punishment is a duty of the state and cannot be delegated to private individuals; the application of different sentences for the same crime infringes on the principle of equality; and submitting the decision about the period of detention to the prison warden is both a threat to liberty and a source of discretion. These risks would not affect the United States, a country of democracy, liberty, and equality, where Brockway's project had yielded good results and where the indefinite sentence had been applied as one of the many aspects of a more complex reformative system. Nevertheless, in the passage from practice to theory, the idea completely changes its nature and undergoes 'a deformation, at least conceptual' (Saleilles 1901: 589).

One year earlier, at the meeting of the *Société Générale des Prisons*, Saleilles defined the rehabilitative system based on preventive detention as 'unfeasible and impossible' because the achievement of the specific goal of indeterminacy (i.e. making the prisoner the author of his or her own correction) would have presupposed the transformation of the present prison system (*Séance* 1899a: 803). Prison administration in France, as in many other European countries, was centralized and uniform, conceived and built to be the theatre of a retributive penalty, and it seemed to be an insurmountable obstacle to import the utopian US model. In Brussels, however, he declared himself more open to compromise. He recognized the success of the principle of individualization in all those countries and schools where punishment was considered 'as a means of social policy' and, therefore, 'as a measure of defence and preservation', particularly against recidivism (Saleilles 1901: 592). The indeterminate sentence system was now considered a state method, and, for many years, due to the suspension of sentences (*sursis*) and other forms of individualization, 'the idea of equality, intended in its classical and doctrinal meaning, has ceased to be a dogma, fortunately' (Saleilles 1901: 593).

Saleilles remained convinced that individualization should be essentially judicial. However, his receptiveness to indeterminacy,

not as a general rule for all criminals, but only for juvenile delinquents, mental degenerates, and, above all, recidivists and unreformable offenders, shows that the European legal culture had accepted the idea of preventive detention in terms of a supplementary measure employed as a selective tool of criminal policy for more effective social security. This point, as we shall see, was not visible in the resolution, but clearly emerged in the plenary discussion and in other reports of the Brussels Congress, such as, e.g., Gauckler's.

Édouard Gauckler, an adherent to the French criminological approach that emphasized the social milieu rather than Lombrosian heredity as the main factor in criminality (Nye 1984: ch. 4) and also a leading member of the IUPL, wrote an essay in 1893 in which he recognized that the sociological idea of justice is always undergoing an evolutionary process and that a new, more rational and utilitarian rationale based on social security was gaining ground, replacing the traditional retributivist idea of punishment. The transformation was slow and gradual; nevertheless, at the end of the nineteenth century, it was clear that the social reaction to crime demanded two types of measures: a retributivist pain inflicted on the offender and a measure of social defence against dangerous and incorrigible criminals. The Brussels Congress gave Gauckler the opportunity to reframe his sociological analysis into a feasible proposal, in which he attempted to interpret the difficult balance between the Durkheimian social conception of punishment and modern correctionalism from a new perspective. His project was to combine retributivism and correctionalism in a more useful manner for continental criminal policies. If the principle of retribution was accepted by all civilized societies, it was also true that repression was a broader notion that encompassed rehabilitative measures for social defence. These two aspects should not be confused because 'actually, reformation and retribution are two distinct choices, two different targets set to repression' (Gauckler 1901: 522). Given that punitive measures are not necessarily reformative measures and vice versa, their rules cannot be the same. Whereas punishment should conform to the traditional tenets of proportionality, legality, and certainty, it is rational that reformation should be based on other rules, including indeterminacy. The major mistake, the French jurist continued, was that if retributive and reformative measures are confused, as usually happens, the application of reformative methods with punitive measures becomes an 'irreducible contradiction'. From the clear distinction

between retribution and correction, therefore, another general principle can be deduced: it is desirable that when punishment has expired, other measures can be imposed on offenders that aim for their reformation and last indefinitely until their rehabilitation is achieved (Gauckler 1901: 523).

Gauckler thus theoretically justified the possibility of introducing a double track in repression that consisted of an ordinary punishment followed by another variable control measure of indefinite duration, but with a maximum defined by the law when the offender was considered still dangerous. To avoid completely prejudicing the apparatus of safeguards that the *Rechtsstaat* had provided to citizens, Gauckler indicated two more principles. The first was that every decision concerning the supplementary measures must be made by a court, and the second was that the prisoner, after having served the punishment, should be conditionally released, and the additional measure should be applied only in cases in which he or she did not comply with the conditions imposed on his or her freedom (Gauckler 1901: 524–6).

6.1.2 Ruggles-Brise: Preventive detention as a supplementary sentence

A similar proposal was advanced by Evelyn Ruggles-Brise, who was one of the British leading prison administrators and chairman of the National Prison Commission from 1895 to 1921, founder of the borstal system and a reformer who certainly could not be considered a radical positivist (Radzinowicz and Hood 1986: 596–9). After visiting the Elmira Reformatory and studying Brockway's system, he was puzzled about some of the system's features. The indeterminate sentence did not convince him, and in Brussels, he suggested a different method. Indeterminacy could be employed against professional delinquents, for whom a time and not a reformative sentence was required (Ruggles-Brise 1901b: 111). Only against professional criminals, guilty of repeated crimes of acquisitiveness, did he recommend the indeterminate sentence 'in this new or inverted sense' (1901a: 111), namely, as a supplementary sentence that was exclusively based on the principle of preventive justice. When the habituality of the offender was proven, the judge sentencing the prisoner 'would, in addition to the penalty for the immediate offence, order him to be detained at the expiration of such penalty in a specially constituted penal establishment, for a

period equal to the statutory maximum for the offence, subject to conditional release by the Secretary of State' (Ruggles-Brise 1901b: 58).[2] This scheme, as Ruggles-Brise explained, would be in agreement with two principles: the retributive principle, based on the correspondence between chastisement and wrongdoing, and the preventive principle. Moreover, it would enable the clear definition of the classes of criminals to whom the measure could be applied. Above all, it would avert the two main objections that had prevented the enactment in Europe of specific provisions against habitual offenders because it neither postulated the incorrigibility of the offender nor infringed in any way upon the discretionary power of the judge (Ruggles-Brise 1901a: 116).

Although they started from dissimilar legal contexts (civil and common law) and diverse penological and penitentiary experiences (France and the United Kingdom), both Gauckler and Ruggles-Brise designed new similar punitive patterns that employed the idea of indeterminacy from a preventive point of view as a measure in addition to punishment for more dangerous offenders. Although their proposals seemed to have no repercussions for the final resolution of the congress, this unusual convergence of ideas (Ruggles-Brise 1901b: 59) provides a revealing insight into the growth of a European penological identity, as well as into the importance of the international penological debate to the cultural circulation of criminalization patterns. 'Paradoxical as it may sound', wrote Ruggles-Brise in his report, 'the underlying idea, or the principle, of the Indeterminist School in America, and the "determinist", or Italian, School in Europe, is the same'—that is, that the criminal, rather than the crime, is to be punished and that social defence is the only goal of punishment. Both schools professed the ' "pathological principle" of punishment', according to which the passions of the offender should be studied and the crime addressed accordingly. The US school, 'notoriously lenient, and with a generous faith in humanity', studied the tendencies of the criminal resulting from heredity or a vicious environment, and it believed in the possibility of eradicating these traits through a moral and physical treatment that would return the purged offender to society, whereas the European school recognized in the

[2] On the former unsuccessful proposal of a dual-track scheme for habitual offenders formulated by Henry Taylor in 1868, see Radzinowicz and Hood (1986: 240–1).

delinquent's passions the signs of a congenital and degenerative decay that doomed the subject to an unhappy life of crime. The outcome of the application of these two divergent theories, 'though based upon a common idea, is that, in the one case, the criminal will only be detained for a sufficient time to admit of a cure, in the other he will be eliminated either by death or perpetual seclusion'. Both approaches indicate a reallocation of the punitive powers because the treatment is indeterminate in any case, punishment is not apportioned to the offence, 'the function of the judges disappears, and, in his place reigns the prison official and the medical professor'. Nevertheless, the Brussels congress addressed the question 'with great sobriety and good judgment', absolutely rejecting the indeterminate sentence for ordinary crime and accepting it only for specific, limited cases that were legally defined (Ruggles-Brise 1901b: 55–6; see also Ruggles-Brise 1924: 91–2).

The brief analysis of Ruggles-Brise, although it oversimplifies the more complex positions within the US and European criminological movements, presents revealing evidence of how, at the turn of the century, the contraposition between the two penological approaches was clearly acknowledged by criminal law scholars. Indeterminacy and, more broadly, individualization can be interpreted from two different perspectives: Americans emphasize the reformation of the criminal, whereas Europeans emphasize social defence (see Cantor 1936: 17).

The Brussels resolution on the fourth question analysed here stated that the system of the indeterminate sentence was 'rejected' and that it was necessary to distinguish three types of measures: (1) regarding penalties properly considered, 'the system of the indeterminate sentence is inadmissible' and it may be 'advantageously replaced by conditional liberation combined with a progressive cumulative sentence for recidivists'; (2) regarding measures for education, protection, or safety, the proposed system 'is only admissible through restrictions which involve the abandonment of the principle itself', and it is therefore 'more logical, more simple, and more practical to preserve with the system of prolonged imprisonment as modified by conditional liberation'; and (3) regarding the pathological treatment of irresponsible criminals and those affected with mental disease, 'the duration of restraint must necessarily be indeterminate', but these measures 'have no penal character' (quoted in Barrows 1903: 38–9). In fact, the approved resolution, which appears to have been a victory of the

more conservative delegates who were hostile to the reform and 'who easily dispelled the reverie coming from beyond the Ocean and the Rhine' (De Combes 1900: 66), seems to be the last anachronistic effort of the Classical School to reject the principle of indeterminacy.[3]

Nevertheless, the Brussels resolution does not correspond with the emerging theory that, as we have seen in Saleilles and Gauckler, accepts preventive detention beyond the ordinary punishment for habitual offenders and dangerous recidivists.[4] Nor was that conclusion consistent with some legislation that, as we shall see in the following section, began to introduce forms of a dual-track system.

6.2 The European Dual-Track System in the Making

Let us now turn our attention to the effects of the European notion of indeterminacy on legislation. At the turn of the twentieth century, many European states drafted important bills and laws were enacted that were clearly modelled on the peculiar idea of the dual-track system, with a supplementary form of indefinite detention justified on the basis of social defence and the principle of preventive justice to be added to ordinary retributive punishment. The theoretical debates preceding and following these pieces of legislation echoed the influence of the international debate, as well as the European effort to formulate an alternative concept of indeterminacy which differed from that in the United States.

In 1888, Carl Stooss, a leading criminal law scholar in Switzerland and one of the main architects of the dual-track system, was asked by the Swiss Federal Council to draft a bill for a unitary penal code with the aim of rearranging the chaotic legislative situation

[3] At the Brussels Congress, the opinion that punishment should never be indefinite was expressed, among others, by Pessina (1912: 91–2), the Belgian delegates Isidore Maus, Fernend Thiry, and Adolphe Prins, and the French reformer René Bérenger. Some of them (e.g. Prins and Thiry), however, admitted forms of indefinite preventive treatment (conceptually distinct from punishment) for habitual drunks, vagrants, beggars, lunatics, or incorrigible offenders (*Actes du…Bruxelles* 1901: 179–218).

[4] The same position was also confirmed a few years later in the conclusion of the twenty-eighth meeting of the German jurists (*Deutschen Juristentagen*) held in Kiel in 1906 (quoted in Freudenthal (1908: 279, 320)).

of the cantons.[5] He developed several different draft codes (eight between 1893 and 1918), and he is considered to be the father of the Swiss Penal Code enacted in 1942 (Luminati 2004), eight years after his death. His theoretical contributions to the Swiss codification process and, more broadly, to the conceptualization of the measure of security, as we shall see in the next section, exerted a great influence on the entire European (and, notably, the continental) reformist movement. His projects also laid the groundwork for many other pieces of legislation.

6.2.1 The Norwegian Penal Code of 1902 and other draft penal codes in Europe

After the first project was formulated in 1896, the Norwegian Penal Code was enacted in 1902 (22 May) and came into effect in January 1904. It aroused great interest[6] because it was considered to be the first implementation of the indeterminate sentence system in Europe and a law centred on a social defence policy. Indeed, despite its judicial precautions and maximum limits, the Norwegian law actually realized van Hamel's suggestion, namely, the idea of imposing indefinite detention with periodic control of the prisoner's correction not as an ordinary punishment, but as a supplementary sanction. It stated that when the court and the jury believed that the offender was dangerous (according to the seriousness of the offence defined by law and the offender's personality), the court could sentence the offender to a determinate penalty, but it could also require that the convict, after having served the ordinary sanction, be detained in prison or in a workhouse for an indefinite period (never more than three times the length of the penalty or more than fifteen years) (Urbye 1898, 1899). As the Italian jurist Giuliano Amalfi wrote (1907: 92), the innovation of the Norwegian Penal Code was reduced to an increase in

[5] The preliminary work on the code was linked to an inquiry into incorrigible delinquents promoted by Louis Guillaume, who was director of the statistical bureau and an expert on penitentiary discipline. The outcomes of the inquiry constituted criticism of short prison sentences and the proposal of long sentences, either determinate or indeterminate, for unreformable offenders (Guillaume 1893).

[6] A translation into German of the Bill was published in 1898 by Andreas Urbye and Ernst Rosenfeld as an attachment to the VII issue of *Mitteilungen der IKV*.

punishment determined in advance and tempered by conditional release.

In 1909, the Swiss, German, and Austrian penal code bills were drafted and aroused great interest among continental jurists, particularly because of their provisions for measures of security. Notwithstanding some very slight differences, they were usually considered a sort of systematic and unique legislation because they were affected by German legal thought, their drafters were intellectually connected, they were under the influence of the IUPL, and they had clear roots in the sort of preliminary work that was the *Vergleichende Darstellung des deutschen und ausländischen Strafrechts*. Liszt (1910: 24, 1911: 93–4) considered these bills to consist of the substantial implementation of the ideas he sketched in his Marburg speech and to be based on the tripartite classification of criminals (occasional criminals, those who needed to and could be reformed, and the incorrigible), which corresponded with a tripartite form of punishment (deterrent, reformative, and measure of security). Although their drafters presented them as the substantiation of the classical theories with only a few acknowledgements of the modern school, they were perceived as a clear breach of the tenets of traditional retributive criminal law. The concessions made to criminological theory were not insignificant because crime was considered a symptom of the criminal inclination of the offender (§ 81 of the German bill), conditional sentencing was accepted, special treatment for juvenile delinquents was introduced, broad discretion in sentencing was afforded to judges, and, above all, the distinction between punishment and measures of security was not as clear as asserted. In some cases, after the crime was proved, the judge could decide to apply a measure of security *in place of* punishment.[7] In other cases, the complementary special measure against dangerous offenders was applied after they had served an ordinary penalty.[8]

[7] Art. 31 of the Swiss bill, e.g., provided that in cases of recidivism and when a culprit showed an attitude towards delinquency, wrong behaviour, and idleness, he or she could be sent to a specific detention institution; § 42 of the German bill provided that if the offence was due to idleness and depravity and the offender had been sentenced to at least four weeks' imprisonment, the judge could, in addition to or in place of punishment, decide to send a convict who was able to work to a workhouse for a term of six months to three years.

[8] § 38 of the Austrian bill provided, e.g., that in cases of habitual criminals, at the time of the verdict, the judge could sentence the convict to a possible

It is no surprise that these draft codes gave rise to opposing reactions. They were welcomed with enthusiasm by the more or less radical reformers (Battaglini 1912; De Asúa 1918; De Marsico 1912; Ferri 1926b: 572; Grispigni 1911; Liszt 1910; Longhi 1910; Stooss 1910), who noted that they effectively rejected any essential distinction between punishment and measures of security and that they were not applied in proportion to the seriousness of the offence, but in consideration of the offender's personality and dangerousness (Grispigni 1911: 203–4).

In contrast, these bills were criticized by the proponents of the Classical School, who considered the measure of security purely preventive means that, as such, should be regulated by a specific code that differed from the penal code (Lucchini 1897: 10–11). Even against dangerous recidivists, more traditional punishment, such as relegation, should be preferred to the new measures. The French jurist Roux, champion of the classical current, feared that these measures might be 'the first and dangerous concession made to the theory of the indeterminate sentence', and he warned French legislators of the perilous imitation of foreign legislation. In France, indeterminate sentencing would be 'a detestable imported item', and French legal science should commit itself to the defence of the 'natural limits and traditional rules' of the national criminal law. If it is undeniable that, due to the international congresses and legal comparison, criminal law has gradually lost 'its former autochthonous character', the Austrian draft code seemed to be under the powerful influence of the IUPL and its reformative credo to the point of displaying some tendencies that were very destructive regarding the principle of freedom on which criminal law had been founded after the French Revolution, not only in France, but also in all of the European states that followed its example (Roux 1910: 620, 624, 616).

6.2.2 The Prevention of Crime Act of 1908 in the United Kingdom

As Radzinowicz and Hood have shown (1986: 268–87), questions of indeterminate sentence, preventive measures of indefinite

supplementary period of detention in a special institution, to be confirmed at the expiration of the ordinary sentence.

length, and the dual-track system were also addressed in the United Kingdom. Although the traditional ideas of 'just deserts' (Farrer 1880: 82), retribution for moral sin (Fry 1884), and prevention by punishing and terrifying others rather than by reforming criminals (Stephen 1885: 758) lingered in late Victorian penal culture, requests for penological reform were growing, even among British jurists, prison officials, and politicians. The move to reduce the widespread disparities in sentencing practices through legislative constraints or other standards for sentences authoritatively adopted among judges (Crackanthorpe 1900; Handler 2012; Radzinowicz and Hood 1979: 1307–13) was advanced side by side with a rethinking of the rationale for punishment and the demand for prison reform, particularly with regard to habitual and professional offenders. New methods of addressing criminals that combined deterrence with rehabilitation (probation systems, police supervision of released prisoners) were experimented with in the last decades of the nineteenth century to render the administration of justice more effective against both reformable delinquents and incorrigible ones (Du Cane 1879). The British approach to penological reform was very different from that in the United States. It was clearly stated that only the courts, which were supposed to have full knowledge of the previous careers and characters of prisoners, could consider these elements in sentencing (Du Cane 1885: 155–6) because if any variation in punishment was decided by prison authorities, the prisoner would practically be punished twice on the same account.

There is a clear difference between the wide competences delegated to the prison boards in the United States and the rejection of any administrative discretion in sentencing in the United Kingdom, where judicial discretion was still considered essential and, if need be, was increased (Thomas 2003: 50–4). A rethinking of the rationale of punishment and of its purpose and fair measure represented a crucial concern of British jurists at the turn of the century, leading to the definition of a new grammar of penal science. This resulted from a combination of the objective aspects of crime emphasized by classical theory, the emphasis on weakened moral responsibility suggested by the neo-classical school, the offender's personal characteristics, and the classification of criminals upon which the neo-positivist (post-Lombrosian) school was built, as well as, occasionally, the desirability of imposing exemplary sentences (Crackanthorpe 1902: 857). The retributive

foundation of punishment was overshadowed by the prominence achieved by prevention and reformation of the offender as the main goals of punishment, although none of these three principles was overwhelmed by the others or accepted as the exclusive principle. Above all, apart from a few isolated opinions (e.g. Carpenter 1905: 23–5), the example of Elmira and the idea of indeterminate sentence were firmly rejected as both unsuitable for the United Kingdom, being 'far too elaborate and expansive to be likely to meet with acceptance here', and ineffective, combining 'the material comforts of a Temperance Hotel with intellectual luxuries of a Mechanics' Institute' (Crackanthorpe 1893: 629; see also 1900: 106).

However, even British penologists addressed the two main problems of the period, namely the growth of recidivism and treatment for habitual offenders. In the last decades of the nineteenth century, the practical solution rested on judicial discretion, the power of the judges to increase sentences, and the principle of cumulative punishment for habitual offenders even though the statutory minima had been eliminated (Ruggles-Brise 1901c; see also Thomas 1979: 11–27): the supervision was left to the discretion of the sentencing judge (Godfrey et al. 2010: 65–9). In 1894, a report of the Gladstone Committee on Prisons suggested that 'a new form of sentence should be placed at the disposal of the judges by which offenders might be segregated for long periods of detention, during which they would not be treated with the severity of first-class hard labour or penal servitude, but would be forced to work under less onerous conditions' (Morris 1951: 34). This statement, as Morris noted (1951: 34), 'sowed the seed' for the theoretical and political debate that led to the Prevention of Crime Act 1908, which, in accordance with Ruggles-Brise's proposal in Brussels and with Gladstone's view, introduced the dual-track system in the United Kingdom. Following the Norwegian Penal Code of 1902 as well as the aforementioned draft codes, and espousing the peculiar European notion of measures of security as supplementary treatment for dangerous offenders widely discussed at the turn of the century, the Prevention of Crime Act provided for preventive detention.[9]

[9] In cases of habitual offenders 'leading persistently a dishonest or criminal life' and when a sentence of penal servitude was passed, the court, 'if of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be kept in detention for a lengthened period of years, may pass a further sentence' for a period not greater than ten nor less than five years (Part II Sect. 10[1]).

Effectively, the Act adopted the US idea of a relatively indeterminate sentence, but modelled it on the European notion of additional punishment. If we examine the parliamentary debate on the bill presented by Gladstone, we find in the opposing views the usual arguments employed in support of or opposition to such a reform. Gladstone (Hansard vol. 189 [1908] cc. 1121–5; vol. 197 [1908] cc. 246–50) emphasized the double rationale for his proposal based on both prevention of crime and reclamation of even the very worst offenders. He resorted to the recurring image of the prisoner who has the key to his or her own release, he emphasized the 'introduction of a new principle in our penal system' consisting of 'prevention of crime through reforming agencies', and he pinpointed the safeguards that accompanied preventive detention before and after conviction (the Secretary of State's constant supervision, the prison authorities' reports and recommendations, routine inspection by the board of visitors, and the right to appeal). He explicitly rested 'on the authority of many criminologists in America and elsewhere', the United Kingdom included (see, e.g., Anderson 1907: 140), and emphasized 'that the fact of there being an indeterminate period of detention was of great assistance in steadying down hardened offenders' (Hansard vol. 197 [1908] cc. 250, 252).

In contrast, other MPs attacked the bill for the 'invasion of constitutional practice' because it gave human beings the right to confine others, which was considered 'a departure in the science of penology, an invasion on the principles of punishment which have been applied in any other civilised country' (Atherley-Jones, Hansard vol. 197 [1908] cc. 233–6). Preventive (and indefinite in the original bill) detention was depicted as a 'cutting apart from the whole traditions of legislation, moral, jurisprudence of civilised Europe', an after-effect of the theories of 'pseudo-scientists with broken-down reputations like Lombroso' (Belloc, Hansard vol. 197 [1908], cc. 237–8), and a 'scandalous and retrograde' measure 'inconsistent with modern legislation' (Dillon, Hansard vol. 197 [1908], c. 243). The example of Elmira could not be used in support of the bill because it did not provide a dual-stage system with preventive detention following a period of penal servitude (Collins, Hansard vol. 198 [1908], cc. 137–8). Furthermore, in introducing the bill, it could not be reasonably recommended 'to copy societies far less civilised, with less traditional knowledge and complexity of situation, with less experience of mankind than

their own' (Belloc, Hansard vol. 198 [1908], c. 165), such as the United States. Despite the strong opposition to the dual-track system (Russell, Hansard vol. 198 [1908], c. 1536), the bill was passed owing to the compromise over the maximum term for supplementary detention. The act, as Ruggles-Brise put it in 1910, was a good compromise between the endorsement of the principle of indeterminate sentencing in Gladstone's Bill and the oppositions to the reform due to its excessive severity and the overly arbitrary power placed in the hands of the executive. To the advocates of the pure indeterminate sentence, the Act was 'misconceived' because the 'principle of protection' was engrafted 'upon a scheme of treatment which is primarily punitive and deterrent' (Gamon 1910: 202). However, it marked an advance, by 'accustom[ing] the public to the prolonged detention of habituals' (Gamon 1910: 202). 'The new departure which is involved in this system of preventive detention', Ruggles-Brise wrote with satisfaction (1911b: 35), 'has, I believe, no exact analogy in the present European law as a means of combating recidivism, and its operation will, no doubt, be watched with extreme interest'. The law, 'whose successful working depends almost entirely on the capacity and discretion of the Advisory Committee', provided a defensive power that, according to him, was not to be used against recidivists in petty offences, such as habitual vagrants, drunkards, or offenders against by-laws and police regulations, but only against the most dangerous professional criminals, and it represented 'an invaluable instrument for social defence' (Ruggles-Brise 1921: 58, 55).

Although preventive detention as a dual-track system was modified by the Criminal Justice Act 1948 (Sect. 21[I]), it was opposed soon after its enactment by Winston Churchill beginning in 1910 (Godfrey et al. 2010: 76–80). Before being repealed, preventive detention was rarely applied, and the cause of its failure can be mostly ascribed to the dual-track system and its inconsistent 'juxtaposition within the same sentencing structure of the classical tenet of just proportion and the positivist credo of social defense' (Radzinowicz and Hood 1979: 1327), its inconsistency with British penal culture, and the 'tactical error to insist on it in 1908' (Morris 1951: 80).[10] Nevertheless, the Prevention of Crime Act

[10] See *Report of the Departmental Committee on Persistent Offenders* (1932: 62): 'the dual sentence is apt to create the impression that the offender is being punished twice for the same offense'; see also Craven (1933: 242).

1908, although not as original as its proponents argued, together with the Norwegian Panel Code of 1902 and the contemporary continental drafts codes, represented a breakthrough in the establishment of the dual-track system in international penal science.[11] Moreover—and most importantly—by marking a different approach from the US reformatory system, it reinforced the idea of the existence of a European penological culture (with which even UK reformers identified themselves) that was grounded on common fundamentals, rooted in shared traditions, and moved towards similar reforms.

6.3 Measure of Security as *Zweckstrafe*

Theorists of security measures attempted to find counterbalances and limits to the new legal device to make it correspond to the securitarian needs of social defence without dismantling the tenets of penal liberalism. As Stooss explained with reference to the Swiss draft penal code, the dual-track system (*Zweispurigkeit*) does not substitute measures of security for punishment by creating a unique type of sanction, nor does it embrace the principle of indeterminacy comprehensively. The two measures should remain distinct because their substance, goal, and, consequently, technical features are different. Punishment is retributive (*Vergeltungstrafe*) and past-oriented; measures of security are future-oriented 'purpose penalties' (*Zweckstrafe*). The first punishes a fact committed by a responsible subject, whereas the second operates as a preventive device against the dangerousness of a subject, whose act is simply a symptom of his or her attitude. Punishment presupposes a legally defined offence and a general punishment that is binding on the judge, whereas measures of security do not follow any fact that is strictly defined by law nor proportionately correspond to its seriousness, but depend on the condition of the subject. However, the methods and duration of punishment are predetermined and rigid, whereas the manner and length of security measures rest on the purpose and outcome of the treatment (Stooss 1905: 2–3, 1911). Unlike most radical proposals of criminal psychiatrists such as Kraepelin and Aschaffenburg, and unlike the more progressive

[11] Also, the Prevention of Crime Act 1908 was translated into German (Rosenfeld 1909) at IUPL's suggestion.

positions held by IUPL's members in support of unifying all punitive measures under the domain of the preventive aim of social defence, Stooss's proposal, which would have become the framework for many continental codifications, considered the measures of security an additional weapon rather than a substitutive means to combat criminality (Stooss 1905: 4). According to the dualistic theory (Exner 1914; see Sebald 2008: 223–45), the notion of criminal law, which is broader than that of penal law, encompasses both punishment as a means of general prevention and security measures as a means of special prevention.

In these terms, legality was complied with not only because the principle *nulla poena sine lege* continued to be applied to punishments, but also because the same principle governed security measures, albeit in a tempered manner. If, indeed, the flexibility of security measures based on the dangerousness of the offender thwarted determinacy, these measures were nevertheless only those provided for by the lawmaker and always presupposed the ascertainment of a crime as an unavoidable symptomatic element of dangerousness (Hafter 1925b: 281).

As for the problem of the allocation of competences between the judicial and administrative branches of government, Stooss's proposal looked for a compromise to avoid upsetting the traditional distribution. Measures of security, in Stooss's opinion, confer upon the judge even administrative functions. The court is granted broader authority, but always within the province of judicial jurisdiction. For Stooss, the infliction of security measures of indeterminate duration is not delegated to an administrative body as in the United States, neither in the form of a substitution for punishment nor as a supplementary sanction, but the court is given the power to decide if a security measure should be applied *instead of* punishment, thus avoiding a useless duplication of detention. However, the positions of European scholars on these matters were not completely aligned with Stooss's view, and criminal laws reflected a different approach: measures of security, as we have observed with the Prevention of Crime Act and many draft penal codes, were not conceived of as preventive means to replace punishment, but were often thought of and codified as supplementary penalties for dangerous offenders.

In the Italian debate between the Zanardelli Penal Code of 1889 and the Rocco Penal Code of 1930, criminal law scholars recognized that the matter of security measures risked upsetting the

fundamentals of criminal law. The controversial theoretical core as well as the determinant factor for reforming criminal law was the relationship between dangerousness and the offence. From the perspective of reformers, measures of security should be absorbed into punishment because, on the one hand, ‘in modern criminal law the offence is primarily taken on as cause of social danger due to the probability of recidivism’ (Grispigni 1928: 168) and, on the other hand, criminal sanctions should be the measure of neither the offender’s liability nor the causal relationship between action and fact, but instead should measure the subjective danger of the offender to society (Florian 1924; Sabatini 1921). Both punishment and security measures: ‘presuppose a crime before being applied’; are apportioned not to the seriousness of the offence, but to the antisocial personality of the offender; ‘have the same purposes of general prevention (intimidation) and special prevention (segregation)’; have an indefinite duration (because determinate punishments also become indeterminate as a consequence of suspended sentences and conditional releases); and are considered for recidivism. In addition, the judge can substitute a measure of security for punishment for the same crime and the same offender (Ferri 1926b: 569).[12]

The principle of legality would avoid both the risk of a sanction based on an uncertain or only probable element and the risk of opening the door to judicial discretion in evaluating the factors of temibility. The legality principle would be expanded to typify the notion of continuing danger, namely, ‘to fix by law, in a mandatory way for the judge, the symptomatic value of all the crimes and of each element of them’ (Grispigni 1920b: 110; see also Ferri 1911: 30). The *nullum crimen nulla poena sine lege* principle was revised by positivists, but was also retained and interpreted in an expansive way to predetermine even the criteria for evaluating a subjective status such as dangerousness. However, there were strong objections to the theory that aimed to absorb punishments and security measures into a unitary concept (see, e.g., De Mauro 1912, 1927), and the Positivist School never achieved this target.

[12] The Swiss, Austrian, and German drafts, according to Ferri (1926b: 569), realized his main criminal-sociological proposal: ‘that every punishment is a measure of security so as every measure of security is a punishment’.

6.4 The Great Divide between European and US Penologies on Indefinite Punishment

The Eighth International Prison Congress, held in Washington, DC in 1910, devoted three mornings to the discussion of the first and most important question of the criminal law section concerning the relationship between the principle of indeterminate sentencing and the fundamental principles of criminal jurisprudence. The eighteen reports prepared on this subject, more than on any other question of the programme, confirm the great interest it aroused. The entire section, according to Charles Richmond Henderson (1913: 33)—Commissioner for the United States on the International Prison Commission, who in Washington was also greeted as President of the same commission by acclamation—was influenced by the prevailing point of view of the criminal law jurists, 'marked by cautiousness in phrasing proposals for a change in the present penal system and hesitation in recommending changes of a too specific or too radical character'. The resolution, adopted as a result of intense discussion, seemed to completely change the Brussels decisions about the indeterminate sentencing principle, but also outlined the transformation of preventive detention into something different from the first US proposal.[13] The congress represents the moment of the most bitter dispute between the two contrasting views of indeterminacy, namely: the US notion that considered indeterminacy to be an essential aspect of reformatory sentencing and claimed its absolute progressive adoption; and the

[13] See Teeters (1949: 625–6): '§ 1. The Congress approves the scientific principle of the indeterminate sentence. § 2. The indeterminate sentence should be applied to moral and mental defectives. § 3. The indeterminate sentence should also be applied as an important part of the reformatory system to criminals, particularly young delinquents, who require reformation and whose offences are due mainly to circumstances of an individual character. § 4. The introduction of this system should be conditioned upon the following suppositions: 1. That the prevailing notions of guilt and punishment are compatible with the principle of the indeterminate sentence. 2. That an individualized treatment of the offender be assured. 3. That the 'Board of Parole' be so constituted as to avoid outside influences, and consist of a commission made up of at least one representative of the magistracy, at least one representative of the prison administration, and at least one representative of medical science. § 5. It is advisable to fix the maximum duration of the sentence only during such a period as it may be necessary because of the novelty of the institution and lack of experience with it.'

European notion that interpreted indeterminacy exclusively as a means of social defence against specific classes of criminals.[14]

The awareness that contrasting opinions on this point were among the crucial subjects of the convention and that a solution was needed to mend the theoretical fracture between US and European reformers appeared immediately during Henderson's opening address. He recommended that the congress '[assume] the unity of reason', even admitting the 'necessity of local adaptations of devices and measures for the application of general principles' (Henderson 1913: 23). To resolve the differences and achieve shared resolutions, in the name of the US delegates, he took a position of great openness to dialogue with no preconceptions. In this cooperative spirit, Henderson said (1913: 24), 'by no means do we ask you, lawyers of the Old World, to accept our phrase, "the indeterminate sentence". If it seems to you, as to some of our own jurists to savor of the arbitrary and uncertain, the capricious and the lawless, reject the name; it will not offend us.' What was at stake was certainly not a terminological question; rather, it was necessary to examine the essence of problems, begin the discussion on common ground, and 'go below the surface of a much-debated epithet which awakens suspicions and antagonism' (Henderson 1913: 24).

After years of theoretical struggle over the measure endorsed by Brockway and controversies over its nature and legitimacy that had divided the reformative paths on both sides of the Atlantic, Henderson hoped that principles, content, and programmes could be finally shared. He first identified the key points of agreement with modern criminal science: special procedures and rehabilitative treatments for juvenile offenders; exclusion from prison for clearly insane convicts, who should be sent to hospitals and asylums; suspension of sentences, with probation and careful surveillance for all offenders who were not vicious or criminal and could avoid the disgrace and damage of imprisonment; conditional release (*liberté surveillée*) for many youths and adults, with a gradual reintegration into society, which was not so different from the parole system; and, finally, the need to abolish short sentences for those who were dangerous to society, such as habitual

[14] See, e.g., in *Actes du… Washington*, I (1913): 67, 73–4, 90, the opinions of Silvela, Kastorkis, and Prins.

vagrants, inebriates, and professional criminals, whose detention and surveillance might be increased either by a supplementary imprisonment or by 'placing the offender at the disposition of the government', as Prins and the Belgian law called it. With reference to the last measure, Henderson said (1913: 24), 'we call this the "indeterminate sentence", perhaps improperly and not exactly, but we're all trying to get at the same thing—social protection and re-education'. At the provocative tail end of his address, however, the US professor could not avoid admonishing his European colleagues by pointing out that 'the ultimate and final test of a penal law, of any law, is not its constitutionality, its agreement with tradition of judicial decision, its conformity with ancient usages', and that the time was ripe for change (Henderson 1913: 25).

Henderson's effort to tone down the differences and extol the uniformity of many shared proposals of international penal reformism led him to reduce the form of the indeterminate sentence in the United States only to its essential rationale. Social defence and reformation were the two pillars of this punitive method, which could even be called by different names or could be applied in dissimilar ways, but the goals of which could not be questioned. By losing its original identity and weakening the revolutionary spirit of its first proposition and experimentation in the United States, the idea of indefiniteness became a vague concept that could be interpreted in a variety of ways and variously employed as a means of criminal policy. In this sense, the first part of the resolution, which approves the scientific principle of the indeterminate sentence, seems to prove that Henderson was correct. It seemed to resemble the revenge of US criminology on European criminology after Brussels. However, combined with the subsequent points of the resolution, indeterminateness lost any connection with the idea of Elmira and became, so to speak, a US dress on an entirely European body.

6.5 The Dispute on Indeterminate Sentencing at the Washington Congress of 1910

Both the reports and the discussion again proposed well-known arguments and corroborated the existence of three approaches to the notion of indefinite punishment: (1) the radical approach in favour of indeterminate sentencing for all the convicts without distinction, with the usual exception of the death penalty and life

sentences for the most serious crimes;[15] (2) the conservative approach, which rejected the notion completely with regard to punishment, and which preferred offsetting the rigidity of penalties with other measures such as conditional liberation, but favoured the dual-track system for dangerous offenders;[16] and (3) the median approach, which accepted the principle on the condition that it be applied only to some categories of offenders (e.g. the so-called abnormals, moral or mental defectives, juveniles, and recidivists) and with the guarantee of a decision taken by a judicial (or quasi-judicial) body—not exclusively by an administrative prison board.[17]

Even though their opinion did not prevail in the resolution, some rapporteurs and delegates emphasized the need to accept indeterminacy only in the light of a binary punitive logic whose rationale was based on the distinction between liability and dangerousness. According to this position, the criterion on which the state intervention is founded cannot be exclusively that of liability, because such an approach would exclude from any form of punishment the very classes of individuals who are 'powerless to resist illegal acts, to dominate their disordered inclinations and guilty habits, and who are the greatest threat to public safety' (Beck 1912: 11; see also Conti 1912a: 46–8). The protection of public safety represents the first and foremost duty of the state that should replace the application of retributive punishment against these dangerous subjects with security measures. Even if this policy is called a *penal* measure for security, it must be clear that it is a form of prevention and not of punishment. For these delinquents, who are not psychologically responsible for their own acts, but who are socially responsible for their dangerousness, retributive punishment makes no sense. It is necessary, instead, to abandon the judicial process entirely and to entrust an administrative body with the task of enabling more suitable measures for public safety (Beck 1912; Bruck-Faber 1912; Conti 1912a, 1913).

[15] This was the opinion of many US rapporteurs and delegates, such as Butler (1912); Shipley (1912); Smith (1912); and Wines (1912).

[16] Baldwin 1912; Berlet 1912; Friedman 1912; Conti, Dresselhuys, Engelen, Khrouloff, Prins, Sherman, and Silvela (*Actes du… Washington… Procès-verbaux des séances* 1913).

[17] Gleispach, Kastorkis, and Vámbéry (*Actes du… Washington… Procès-verbaux des séances* 1913).

This opinion follows the path of a twin-track system already indicated by Gauckler, Ruggles-Brise, Stooss, and others. Whereas it is unjust to apply the indeterminate sentence to all 'normal' offenders because it would be an unjustifiable attack on their individual rights, and because punishment can neither lose its retributive character nor perform a 'function of police' instead of a 'function of justice', indefinite preventive detention is indispensable against habitual and professional criminals (Beck 1912: 12; Bruck-Faber 1912; Conti 1912a: 46–8). The reasons guiding public intervention are radically different. Towards the first group of criminals, the state should act within the limits of the principle of legality and independent judicial jurisdiction by safeguarding the rights of the individual that, according to the nineteenth-century notion of *Rechtsstaat*, should prevail over the *raison d'état*.[18] Towards the second group, in contrast, 'the time is ripe for justifying a summary administrative procedure... a sort of law of war applied to civil life' (Beck 1912: 12).[19] In criminal science at the turn of the century, the incorrigible, abnormal, or professional offender represented the inner enemy to be fought using exceptional rules and the summary and extraordinary procedures of the law of war. The criminal law of the citizens, with its constitutional safeguards, gave way to a forerunner of the present concept of enemy criminal law.

However, as it emerged at the Washington Congress, the problem of the boundary between punishment and security measures is inseparable from the problems of legality and safeguards. The law should define in advance the conditions of dangerousness on which the measures of security are founded, and the temibility can never be based on simple suspicions or biases, but exclusively on facts (Conti 1912b: 47–8). Moreover, to provide citizens with all of the possible safeguards, even these 'complements of punishment' should be surrounded by substantial and procedural guarantees, following the example of judicial jurisdiction. The support for security measures, although a minority opinion in Washington, perhaps best described the logic and implementation procedures of the dual-track system and paved the way for many future European and non-European codifications that would adopt this system.

[18] See, e.g., Dresselhuys in *Actes du... Washington*, I (1913: 64).

[19] This kind of exceptional measure was admitted also, e.g., by Dresselhuys and Khrouloff (*Actes du... Washington*, I, 1913: 65, 77).

After a fiery discussion,[20] the sub-commission approved the resolution proposed by the Austrian Wenzel Gleispach and the Hungarian Rusztem Vámbéry. It was a compromise solution that formally endorsed the principle of indeterminate sentencing, but substantially modified the US reformatory system. The restrictions on the principle of indeterminate sentence, stated in § 4 of the resolution, answered the requests of the majority of the European delegates and were so stringent as to defuse every revolutionary effect that would have been provoked by pure acceptance of the principle. Notably, it was established that neither the traditional notion of criminal liability nor the prevailing retributive notion of punishment would be abandoned. Nevertheless, the compatibility of the indefinite sentence with the classical theory of responsibility and punishment was a difficult question on which the assembly did not decide and which reflected all of the ambiguities of the criminalization process. The point clearly presupposed the separation of criminal trials into two phases: one in which the guilt of the accused was judged in conformity with the classical rules; and a subsequent phase in which the punishment was individualized in accordance with the precepts of modern criminology.

Saleilles was among the few European jurists who attempted to thematize this theoretical compromise between the sociological Durkheimian idea and the requests of penological reform. ‘Punishment remains a penalty’, he wrote, ‘because the conception of responsibility persists and because satisfaction is due to the sentiment of popular and social justice’, according to which the public power has the duty to reprove moral evil injurious to society (Saleilles 1911: 275). However, this penalty, although justified by the idea of responsibility, should not be measured thereby, but ‘must be apportioned to the subjective criminality of the agent and made to reflect not a quantitative but a qualitative factor of the will’ (Saleilles 1911: 276). Therefore, ‘the judge must thus apply two points of view and two very different principles. He must determine the length of the punishment according to the active criminality that characterizes the crime, thus considering the principle

[20] The first vote was contested by Gleispach because many delegates were not present and the language of the discussion (French) could not be correctly understood by the US delegates. Therefore, the vote was declared void, and Gleispach was finally able to persuade the majority of delegates (twenty-two votes in favour and seven votes against) to support his resolution.

of penalty; and he must determine the nature of the punishment according to the passive criminality of the agent, according to his character, thus considering the principle of the underlying purpose and of the individualization of punishment' (Saleilles 1911: 278).

Saleilles's theoretical efforts to reconcile the core of the liberal penal credo that could not be abandoned with the innovative criminological claims were not developed by European legal science. In the United States, as discussed in the next chapter, a distinction emerged between the verdict and the sentence. The mandatory presence of a magistrate among the members of the prison board, which was the last limitation of the resolution, partially satisfied the European delegates' demand for judicialization of this body. The final outcome was a compromise that solemnly endorsed the principle of indeterminate sentence, but actually restricted its application within rather limited circumstances. Although the stand taken by the Washington assembly on this issue would later be praised by some US commentators as 'one of the most revolutionary departures from traditional penology ever taken by this conservative body' (Teeters 1949: 622), it retained very little of the original idea, deprived as it was of the most ground-breaking features and forced to abdicate to determinism entirely, combine reformation with retributivism, and weaken the role of the prison board. Rather than putting an end to a twenty-year international quarrel, the Washington Congress confirmed the definitive divide between US and European penology.

6.6 Conclusions

The principles of individualization and indefinite punishment took a different shape in Europe and instigated the gradual formation of a European penological identity that differed from the US penological identity. The bases for this divide are mainly historical, theoretical, and constitutional, and include the following: (i) a strong adherence to the legality of punishment grounded on the fight against any form of discretionary sentence typical of medieval criminal law, which was prompted by the late-eighteenth- and nineteenth-century liberal reform movement; (ii) Durkheim and Tarde's sociological retributivism, which was the foundation for the adversaries of punishment uniquely based on special prevention (rehabilitation and social defence) and oriented to the offender's personality; and (iii) the conviction that every decision related

to the sentence (type, duration, and execution) should be judicial, not administrative.

These tenets of European penology led to the gradual elaboration of the dual-track system, in which the idea of preventive indefinite detention was integrated with definite punishment through the notion of a supplementary penalty, the rationale for which was security and social defence, rather than reformation of the criminal, and the duration of which depended on the dangerousness of the offender. By the end of the nineteenth century, European jurists had devised the theoretical and normative characteristics of security measures and, in the first decade of the twentieth century, many pieces of legislation (already enacted or simply drafted) testified to the emergence of a particularly European penological structure. The rising antagonism over the notion of indeterminacy between European and US jurists at the International Congress in Brussels (1900) and Washington (1910) reflected a deepening divide between the trajectories of criminological and penological reformism on the two sides of the Atlantic.

7

The 'New Penology' as a Constitutional Matter: The Crisis of Legality in the Rule of Law and the *Rechtsstaat* (1900s to 1930s)

The impact of criminological positivism on penal systems has affected many fundamental aspects of criminal law in both Europe and the United States: it has modified the legitimacy of the state's repressive power, the premise of punishability, the procedural rules for ascertaining liability, the goals of punishment, and the methods of executing sentences. It is worth emphasizing that the criminalization process redefined the meaning of penal legality. When, in the late nineteenth century, criminology radically rethought 'criminal law in the making' and gradually succeeded in pushing its way through the solid walls of liberal orthodoxy, even the principle *nullum crimen nulla poena sine lege* was strongly criticized. In particular, the goal of an individualized punishment for either reforming or incapacitating the offender required the greatest flexibility in sentencing and contrasted the ideas of the certainty, proportionality, and uniformity of penalties.

After an outline of the significance of the principle of legality in penal liberalism, section 7.1 examines how the *nullum crimen nulla poena sine lege* principle was re-defined by a social-defence-oriented criminal policy and fragmented in its two components. Section 7.2 analyses the growing dissatisfaction with the administration of criminal justice in the United States at the beginning of the twentieth century and the criticism of some of the tenets of traditional penal liberalism. Section 7.3 examines how the constitutional allocation of sentencing powers was modified by the new penology, with a particular focus on the broad discretion given to administrative bodies. By criticizing the model of fixed punishments, reformers' theories affected the roles of both judges

and prison administrators, broadening their powers and requiring new safeguards. How should a reformative system based on individualization be concretely implemented? What changes in the criminal procedure are required? And what counterbalance should be taken to protect the fundamental rights of the accused and convicted persons within a system that relies on great administrative discretion? The application of the new, preventive rationale of punishment gave rise to new problems that—in the second part of the chapter—I seek to address from the constitutional perspective of the distribution of powers, with a specific focus on the US situation. Sections 7.4 and 7.5 consider the bifurcation of criminal trial into guilt and sentencing phases and its consequences. Section 7.6 examines the concerns of US reformers regarding the inconsistencies of the reformatory system in the 1920s and early 1930s. Section 7.7 focuses on the reaction against administrative justice during the 1930s and the proposal of creating a specialized sentencing tribunal.

7.1 The Principle of Legality as Bulwark of Penal Liberalism

The principle of legality represents the cornerstone of the continental criminal legal system of nineteenth-century liberalism, which epitomizes the ideas of the Enlightenment and the French Revolution regarding the relationships among the individual, the state, and social control (Costa 2007a). Because the notion of the centrality of the law was opposed to the discretion of the *Ancien Régime*, the entire province of criminal law should be strictly and abstractly defined by the lawmaker. The law, according to contractualistic arguments, is considered to be the unbiased expression of the collective will; offences, procedural rules, and penalties should all be predetermined by the law. Every citizen has the right to know precisely and in advance the penalty applied to each offence; thus, certainty of punishment exerts a deterrent effect on the free will of the citizen and, at the same time, embodies the spirit of equality on which the fairness of the entire system of justice is based. The penal codes of liberalism, grounded in utilitarianism and worship of the law, provide for penal scales objectively apportioned to the offence, damage, or danger caused by the act, which should be applied by the judge mechanically and without distinction. This is, in a nutshell, the framework of the *Rechtsstaat*'s constitutional

criminal legal system, according to which the legislative, executive, and judicial powers are rigidly divided and separated and the individual is adequately protected by this tripartition (Ferrajoli 1996: 368–419; Naucke 2007).

Criminal law norms represent 'the insurmountable limit of criminal policy', penal legislation can be paradoxically defined as 'the Magna Charta of the criminals', and the principle of legality is the inalienable defence of individuals against public authority (executive power, abuses of judges) and against every possible unlawful violation of individual freedom. For the nineteenth-century continental criminal legal system, the principle of legality embodied 'the bulwark of the citizens against the omnipotence of the government, against the reckless power of the majority, against the "Leviathan" ' (Liszt 1905c: 80; see also Ehret 1996). The *nullum crimen nulla poena* principle, although characterized in a peculiar manner and elaborated through a different historical process, is also recognized in the Anglo-American legal experience. Indeed, both the common law, in its mainly procedural and judicial approach, and statutory laws provide means for the protection of the individual, limitations of power, and certainty of punishment, which express the same idea of legality in different forms (Allen 1996: 14–26; Ancel 1931, 1936; Grande 2004; Pomorski 1975; Spencer 1983: 35–7).

The theoretical debate and conflicting cases regarding the individualization of punishment and indeterminate sentencing described in the previous chapters reveal that legal culture clearly perceived the risk of the collapse of the entire liberal system due to the more or less revolutionary propositions of criminological positivism (Birkmeyer 1907; Lucchini 1878). The recognition of determinism, the exclusive target of social defence, and the shift from the fact to the offender's personality all imply the rejection of both the traditional conception of formal legality and the principle of equality before the law, undermining the pillars of the system. The criminological attack on free will, which is the necessary premise for the new aim of the treatment-punishment, goes beyond the struggle between schools and subverts the constitutional balances of the liberal state (Green 2014: ch. 4), in which criminal law plays a crucial role because, as the Italian champion of penal liberalism Luigi Lucchini (1883: 14) put it, 'in the notion of moral liability, different from that of ethical responsibility, the conscience of virtue, of duty, of human and civic personality, finds a powerful

help'. By removing the cornerstone of liability, criminal law loses its proactive capacity to motivate citizens to respect democratic values 'by educating and developing the moral, legal and political sentiment' (Lucchini 1883: 12).

There is a natural defensive reaction of the traditionalist school of criminal law, which does not renounce the dogma of individual responsibility and even accepts some corrections to the idea of punishment as retribution (Napodano 1879; Pessina 1915a). Although it is admitted that punishment should aim to both intimidate and correct, it is confirmed that 'corrigibility presupposes intimidability' (Impallomeni 1891: 222). In 1905, the Italian Pessina—an adherent to the Classical School—recognized (1915b: 217) that in the last three decades of the nineteenth century, 'an intellectual turmoil generated a violent crisis in the field of criminal law, especially in Italy', a 'revolution *ab imis fundamentis*' that aimed to overturn the basic principle of penal institutions (i.e. retributivism). The application of a scientific method to criminal science together with determinism, criminal anthropology, and craniology led the Positive School of criminology 'to contest the doctrines of moral law and free will that are the foundations of punishment, as if they were metaphysical hypotheses' (Pessina 1915b: 223).

Pessina, who was committed to the defence of classical criminal law in both the national debate and the international congresses, was aware that the success of criminological theories would provoke a definite breach with the post-Enlightenment penal model. The innovators censure all of the individual safeguards, such as the presumption of innocence, provisional release, trial by jury, and determinate sentencing, labelling them 'artificial exaggerations in favour of the criminals, grounded on an undue individualism' (Pessina 1915b: 227). The only answer to the danger of delegitimization of the classical philosophical tenets of the right to punish, implying the gradual dismantling of the system, is, in Pessina's opinion (1915b: 230, 231), a return to Kant (*Zurück zu Kant*); namely, it is necessary to reaffirm the importance of the moral conscience because 'we are not the pure and simple result of material elements, our spirit is not a secretion of the kidneys'.

7.1.1 Revising the nulla poena *principle*

The reason for the repeated discussions of indeterminate sentencing, for the research undertaken by European jurists into solutions

different from the US method, and, particularly from the 1930s, for the criticisms lodged by some influential US scholars (Cabot, Cantor, Glueck, Hall, and Warner) against the indeterminate sentencing system is, fundamentally, a feeling of fear. It is fear of the end of a world that consists of certainties, clear rules, and definite competencies; fear of a crisis in a system that provided formal safeguards by hiding substantial inequalities; and fear of the loss of legitimacy of legal technical knowledge, surpassed by the epistemological primacy of the experimental sciences. The defence of the legality of punishment does not necessarily mean the defence of the rights of the individual. Legal historians have recently shown how ambiguous and elusive the formal protections of the *nullum crimen* were in liberal systems, as well as how vague the boundaries of criminal law were (Colao 2007, 2015; Lacchè and Stronati 2011; Martín 2007; Pifferi 2007). The criminal law 'of the law' is surrounded by and integrated with other sources, such as: the criminal law of public security; the regulatory and administrative law of contraventions; the extraordinary law against political enemies, anarchists, and socialists; and the police law against vagrants, idle people, and beggars. What the advocates of the Classical School oppose in the criminological revolution is rather a defence of cultural traditions and of legal institutions rooted in the mentality (as well as in the political and constitutional history) of the European *Rechtsstaat*.

The constitutional conflicts aroused by the new criminal policy are clearly exemplified by Liszt's antinomy between fidelity to liberalism and social defence-oriented penology (Dannenberg 1925: 55–65). The more the 'pure' original idea of *Rechtsstaat* is changing under the influence of the growing welfare state and liberalism is turning into social-liberalism or social democracy, the more criminal law has to be changed accordingly. If the legitimacy and limit of the state power are not limited to the protection of individual freedom, but are extended to the promotion of social equality, social security, and social welfare, even the boundaries, methods, and targets of criminal law have to be modified. The key problem lays in finding an acceptable balance between social needs (reformation and/or neutralization of the criminal) and individual rights. The individualization of punishment disrupts the settled order of rules and values and changes the meaning of penal legality, both in the continental *Rechtstaat* and in the Anglo-American rule of law. Notably, it is the second part of the formula *nullum*

crimen nulla poena sine lege that is questioned, because the *nulla poena* must be revised in light of the convict's reaction to personal treatment. More broadly, it is the very idea of legality that takes on new meanings, with a law that simply defines rather vague limits (maximum and minimum penalties) and notions (dangerousness)[1] and with punishment that, in the new formula *nulla poena sine crimine*, seems even more independent of any legal norm and exclusively determined by the criterion of dangerousness (Grispigni 1911: 295, 1920a, 1920b; Kumar Sen 1932: 65–6; Rappaport 1928: 220–1).

However, exactly because legality takes different forms in the European framework of the *Rechtsstaat* and in the Anglo-American concept of the Rule of Law (Palombella 2010), the impact of individualization has evoked different reactions. The different shapes of the constitutional limits of legality in these two legal systems are, therefore, among the main reasons for the diverse views of jurists on the individualization question, which can be understood only through the historicizing processes of dogmas, principles, and institutional frameworks. The final recognition of the divide between the European penological movement and the US movement that characterized the Washington Congress can be explained, in summary, in light of two opposing views of penal legality. Whereas European criminal law scholars are not willing to abandon the principle of *nullum crimen nulla poena* and consequently consider indeterminate sentences to constitute an incurable wound to the system, US scholars are absolutely disposed to accept Brockway's idea, and they attempt to elaborate, not without contradictions, other checks and balances in place of fixed sentences.

The separation between these two approaches has led almost all of the European states (as well as many Latin American countries) to adopt the dual-track system, whereas in the United States, the indeterminate sentencing system was preferred at least until the criticism of the 1970s, followed by the Federal Sentencing Guidelines of 1984 and the more recent return to mandatory sentences (Hirsch et al. 1987; Stith and Cabranes 1998). Measures of

[1] Liszt (1909: 495–6) argues that the more the individual's freedom is encroached upon by the new penology through the notion of the 'status of dangerousness', the more precisely the hypotheses, nature, and measure of this encroachment should be defined by the law.

security resort to the idea of (relative) indeterminacy, but the law should provide for types, conditions, and procedures of applicability. They not only presuppose the offence as a symptom of dangerousness, but, despite the critiques of double punishment, they are often applied as further sentences after the ordinary punishment has been served. Indeterminate sentence laws, conversely, do not provide for cumulative forms of segregation and control, but are based on the idea of a clear separation between the trial and sentencing phases. To the same criminological request of indefinite punishment for the purpose of individualization, the responses of the European and US legal systems are different, but somehow equivalent. It could be stated that the measures of security are the European alternative to the US indeterminate sentence (Ancel 1954: 23–6; De Asúa 1948: 267; Silving 1961).

Let us now turn to investigating the cultural, political, and constitutional reasons for these two different paths, which originated from similar standpoints.

7.1.2 The principle of legality fragmented

The criminalization process questioned the principle of legality, and the classical Feuerbach's brocardo *nullum crimen nulla poena sine lege* was divided. Substantive legality continued to be formally respected together with its corollaries of banning analogy and non-retroactivity. The *nulla poena*, conversely, was gradually eroded: the administrativization of sentencing and the personalization of treatment took away from the legislature any legitimacy to determine punishment in advance.

In 1908, Maurice Parmelee analysed and enunciated the changes effected by criminological theories on the two parts of the principle of legality. The *nullum crimen* could not be rejected, but its legitimacy should have been based on a more general classification of offences, and the evaluation of the seriousness of crimes should have been left to judges given standards based on the offender's dangerousness, rather than on the objective gravity of the facts of the crime. Conversely, the *nulla poena* underwent radical changes because the individualization movement made the principle less strictly applicable. The criminological perspective did not reject the principle, but reduced its significance because legality could no longer serve only as protection for the individual against abuses by judges or state authorities, but also had to be a means

of social security and individualization (see Parmelee 1908: 188). Parmelee's proposal to divide the principle of legality represented one of the essential arguments of the new penology and of the US reform movement in particular. This position was the logical corollary of the biphasic division of the trial as well as of the weakened procedural legality—the due process—of the sentencing phase. The *nullum crimen* governed the judicial function of the finding of guilt in full compliance with constitutional prerogatives forbidding any judicial creation of new crimes, whereas the *nulla poena* in the sentencing phase no longer had any theoretical justification in light of correctionalism and individualization.

According to Parmelee, the fragmentation of the principle implied some consequences that characterized the new features of criminal law: penal law should be limited to protecting social interests and social defences, and punishment should be determined exclusively by social necessity. The law's punitive aim could not be the defence of 'judicial order', nor could this order be based on the administration of absolute justice because these criteria implied reference to a metaphysical and retributive idea of justice that was challenged by the criminological school (Parmelee 1908: 191). The judge should have the power to use flexible methods to individualize punishment and, in shifting from moral responsibility to social dangerousness, the scope of substantive criminal law and criminal procedure should be limited and extended respectively. These new tendencies would not have made criminal law unpredictable or uncertain, but would have consisted 'in a simplification of the law' because substantive criminal law would only provide for general fundamental principles and leave the details to criminal procedure (Parmelee 1911).

In *Criminology*, published in 1918, Parmelee's position regarding individualization changed. He still defended the principle, but was aware of its related risks. The problem was not only the high costs resulting from the different and personalized treatments; the key issue was that 'it would be dangerous to individual rights and personal liberty if unlimited powers of individualisation were put into the hands of the courts and penal administration' (Parmelee 1918: 395). Although individualization was desirable and just, it jeopardized 'fundamental democratic principles' and had to be clearly limited by fixed legal maxima and the recognition of the right to appeal against decisions regarding treatment. There were many reasonable objections against individualization, and

Parmelee (1918: 395) distanced himself from the dangerous 'excessive enthusiasm' of reformers, 'especially when they are ignorant of the history of the evolution of human liberty and personal rights'.

As polemically asserted by many conservative European criminalists, even the US sociologist argued that historical knowledge had a moderating function over reformist exaggerations that were inclined to dismantle the achievements of the past regarding guarantees (Parmelee 1918: 398). Social defence theory and individualization had to be harmonized and balanced with individual responsibility and retributionist approaches because abandoning the legality of punishment could easily be turned into a means of discriminatory political marginalization against forms of deviance from the WASP model of a good citizen.[2]

7.2 Dissatisfaction with the Administration of Criminal Justice and the Criticism of Archaic Judicial Safeguards in the United States

From the 1870s in the United States, a broad critical movement began to question the penal and penitentiary system because different state legislations and the broad discretion given to judges caused wide variety in both the definition of crimes and the sentences imposed (Wines 1895). Popular dissatisfaction with the administration of criminal justice (Pound 1906) was aggravated by the perception that criminal procedures were ineffective, paralysed, and weakened due to formalism and useless technicalities that seemed to protect the criminal to the detriment of public safety. The reform movement was driven by various causes that were not always coherent; it called for greater uniformity and more effective justice, standards with which judicial discretion should comply, and even, with the rise of the rehabilitative ideal, greater flexibility and individualization of punishment.

[2] The report of the NY Department of Correction showed that implementation of indeterminate sentences even for petty offences had caused segregations of up to two years for vagrants, prostitutes, and petty offenders. Parmelee (1918: 399 n. 2) considered it 'unjust and dangerous' to delegate to a parole board representing the will of the mayor such great power to imprison petty offenders for months or years by means of an unreviewable decision because 'this would indeed be an easy method of "railroading" to prison opponents of the city administration or political offenders'.

Excessive technicalities result in a number of ridiculous formalities in trials, which multiply the defendant's objections, produce unnecessary delays, make the sentence uncertain, favour irrational reversals, and effectively result in denial of justice for have-nots and privilege for those criminals who most deserve punishment (M'Dermott 1911). Dissatisfaction with the administration of justice mobilized politicians because growing mistrust in public justice weakened one of the pillars of government, destroyed public confidence in the law, and generated uprisings that took the form of increasingly frequent lynchings (Brandon 1911; Lawson 1910; Ray Stevens 1914: 18). In 1907, President Theodore Roosevelt (1913a: 7085) identified 'sentimentality and technicality' as the two main evils of the US penal system, and in 1908, he (Roosevelt 1913b: 7209) defined technicalities as 'a mere hindrance to justice' to the extent that, in some cases, 'this over-regard for technicalities has resulted in a striking denial of justice, and flagrant wrong to the body politic'. In 1909, President Taft (1913: 7431; Garner 1911a) attacked the delays that made US penal justice 'archaic and barbarous'.

Reform proposals aimed to affect the role of the courts. According to the common law tradition, the judge was seen as a spectator, an umpire who left the conduct of the trial to the two parties in the case. The 'sporting theory of justice', which, according to Pound (1906: 404), is a consequence of 'our American exaggerations of the common law contentious procedure', 'disfigures our judicial administration at every point' and 'gives to the whole community a false notion of the purpose and end of law' (Pound 1906: 405, 406). The 'game spirit' that characterizes the criminal trial is an expression of the individualistic model in which the defendant and prosecutor contend for the final decision made by an impartial judge, whose powers are intentionally limited in defence of individual freedom. In the twentieth century, reformers suggested replacing this type of trial with a more modern model in which the 'bold and fresh fighting spirit of the artist of the legal game' was replaced with 'unification and simplification of laws' and 'clear knowledge of the real activities in practical criminology' (Meyer 1910).

The old, liberal procedural system was conceived in a historical period in which individual freedom was jeopardized by arbitrariness and its formal limits and procedural mechanisms represented a protection for the rights of the defendant. In the early twentieth century, the archaic constitutional provisions protecting the accused (Ray Stevens 1914) seemed outdated because they no longer

answered any real social need; rather, their 'overprotection' of the defendant caused injustices and delays. The provisions were considered the inheritance of a political view overtaken by new problems and were used for purposes that were in contrast to the idea of equal justice for the US society of the new century. All of the rules previously believed to exist for the individual's protection, such as the rule against double jeopardy, the presumption of innocence, the right to appeal, the right to remain silent, the impartiality of jurors, the prohibition for judges to comment upon facts, and the doctrine of reasonable doubt, could not be turned into opportunities for the guilty to escape justice (Bostwick 1911; Lawlor 1911). Reformers claimed that these rules should not be entirely removed, but substantially modified.

The contraposition between formal and substantial justice, which became intolerable in public opinion, was thematized by the progressives during the first decades of the twentieth century as one of the main problems that the reform movement aimed to solve by increasing the power of judges. The British criminal procedure was considered to be examplary because it had evolved and become more efficient, but remained in full obedience of tradition (Lawson and Keedy 1910, 1911). In the United Kingdom, verdicts are quickly reached by the jury, appeals are comparatively few, reversals are very rare, formal defects of indictments and technical errors are almost irrelevant, and, above all, 'the English judge takes a very active part in the proceedings and directs the trial at every stage' (Garner 1911b: 683). The British criminal court, it was argued by US observers, 'considers that its principal function is to administer "substantial justice" and it has not therefore laid stress on technicalities either for or against the defendant' (Garner 1911b: 684). The ambition of imitating the British model prompted even US reformers to endorse the idea of strengthening the powers of judges to make trials quicker, less conditioned by the blind observance of formalisms, and more consistent with the demands of substantial justice of public opinion (Garner 1911c, 1911d). Although the typically conservative attitude towards the courts was reluctant to accept these proposals of anti-formalistic interpretations, some signs of progress gradually appeared.[3]

[3] One of the most criticized decisions was *Goodlove v. State* 92 N. E. 491 (1910), commented on by Garner 1911e. Among the most revolutionary cases, see *Caples v. State* 104 P. 493 (1909), *Hack v. State* 141 Wis. 346 (1910), commented on by Wigmore 1910; Garner 1910c, 1910d; see Pifferi 2011: 695–700.

The US reformers, as well as their European counterparts, required the overturning of the polarities of criminal trials, from the centrality of the individual to the priority of society, from the safeguarding of the defendant to the protection of the body politic, and from the rights of the accused to social security. In the twentieth century, it was considered anachronistic to insist on an entirely individualistic conception of criminal trials because the risk of arbitrary exploitation of penal justice by the public authority against citizens was very low. In contrast, the social danger that the offender might escape punishment through the technicalities of the trial was high (Bostwick 1911: 216). As Pound argued in 1929, it was a question of having the heart to abandon those traditions that, rooted in the pioneer institutions, constituted the main obstacle to the reform of the criminal justice system. Efficiency, equality, and the credibility of justice could be regained as a result of the new criminological approach, which, by emphasizing prevention, the social causes of crime, and social defence, showed that 'our whole apparatus of juristic thinking on this subject must be overhauled' and that a 'readjustment of our legally received ideals' was needed to find a 'workable balance between the general security and the individual life' (Pound 1929b: 215, 213, 214).

The principle of individualization that, by the end of the nineteenth century, prevailed as the main rationale for punishment should also imply changes to the technical machinery of criminal trials as well as to the role of judges. The modern idea requires new legal devices because the traditional legal apparatus was constructed for retributive justice, which proved increasingly incompatible with the transformations brought about by criminology.

7.3 Social Defence and the New 'Economy of Repression'

'People now feel very acutely the demands of general security. A century ago the stress was upon the individual life, upon humanity, not upon security. Men now are afraid of anything that seems to have any flavour of humanity' (Pound 1930: 111–12). Pound's words clearly testified to the shift in criminal justice towards a more securitarian attitude. A change in mentality had occurred, and its consequences could be seen in the conception of criminal law no longer as the field of individual safeguards, but rather as the field of social defence, the prevention of dangerousness, and

the control of deviance. This transformation described by Pound was plainly paralleled by the writings of the European positivists (Dorado Montero 1895; Ferri 1917: 19) and was clearly an effect of the international criminological movement, which provided good reasons to support extending the powers of the welfare state to control crime (Garland 2001: ch. 2; Rothman 1980; Wetzell 2000).

Criminology, positivist criminal science, and study of the criminal were different expressions identifying the same methodological approach, essentially based on the consideration that, as Puglia argued (1882b: 294), 'today the principle of individualism starts being deeply modified, as the concepts of individual and state start becoming positive'. The contraposition between the individual and the state and the negative conception of the latter, which was at the root of the hyper-protection of penal liberalism, was gradually substituted with the idea that the state *was* the society in its organic unity—namely, it was not simply a juridical entity, but rather a legal-ethical association 'whose duty is to prevent crimes by employing all the possible means' (Puglia 1882b: 294).

As Sayre explained, the increasingly frequent decisions by which the courts imposed sentences for petty police offences, regardless of culpability but simply as a consequence of the deed, corresponded to the need to discipline the increased social complexity via administrative regulations that were entirely independent of the problems of penal responsibility. The rise of public welfare offences, transgressions of regulatory laws, and cases of strict liability were the result of the shift in emphasis from the protection of individual interests, which characterized the nineteenth century, to the protection of public and social interests. Consequently, in addition to true crimes, criminal law could punish even new forms of regulatory measures unrelated to any moral blame. Clearly, this late nineteenth- to early twentieth-century oscillation of the penal pendulum towards the public interest corresponded with the proposals of contemporaneous criminologists based on the idea that 'the objective underlying correctional treatment should change from the barren aim of punishing human beings to the fruitful one of protecting social interest' (Sayre 1933: 68).[4] The new criminology, by attacking the foundations of penal liberalism, developed

[4] However, in Sayre's opinion (1934), the emphasis upon the protection of public interests could not lead to a complete reversal of the penal liberal paradigm based on *mens rea* in favour of determinism and social responsibility.

a discourse that legitimized the state's punitive power on a new basis by combining reformation and security, by: replacing the old inequalities due to judicial discretion with the evaluative powers of administrative boards; eroding the criterion of liability in favour of that of dangerousness; widening the field of social control; and, finally, rethinking the problems of the limits of power, constitutional checks and balances, and individual safeguards.

What Garland (1985a: 28–9) described as a 'move *from individualism to individualisation*, which alter the penal field fundamentally' and a move 'from a reliance upon the forms of legal *prohibition and penalty*, to a new mode of *normalisation*'[5] was grounded in a frontal attack on penal liberalism that led, over the twentieth century, to the adoption of a penal model in which the power of the state was strengthened and the individual was neither recognized nor defended as such, but, as Norrie put it (1993: 220), was 'studiously pushed to the edge of the picture so that individuals can be blamed for, or "cured" and controlled in relation to, the real problems of violence and poverty created by our society'. The cultural horizon of US reformism in the Progressive Era was not very different from the European concept; the anti-historicist criticism and anti-formalism pleaded by Pound and many contributors to the *American Journal of Criminal Law and Criminology*, together with the accusations against the sterile conservative attitudes of that part of jurisprudence attached to traditional rules, were all elements that should be interpreted in light of the global coordinates of social defence, which moved criminal justice into a new dimension of social control.

Garofalo's article on how criminal trials for social defence should be conducted stemmed from the same theoretical premise: provisional release, appeal, claim to the Court of Cassation, and pardon are all 'concessions given to the wrongdoers' (Garofalo 1882: 92) that make no sense according to the logic of modern criminal law, the main purpose of which is social defence rather than the limitation of public arbitrariness. For Garofalo (1882: 99), therefore, the 'criminological' criminal trial is useful and consistent with its aim only by turning into a psychic examination of the offender to ascertain his or her temibility rather than his or her culpability. As lucidly explained by Prins (1910: 139–40), the Enlightenment fear of the judge made no sense because the honest

[5] Emphasis in the original.

and normal individual now no longer had anything to fear; it was society that should protect itself against dangerous criminals. To do so, rules conceived for the protection of the individual should be changed into rules for the defence of society. The demand of reformers to focus on the individual delinquent matches the project of turning crime from a personal event into a social problem. Conversely, conservatives believe that these new arguments put society at risk, leaving society less protected by a system whose target is reform of the offender rather than retribution because, in this manner, punishment would be weakened.

These contrasting views even influenced the debate over the individualization of punishment, involving the functions and powers of the judiciary.[6] Paul Cuche, on the twenty-fifth anniversary of the IUPL, criticized the individualization principle for thwarting the collective interests pursued through punishment, namely, general prevention and retributive exemplarity, by substituting the good of the offender who serves the sentence for the good of the society that imposes it. Due to judicial individualization and the power to acquit, suspend sentences, or acknowledge extenuating circumstances, 'the judge is free to pulverise the definition of crime made by the law and to dose this powder in the more variable way' (Cuche 1914: 47). The 'economy of repression' is turned upside down by a 'real turnabout of values' whereby punishment ceases to be a 'social remedy' and becomes an 'individual remedy'. The theoretical deficiency of this view, in Cuche's opinion (1914: 48–9), consists of mistaking the public aim of punishment for its utilization in a single case. In fact, as we have seen in the discussion of indeterminate sentencing, behind the façade of consideration of the individual there is a strategy, more or less veiled, of social control and defence. Nevertheless, the very notion of punishment as a social remedy takes on a new meaning, according to which even the judiciary's role should be rethought.

7.3.1 The reformatory system and the redistribution of powers

The effect of the criminalization process on penal legality essentially depends on the influence exerted by the individualization

[6] The case of the German *Gerichsthilfe* and the controversy over its judicial or administrative control is emblematic; see Rosenblum 2008: 165–99, 2014.

principle on criminal trials. Indeed, the possibility of transforming punishment from retribution for a committed crime into preventive correction from dangerousness implies the rethinking of criminal procedures as they were, with new rules, parties, and competencies oriented towards knowledge of the subject rather than the ascertainment of facts. The means of rendering the penal machinery suitable for individualizing sentencing depends on the different representations of the relationships between the powers of the state and the 'dualistic' or 'monistic' conception of criminal trials (Nobili 1974).

If criminal trials are conceived in their liberal sense, as a place where the judicial truth of the fact is established through the equal confrontation of the prosecutor and defendant, individualization can take only a limited form in which the judge can act exclusively within the minimum and maximum limits fixed by law, weighing the mitigating and aggravating circumstances within determined limits and returning to conditional release whenever it seems appropriate. Thus, criminal procedures were not essentially affected by the new principle, and all of the efforts of individualization were postponed until a distinct and separate phase after the trial when the sentence had already been passed. If, conversely, the trial became the machinery for recognizing historical material truth whereby the state overwhelmed the accused because the goal of social defence prevailed over the individual's rights and because the judgment concerned subjective conditions rather than objective events, then individualization had disruptive effects on criminal procedure. For criminal law based on prevention, individualization could force criminal trials to conform to the targets of rehabilitation, as well as to neutralization.

The US and European experiences followed two different ways of shaping the principle of individualization *in/of* criminal procedure. Whereas in the United States, particularly by court decisions, the trial phase has been separated from the sentencing phase, in Europe, the machinery of criminal trials has not been radically modified, but has simply been adapted to new theories. In both cases, these changes imply a rethinking of the role of the judge, who no longer corresponds either to the liberal conception of 'the mouth that pronounces the words of the law' or to the idea of an impartial umpire. In reaction to the anti-jurisprudential spirit that characterized European penal culture from Beccaria and the French Revolution onwards, 'judicial discretion', as de Quirós put

it (1911: 177), 'is regaining what it had lost, and rids itself of the unfortunate note as the magistrate gains in science and conscience'. The Beccarian principle (Beccaria 1986: 9) held that 'only the law may decree punishments for crimes', and 'no magistrate (who is a part of society) can justly inflict a punishment on a member of the same society, for a penalty that exceeds the limit fixed by law is the just punishment and another besides': it became one of the constitutional fundamentals on both sides of the Atlantic (Glaser 1966). Reformers and adherents to the criminological movement strongly criticize this tenet, questioning both its theoretical foundation and its practical implementation. They suggest returning a decisive role in sentencing to judges or, in some cases, to the administrative power. As Lewis claimed (1899: 18), the conviction that the lawmaker and the judge should predetermine the correct sentence, apportioning penalties to the degree of the offender's culpability and to the seriousness of the offence, 'is completely discredited' because 'the aim of both was to establish a mathematical proportion between the guilty of every offence and its appropriate penalty, and so to adjust one to the other', but 'no common measure of guilt and pain exists' (Wines 1904: 11). The classical model presupposes the idea of human beings 'as an ensemble of abstract types' (Cuche 1905: 19), all free and equal; consequently, it does not allow for any form of judicial individualization because it would be a differentiation of penalties according to the peculiarities of the case and the character of the offender.

The utopia of fixed penalties to punish identical freedoms has proved unworkable, and reformers have argued that gradual enlargement of judges' powers is needed to establish a more proper relationship between punishment and responsibility. This argument is one of the key subjects of criminological reformism, which, by rethinking the mechanical role of the judge, undermines a constitutional cornerstone of the liberal rule of law (and *Rechtsstaat*) and demands an overall redefinition of the relationship between powers, as well as of the limits and safeguards of the administration of criminal justice. According to the reformers' analysis, the judge's powers, which were very limited at the beginning of the nineteenth century, are continually expanding. To Cuche (1905: 21), fundamentally, 'the history of the modern criminal law could have a chapter entitled: the progressive abdication of the lawmaker into the hands of the judge, and currently this abdication is almost complete' (see also Ancel 1931: 94). The

penal reaction and the social feeling of justice expressed by punishment would be better measured by judges due to the particular data collected during the trial rather than by the lawmaker abstractly. Cuche's opinion summarizes one of the programmatic points of the penological movement because, in individualizing sentences, that part of discretion that the Classical School had removed from the judges should necessarily be given back to them (see van Hamel 1914: 444). Taking for granted the safeguards achieved as the results of penal liberalism, the challenge of penal modernism is how to restore judicial discretion for the individualization of punishment without renouncing protections for the individual.

7.3.2 The claim for administrative discretion in sentencing

However, what in criminological theories is in sharpest contrast with the ideas of penal classicism and challenges the system of checks and balances of the liberal penal system is not the demand for extended judicial competencies, but rather the allocation to administrative bodies of decisional power concerning the lengths and conditions of sentences. As Aschaffenburg argued (1913: 306), 'under a future system the judge would not be only a connecting link between the examining magistrate and the prison official, would not merely establish the question of guilt', but would have most difficult duties related to deeper consideration of the external causes of crime and 'psychological analysis of the criminal's individuality', and he or she 'would have to select those for whom treatment and education offer more prospects of improvement than does punishment'. Above all, the judge would have to supervise the execution of the sentence (Aschaffenburg 1913: 307). Therefore, judges would have to change their training and approach to trials by studying inmates in detail and learning to determine when prisoners have been sufficiently reformed to be released conditionally or whether they are still dangerous. However, far-reaching plans for the abolition of fixed sentences must lead to a new centrality for administrative power, not only due to its extended cooperation with the public prosecutor and the courts, but also because 'the principal work will and must fall to the official entrusted with executing the sentence' (Aschaffenburg 1913: 309; see also De Asúa 1925: 241).

The new frontiers of penology consist of reshaping the roles, limits, and safeguards of the execution of the sentence, which should be almost entirely delegated to the administrative branch; 'the judicial decision of punishment no longer represents the last phase of penal repression: there is another phase that starts with the execution of the sentence and can lead to an administrative decision of punishment' (Cuche 1905: 29). It is worth noting that this constitutional rethinking of punishment has concerned both Europe and the United States.[7] If, indeed, the entire realization of the social defence system rests upon the administration of the sentencing phase, the administrative power is called to perform an increasingly crucial function. Whereas, in the traditional model of liberalism, the administrative branch was firmly confined within the mechanical application of decisions made by the legislative or judicial branches, which seemed to offer more guarantees of formal justice, the prison board was now vested with broad evaluative powers that impinged decisively upon the individual's freedom. The criminological school proclaims the need for judges who no longer perform mere exegesis of the law, but the more radical and problematic change is the resorting to such broad discretion for prison boards in the execution of sentences (see Longhi 1911: 702–3).

The fight for the introduction of preventive detention and suspended sentence between reformers and conservatives (Speranza 1901: 219), both in Europe and the United States, has concerned the core of the problem, namely, the distribution of powers and the responsibilities of the sentencing phase among legislators, judges, and prison administrators. Indeed, the rationale for indeterminate sentencing, on the one hand, seems to extend the arbitrariness of judges in apportioning punishment; on the other hand, it largely curtails the judicial prerogatives in sentencing, delegating them to a newly constituted administrative body of which the judge may be (or may not be) a member and the decisions of which are mostly not judicially reviewable. The judicial body, composed of legal experts with no criminological knowledge, would finish its task by sentencing the accused, after the

[7] As Wines noted (1904: 11), 'of the three coordinate branches of the government, two have attempted to establish and secure penal justice, namely the legislature and the judiciary. Neither had succeeded. Obviously, the only remaining alternative is to impose this duty upon the executive department.'

verdict, to a relatively indeterminate punishment. The execution of the sentence and decisions about the release or detention of the prisoner would then be governed by the prison board through careful study of the prisoner's character, background, education, and psychological condition. From the viewpoint of its promoters, indefinite segregation is the complete realization of the principle of individualization. Nevertheless, by shifting the barycentre of the sentence from retribution to reformation and from repression to prevention, it impinges on the legitimacy and competencies of the sentencing authorities.

By the end of the nineteenth century, many reformers, particularly in the United States, considered judicial individualization to be an intermediate step towards 'true' administrative individualization. Even Saleilles, at the Brussels Congress in 1900, showed receptiveness to forms of administrative individualization. The leading principle of individual freedom, linked to the European fear of any form of arbitrariness, led to a great distrust in prison administration and the conviction that the judicial branch—the sentinel of freedom—could exclusively decide the duration of punishment. The only deviation from this rule was conditional release, a sort of compromise by which the judge was obliged to intervene at two distinct times. Actually, the French jurist continued, it is a matter of principle and a question of authority, but if it were a question of safeguards, there would be no reason to believe that individual freedom was better guaranteed by the judiciary than by the administrative board, which has the opportunity to study and learn much more deeply about the offender (Saleilles 1901: 594).

The necessary implications of individualization in the transition from the abstract acceptance of the principle to its concrete implementation forced jurists to rethink the procedural rules, the competences they involved, and the constitutional checks designed to balance contrasting powers and interests during a trial. The proposal to delegate new decision authority to an administrative body composed and endowed with all of the criminological knowledge to choose the correct punishment did not solve the problem but rather raised further questions.[8]

[8] See, e.g., Battaglini (1912) 352; De Marsico (1930) 37.

7.4 Bi-Phasic Trials and the Separation of Verdict and Sentencing in the United States

In upholding the constitutionality of the indeterminate sentence law, passed on 18 May 1917, the Supreme Court of California (*In re Lee* 1918: 693) stated that with the new system, 'the judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty', whereas 'the actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character and properly exercised by an administrative body'. This reasoning was used by the advocates of indeterminate sentence to defend the legitimacy of the reallocation of powers. The punishment mechanism was a composite procedure with different phases, in each of which different subjects acted with particular functions: the judiciary ascertained the responsibility of the accused, and its task ended with the verdict of guilty; and the board of prisons was entrusted with the execution of the sentence, including any choices about the duration of detention, the evaluation of dangerousness, and the conditions of parole.

The rehabilitative ideal and the principle of individualization were the causes of this distinction because the technical legal knowledge of magistrates and the common sense of juries were not competent to determine the most suitable treatment for the offender's personal conditions. To guide the prisoner along his or her personalized correctional process provided by the indefinite sentence, a body of experts in criminological sciences was required. For US reformers, the guilt assessment was but a first step in a complex reformative course and the necessary premise for every correctional sentence, which could neither influence nor determine the time or manners of the individualized treatment because the judge of the fact cannot foresee whether and when the diseased/criminal will be cured/reformed. Given these different functions (to establish penal responsibility and to address the offender's rehabilitation), both the means and the subjects of these two phases should also be different: in the sentencing phase, criminal law should give way to other knowledge, just as the judge should concede to experts in the new prison disciplines (Arnold 1919). The enactment of

indeterminate sentence laws and parole laws led to biphasic trials, the first phase of which is completely judicial, ending with the verdict of guilty and retaining all of the features, rules, and limits of the traditional criminal trial. The second phase, sentencing, rests with an administrative body that is newly constituted and is open to the in-progress methodological experimentations of criminology. As Green argued (2014: 35), 'at the level of theory, the bifurcation of criminal process reflected the differing ways in which jurists and behavioral scientists conceptualized criminal responsibility'. The notion of *mens rea* remains the foundation of the guilt phase, but it is replaced by positivistic ideas of social responsibility and dangerousness in the sentencing phase. The opportunity for this bifurcation is also confirmed by the resentment of US lawyers and judges towards the institutionalization of the courts—that is, the transformation of their traditional functions of judicially determining the guilt or innocence of defendants into overall investigations of the lives, environments, or heredity of delinquents, the infliction of punishment, and the supervision of probation, all of which are occupations considered by judges to be 'repugnant to every tenet of the science of law' (Baker 1920: 178).[9]

This approach upset the constitutional balance by modifying the rigid distribution of powers theorized by Montesquieu and followed by the founders. Whereas previously the function of punishment 'stood, like an island of administration, in the midst of the conflicting currents of the legislature and the judiciary, a forlorn outpost beset by the combers of the seas' (Garrett 1915: 422), now it was brought again to administrative activity. According to this interpretation, the division of the trial into two phases, rather than having constitutional consequences, represented a revision of the tripartite genius of the fundamental law that, by removing sentencing from insecure and quasi-judicial breakers, placed this power in the safer waters of the administrative competence, which was plainly extra-judicial (Garrett 1915: 423). This system, by favouring the full realization of penological theories, fostered the unchallenged spread of indeterminate sentence laws in almost all of the United States. It surely implied radical reconstruction, but it

[9] Although also in the United Kingdom and Europe the magistrates' conservative attitude and legal training make them very sceptical about the new studies in penology and criminology (Ensor 1933: 89–90), the bifurcation of trials is not considered the right solution.

seemed to be the only way to correct the symmetry of government. In the old structure of sentencing, the judicial branch had the right to try offences against the criminal laws, and, upon conviction, to impose the punishment prescribed by law (Townsend 1920: 548); the administrative board had the limited duty to imprison the culprit while pardoning power was an exclusive prerogative of the executive. However, the conflicting powers of three contrasting authorities hampered the realization of the reformative system (Garrett 1915: 425).

Presented as a consequential and rational effect of the reformatory option, this bifurcation was full of applicative complications that deeply affected the procedural mechanisms, generated contradictions that were not easy to solve, and presupposed a penitentiary system (from the architecture of the detention institutions to the training of the prison officers) that did not correspond to the actual US situation. This is simultaneously both the strong and the weak point of US individualization. It is the strong point because it allows for the achievement of reforms, particularly the indeterminate sentence system, probation, and parole, which are peculiar to the US penal system compared to the European system (Ferrari 1917). It is the weak point because it enforces a new system of administration of criminal justice without having created and verified the conditions required for its correct functioning.

7.5 Procedural Consequences of the Bifurcated Criminal Trial

The fact that in 1959 the psychiatrist Karl Menninger still assessed the US punitive methods as ineffective because it relied too heavily on old penology and was impermeable to new scientific knowledge about the treatment of criminals (Menninger 1959) shows that the separation between the verdict and sentencing was not so easy to realize, and the reformatory system, despite progressive legislation, found it difficult to prevail over the retributive idea of punishment. Indeed, the biphasic trial entailed changes in criminal procedure that had significant repercussions for the defendant's rights, and it reshaped the checks and balances of trials by outlining a new equilibrium between constitutional tenets and penological reforms.

Let us examine a few examples of the changes to US criminal procedures. In common law trials in the United Kingdom, as well as in the United States, the jury simply returned a verdict of 'guilty'

or 'not guilty'. The duty of determining the punishment was a prerogative of the court (Green 1985; Horovitz 2007), which, because of the undue prejudice rule, could gather further character evidence to decide the most appropriate sentence only after the verdict. Due to the statutory law, in many jurisdictions, the judge was relieved of the sentencing power, which was entrusted to the jury without any separation of the sentencing function from the trial function (so both became tasks of the jury) and without any amendment of the undue prejudice rule, which, in this manner, prevented any evaluation of the offender's character at the moment of the infliction of the punishment. With the advent of individualization and the importance gained by the evaluation of the individual criminal in determining the appropriate treatment, the undue prejudice rule was necessarily reconsidered. Indeed, whether the trial and sentence-fixing functions were performed by the same body (the jury) or were entrusted to different bodies (the jury and the court), access to data about the offender's personality became essential in deciding the sentence, but the data could not undermine the basic safeguards for the defendant (see, e.g., *State v. Reeder* 1908: 140; *People v. Popesue* 1931; Broady 1934). Both doctrine and jurisprudence recommend a return to the biphasic model of the common law, adjusted to modern criminological requests, because the application of the separation principle is an unavoidable constituent of the proper implementation of habitual criminal statutes (Wolff 1954) and, above all, of indeterminate sentence laws. In those laws with a strong influence of criminological positivism and an emphasis on the offender's personality, the balance between the impartiality of the fact-finding process and the evaluation of the individualized treatment forces a rethinking of the traditional rules.

Under the influence of the criminological movement, modern criminal policy has transformed the logic of bipartition. The sentencing phase not only eases the evidentiary obstacles and the restrictions on judicial inquiries into the offender's character and life (Herman 1992; Horovitz 2007: 281), but it also raises the constitutional question of the role of the administrative branch in the execution of the sentence. Trial and sentencing, now conceived as two separate parts of a criminal trial, are not only governed by different subjects with distinct knowledge and training, but are also regulated by different norms. As the Supreme Court stated in *Williams v. State* (337 U.S. 241 (1949): 248–9), 'modern changes

in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments.' Only the logic of the bifurcation, with two phases that differ in both their aims and their methods, can reconcile the discretionary evaluation of the board of prisons with the undue prejudice rule ('The Admissibility of Character Evidence' 1942). This rule remains binding only on the trial, but no longer on the sentencing phase, during which, in contrast, all of the available information on the convict's personality and life are essential to choose the most suitable treatment for social defence because 'to deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation' (*Williams v. State* 1949: 250).[10] Even the constitutional safeguards of the Fourteenth Amendment, to which character evidence is related, have been reshaped by the principle of individualization because 'the due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure', and every conservative interpretation that could restrict the view of the sentencing judge regarding the information received in open court 'would hinder, if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice' (*Williams v. State* 1949: 251).

The individualization of punishment is in conflict with due process, even with reference to the application of the reasonable doubt clause. In many states where by statute the jury is authorized to interfere with the court's decision (e.g. by recommending pardon) or even to determine the punishment, the reason for the separation between verdict and sentencing fades. The jury tends to condemn even in the presence of reasonable doubt by counterbalancing the decision with a reduced penalty or, vice versa, when the jury is of the opinion that the offender deserves an exemplary punishment, by frustrating the reformatory function of parole with such

[10] As Wigmore pointed out (1923: 413), the undue prejudice rule was not observed in the continental criminal procedure in which the character evidence was 'given great consideration and is freely used'.

a severe penalty that the convict cannot be conditionally released too early. Even in such cases, the adoption of the indeterminate sentence system represents a remedy that settles the different exigencies of the two phases 'since the best solution to this problem, and that most consistent with modern theories of individualized punishment, would be to take the sentencing power completely away from both the courts and the jury and to confer the authority to fix punishments on the same agency which has control of paroles' ('Consideration of Punishment by Juries' 1950: 407).

Analysed from a constitutional viewpoint, the individualization of punishment greatly affects the allocation of sentencing powers among the legislative, judiciary, and administrative branches (McGuire and Holtzoff 1940; Rubin 1967). The method chosen by US penology to legitimize the reformatory system without voiding the safeguards of fundamental law is a reappraisal of the common law that leads to bifurcation of the criminal trial. However, it is not a simple reappearance of the judge's arbitrariness in determining punishment; the key role of the board of prisons shifts the epicentre of the sentencing to an administrative body, thus raising other problems of constitutionality.

7.6 The Judge's Dilemma and the Inconsistencies of the Peno-Correctional System

In 1930, Thorsten Sellin wrote with satisfaction that the philosophy of individualization seemed to have won the battle against retributive theories and that modern penal law, particularly with indeterminate sentence and probation laws, gave trial courts more extensive discretion in deciding punishment, to the point that 'the result has been the restoration to the judge of some of that arbitrary power of which it was robbed by the classical school' (Sellin 1930: 102). These increased responsibilities, however, have emphasized the defectiveness of the judge's knowledge of psychology, but also of social sciences and, most of all, of criminology and penology (Sellin 1930: 104). Information on the offender's past life is seldom available to the court, and even if the probation department or other investigative agencies provide data on the wrongdoer's character, the judge must face a serious dilemma: punishment should be oriented towards a goal and not decided accidentally, but each judge has his or her own opinion on the purpose of penalties, and there is no statistical verification of the success and

functioning of rehabilitative measures upon which the court's decision on the type and place of sentence could rely.

There was no correspondence between the broadening of judicial power and the expectations of the reform movement for individualization. This dissatisfaction led to renewed claims for an 'absolutely indefinite' sentence for every penalty and for every criminal (Sellin 1930: 107). Although Sellin considered the realization of this proposal highly unlikely, his contribution demonstrates that in the 1930s, sixty years after Brockway's report in Cincinnati, US criminology continued to seek a solution to the problem of the distribution of competencies in the reformatory system between the judicial and administrative branches (see White 1935).

In the same period during which European legislators codified the dual-track system that restrains indeterminacy within the limits of legality and judicial prerogatives, US criminology recognized with realism the failures of the adopted reforms (Glueck and Glueck 1930) and sought to plan possible amendments for the realization of a truly individualized system. The relatively indeterminate sentence laws, parole, and probation created a sort of compromise between classical and modern penology that has proven unsatisfactory. On the one hand, these reforms have returned discretion to judges without furnishing them with proper criteria for exercising that power (Warner and Cabot 1936: 159); on the other hand, they have conferred sentencing powers on new administrative agencies without providing them with uniform methods of evaluation and decision. The 'clumsiness' of US criminal justice is due, in Sheldon Glueck's analysis (1936: 103–4), to the deep cleavages that reflect 'the law's fundamental inconsistency'. The penal system resembles 'a house divided', the different levels of which are contradictory and reflect penocorrectional ambiguities, with the foundations still firmly retributive and the top floors camouflaged, and where additions are based on psychological and ethical notions.

The system of criminal law is one of the main causes of the inconsistency of the legal order due to the coexistence within the same jurisdictions of offences punished with fixed penalties and others with indefinite sentences. As Pound put it (1922: 30–1), modern criminal law, particularly the Anglo-American model, 'is made up more or less of successive strata of rules, institutions, traditional modes of thought, and legislative provisions representing different and inconsistent ideas of the end of criminal law, the purpose of

penal treatment, and the nature of crime', and it is therefore 'not internally consistent, much less homogeneous and well organized'. The only way to rationalize such an inconsistent system is to make clear decisions about the aims of criminal law to avoid mixing such irreconcilable ingredients as scientific breakthrough and tradition (Cantor 1935: 334). In an evocative image, Glueck (1936: 104) depicted the bizarre edifice of criminal law as 'the temple of some insane architect who, with little rhyme and less reason, has embodied his delusional dreams in a conglomerate of Egyptian and Assyrian, Greek and Roman, Gothic and Renaissance elements'. It is a 'disharmonious, unaesthetic, illogical and ineffective' pyramid that is reflected in the inconsistent attitudes of criminal judges, prison officials, and parole boards. The time is ripe, in Glueck's opinion (1936: 106), for a 'radical re-examination and overhauling of the complicated and ill-arranged structure of criminal justice' that accounts for the transformations occurring in the priorities of criminal procedures, the socio-economic changes generated by industrialization and urbanization, the modifications in popular attitudes towards crime and criminals, and, of course, the growth of criminology. The reformatory efforts of progressives in the 1930s should be considered all but complete. The rehabilitative method and modern penological theories have been added to the retributive model without replacing it completely, and this change has caused the inconsistent stratification of theories and legal institutions, replicating old incongruities and generating new ones. Variations in punishment, one of the first targets of the criminological criticism of the old system (Wines 1895), remain a major shortcoming of US criminal justice, which is even worse now because the source of disparity is a body that is administrative rather than judicial. The key problem is how the evaluative power of the prison boards should be limited. The suggested solutions are either by means of the law, which strictly defines the types and methods of the treatment, or by means of the safeguard of the judiciary, to prevent the sentencing phase from being governed by the rule of men rather than by the rule of law.

7.7 The Reaction against Administrative Justice: Scientific Treatment and Disposition Tribunal

After a few decades of experimentation, Pound—who, in his 'Introduction' to the English version of Saleilles's book in 1911,

enthusiastically praised the US penal reformism as a 'phase of this general movement for individualising the application of all legal rules' in agreement with the 'general reaction against administration of justice solely by abstract formula' that characterized French modernism and the German *freie Rechtsfindung* (Pound 1911: xvi, xv)—took a different position in 1929. He recognized that the 'movement for individualization and for preventive justice has itself brought about a reaction', in particular against the criteria and procedures adopted by administrative justice, which is 'the chief agency of individualization' (Pound 1929a: 298). Indeed, the individualization of punishment, ideated to achieve social defence and individual reformation simultaneously, has failed in both these aims and has generated public sentiment about justice that is too lenient with the most dangerous antisocial conduct and too threatening to the security of individual life 'by committing too much to the discretion of administrative officers' (Pound 1929a: 298). The reaction of progressives against the injustice of fixed penalties and mechanical jurisprudence has been replaced by a counter-reaction against the unreliability and inadequacy of the new experimental methods to the point that growing distrust of all the agencies of preventive justice has placed 'under suspicion' the scientific convictions of criminology (Pound 1929a: 299).

As the first theorizers of the reformatory method perceived, the critical point is the functioning of the board of prisons, to which are delegated the responsibilities of classification and evaluation of the sentenced. The flexibility of punishment represents the core of the reform and should have scientific criteria for its legitimacy. Its operation requires, first, a board consisting of honest and trained people who are up to date with the progress of psychology, anthropology, statistics, and sociology and, second, the gradual formation of uniform knowledge to guide the decisions of the commissioners. However, these are exactly the weak points because the inadequate cultural training of prison officials represents the cause of the failures of the correctional system. A study by Sheldon and Eleanor Glueck demonstrated 'the unscientific nature of the contemporary treatment', whether based on legislative prescriptions of penalties or on judicial sentencing, because both 'are founded upon considerations almost wholly irrelevant to whether or not a criminal will thereunder ultimately be a success, partial failure, or total failure' (Glueck and Glueck 1929: 327). The two criminologists contested the total lack of a scientific basis for the criteria

upon which judges have founded their decisions regarding punishment, the extemporization of the peno-correctional methods used by parole boards, and, above all, the deficiency of the prognostic factors theorized (Butler 1922; Hart 1923; Warner 1923) or applied to the judgment regarding the dangerousness or reformation of the offender. The legislative provisions are too vague and do not provide any useful elements for adjusting the punishment to the rehabilitative goal, and the incoherent choices of both the courts and the prison boards have thwarted the spirit of criminological reforms.

The attempts of these authors to elaborate on prognostic devices of predictability 'for rendering the work of courts and parole offices much more scientific than it is today' (Glueck and Glueck 1929: 327), after sixty years of experimentation and improvisation, reveals the deep-rooted and unsolved antinomies of the US penal reform movement and foreshadows its crisis. The hurried enactment of indeterminate sentence and parole laws on the wave of the rehabilitative ideal, which was not followed by true cultural reform of the officials in charge of the sentencing phase, transformed individualization into a means of punitive arbitrariness without any rational foundation, if not arbitrary discrimination. The remedy suggested by Sheldon and Eleanor Glueck—and by others after them (Lanne 1935; Laune 1935, 1936; Vold 1935)—without questioning the logic of biphasic trials, at least attempts to base sentencing decisions on scientific and credible criteria.

Warner and Cabot, following Sellin's suggestion, insisted on separation between the guilt and sentencing functions, attempting, so to speak, to complete the process started by the first reformers. Into the 1930s, judges deciding punishment (whether passing indeterminate sentences or not, whether granting parole) continued to place no importance on criminological considerations. However, their sentences were still highly variable without being grounded in any rational criterion because they were apportioned neither to the crime nor to the criminal, but to 'different conditions in the various parts of the city, different types of defendants, and different theories of sentencing among judges'; more simply, 'the variations may be entirely due to personal idiosyncrasies of the judges' (Warner and Cabot 1936: 168). The total lack of any reasonable basis for the inequality in punishment is considered to be, at least among prison officers, the main fault of the penal system. As long as judges do not reveal the reasons for their decisions, it is

impossible for prison officers to convince convicts that variations in sentences 'are due to individualization of punishment and not merely to arbitrariness' (Warner and Cabot 1936: 169).

The solution discussed at the Cincinnati conference on the administration of criminal law in 1935 ('Criminal Law Administration' 1935), recommended by Warner and Cabot (1936) and endorsed even by Cantor (1938) and Mannheim (1939), was the institution of a disposition tribunal that had jurisdiction exclusively over punishment. It should be a judicial body (a court or a section of the Superior Court) composed of an expert in legal subjects (preferably a judge), an expert in criminology, and a third member, chosen from among a jurist, a physician, or a social operator. In this manner, nothing would change in the traditional procedure until the verdict was issued, whereas sentencing would be delegated to this new tribunal, which would be in charge of carrying out the execution of the sentence within the boundaries abstractly defined by the law for each crime. This method, moreover, would offer the advantage of distinguishing the judicial and administrative functions of the sentencing phase because the disposition tribunal would be entrusted with the task of determining the punishment/treatment and controlling its results, whereas the purely executive duties would be left to the officers of the correctional institutions (Mannheim 1939: 204; Warner and Cabot 1936: 170–4, 1937).

As the lawyer Alfred Bettman argued at the Cincinnati conference, the idea of a more centralized disposition tribunal, either on a state-wide or district scale, would be necessary not only for the application of the behavioural sciences to the individualization of punishment, but also for finding a remedy to the extreme variation in sentences due to variations in judicial temperaments and attitudes. Indeed, boards of parole have been assigned the ultimate determination of the length, place, and character of punishment/treatment without being equipped for this essential task, and 'in the set-up of these boards, we have failed to distinguish between the judicial function of determining disposition and the more administrative functions of supervising parolees'. However, Bettman was aware that the bifurcation of the criminal trial was still a complex and incomplete process and that the separation of the guilt issue from the study of the offender's character 'requires such a degree of change in substantive criminal law, in the codes of procedure and in the structural organization of the administration of criminal justice, that the creation of a completely harmonious

system at any one time or by any one stroke of legislation is impossible' ('Criminal Law Administration' 1935: 405).

Abhorrence of the degeneration of the Nazi criminal law towards forms of arbitrariness that resulted in the annihilation of the human being's fundamental rights has evoked legalitarian reactions, even in US criminology. The principle of individualization is not disputed, but criminologists seek to find new means to regiment it within the observance of the principle of legality and the limits of judicial functions by creating bodies similar to the tribunals of surveillance of the European system. In 1938, Cantor, reverting to the proposal of a disposition tribunal, noted that the law attributing judicial functions to the new body should strictly define the limits of its powers to safeguard the rights and freedoms of the offender. The idea that the social defence rationale can give judges the legitimate power to impose repressive measures on dangerous subjects without any legal limitations on their discretion must be rejected.

The criminal justice system, grounded on social defence tenets, should be radically rethought because 'complete abandonment of the rule *nullum crimen sine lege* would expose individuals to the whims of the court . . . and to the political currents of the day . . . No people is safe unless rules of law limit the judgments of men' (Cantor 1938: 60). The principle of legality, in Cantor's view, must be a limit on the individualization of punishment, and in the field of penalties the law should never be entirely abandoned. The treatment of the criminal cannot be exclusively dependent on the character of the wrongdoer, which is a vague and questionable factor, and treatment should always be executed in forms determined by law. The development of modern penology has moved away from the classical model of similar penalties for similar offences. Now, according to Cantor, it is time to reallocate to judicial discretion all of the sentencing decisions given to administrative agencies. Even accepting the idea that the criminal should be treated rather than the crime and assuming that the boards of prisons decide in the light of state-of-the-art scientific knowledge, 'there is no guarantee, however, that sentencing boards will possess wisdom nor that there will be agreement on what knowledge is "best". Individualization of treatment can lead to concentration camps as well as to psychiatric therapy' (Cantor 1938: 61).

The judge's dilemma over the boundary of his or her jurisdiction has legal, philosophical, and historical roots in the principle

of the separation of powers, and it was sharpened by the late nineteenth- to early twentieth-century trend towards the transferring of certain tasks 'of a truly judicial character from the Courts to the administrative authorities' (Mannheim 1939: 174). It is one of the main contradictions of correctionalism; in reshaping the balance between powers to make the peno-correctional phase more flexible, it seems to transfer to judges some prerogatives of the legislative branch. In fact, however, it shifts the responsibility for discretional evaluations to administrative bodies and jeopardizes the safeguards of the individual. The true, unsolved dilemma of the judge caused by individualization lies in: the relationship between the verdict and sentence; the mechanisms for balancing the distribution of roles between the judiciary and the administrative branches within these two phases of the process, which are conceptually distinct but necessarily interconnected; the concession of sufficient safeguards for the defendant in both phases; the impossibility of foreseeing the time for rehabilitation versus the risk of opening the door to unchecked discretion; the difficult alliance between law and science; and the lack of scientific methods for the evaluation of the dangerousness of the offender. This dilemma, in other words, consists of the thin divide between the *Polizeistaat* and the *Rechtsstaat*, between the rule of law and the rule of men.

7.8 Conclusions

The individualization of punishment and its corollaries prompted a revision of the *nulla poena sine lege* principle. The pivotal rule of penal liberalism, the bulwark against the abuse of punitive power by public authorities, was openly questioned and weakened. Criticisms of the legality of punishment were a part of a broader reappraisal of traditional penal liberalism, which was mainly targeted at 'archaic' technicalities that overprotected the individual. Political and social conditions changed (so did the mainstream), and the individual citizen had nothing to fear from the state; rather, society required more effective protection against criminals. Substituting social defence for individualism affected the constitutional framework of penal liberalism and stimulated reconsideration of the entire sentencing systems both in Europe and the United States, particularly with reference to sentencing power allocation.

A first outcome of this transformation can be seen in the proclamation of a restored judicial power to choose the most suitable punishment for offenders without being limited by strict laws. Nevertheless, as the same reformers recognized, in the new punitive system based on the individualization principle, the real discretionary sentencing power was attributed to the prison administration rather than to the judge, and this recognition of the authority over individual freedom of an administrative body whose limits, scientific knowledge, and reviewability were still unclear turned out to be the weakest point of the reformative movement. Once again, the US and European reformers addressed this crucial issue with different approaches and devised dissimilar solutions.

In the United States, the inefficiency of punishment was tackled by delegating more discretionary power to administrative boards charged with carrying out the sentence. By neatly separating the guilt phase from the sentencing phase, in adherence to a common law procedural scheme that was revisited in light of criminological theories, the judge's role was curtailed and limited to the verdict. The sentencing phase, which included decisions on the duration of detention as well as conditions of parole and release, was delegated to prison boards that consisted of experts in criminological knowledge.

The US criminal justice system places strong constitutional safeguards in defence of individual freedom during the trial, but neither the reformatory system nor indeterminate sentencing infringe upon the due process clause, which is a form of 'procedural legality', because, according to prevailing opinion, the accused retains all guarantees until the verdict. However, after condemnation, the protections can be lessened because it is no longer a matter of protecting a defendant who is presumed innocent, but of re-educating a proven criminal. Sentencing, according to this view, should be not a judicial act, but an administrative act (or a series of acts), which should be delegated to a body of experts in criminology without any violation of the separation of powers or the principle of equality.

Only in the 1920s and 1930s did certain critical opinions (Glueck, Cantor, Mannheim, and Warner and Cabot) question the broad arbitrary power given to prison boards and suggest rebalancing this unchecked discretion through introducing a judicial

review or disposition tribunal to restore a judicial check to administrative decisions. The next chapter will trace the European preference for a judicial type of individualization that entailed deep changes in criminal procedure, but never embraced the bifurcation between guilt and sentencing phases.

8

Nulla Poena Sine Lege and Sentencing Discretion

In Europe, the effects of individualization on criminal procedures and the competencies of judges have differed from those in the United States. The main distinction is the role of the judiciary in the sentencing phase. Whereas, as we have seen, the US legal system is inclined to limit the role of the court (and the jury) to fact-finding and the assessment of guilt and to delegate the sentencing tasks to an administrative body, the continental model aims to extend the responsibility of the judge, even to the execution of the sentence and to any form of individualization implying the exertion of arbitrariness.

By accentuating the bifurcation between the trial and sentencing, the US system of individualization formally obeys the strict character evidence rules in the first phase, and shifts the personalization of the treatment *out* of the trial to preserve the individual safeguards traditionally rooted in the rules of evidence. Conversely, the continental system aims to design means of individualization *of* the trial by acting on the methods and procedures that provide the judge (even the investigating *judge*, but not external subjects) with the necessary information to decide the fittest punishment for the convict. Whereas the verdict in the United States cannot (at least formally) consider any element of the defendant's character or life before the contested fact, the European criminal procedure is provided with mechanisms that bring *into* the ordinary trial, under the protections of the jurisdiction and the principle of legality, all of the useful data for judging not only the crime, but also the criminal.

The first part of the chapter examines how, by following this trajectory towards judicial individualization, European reformers revised the role and jurisdiction of the judge and, in so doing, their theories affected the architecture of the *Rechtsstaat* (section 8.1),

as well as the principle of the legality of punishment (section 8.2). In section 8.3, I seek to reveal the tensions inherent in their proposals of an individualized trial. Section 8.4, by analysing the London Congress of 1925, describes the reasons for the theoretical-legal differences between the European judicial individualization and the US administrative individualization.

8.1 Sentencing Discretion and Constitutional Balance in the *Rechtsstaat*

In the continental system the struggle of the Enlightenment and the French Revolution to defeat any form of arbitrariness in the administration of criminal justice has led to historically rooted resistance to the attribution of penal powers to any subject whose discretion is not regulated by law or by strict procedural rules during all of the criminal trial phases, including sentencing. In many continental states, criminal procedure has been modelled on the French *Code d'Instruction Criminelle* of 1808 (Jung et al. 2010), which divided the criminal process into two parts: first, the inquiry, mostly inquisitorial, secret, based on written documents, without cross-examination, and presided over by the investigating judge (Farcy et al. 2007); second, the hearing, mostly adversarial, public and with the presence of the defence counsel. There is no strict separation between the pre-trial and trial phases; the court, in its task of determining the truth, has complete freedom in evaluating the evidence, and all evidence regarding the background and character of the accused collected in the preliminary inquiry are admitted.

The European notion of legality, expressed in the formula *nullum crimen nulla poena sine lege*, has a substantial character, unlike the Anglo-American notion, which is mainly procedural and embodied in the due process principle (Mott 1926: 589–604). Nevertheless, in the specific domain of punishment, which has been deeply affected by the individualization movement, European jurists seem to be much more committed advocates of the idea that even in the execution of the sentence, some judicial safeguards are necessary because the legislative provisions of the limits and types of penalties are not sufficient. Even admitting, as many positivists do, that the judge cannot foresee the length and manner needed for the reformation of each offender at the moment of the verdict, this consideration does not lead to a diminution of the responsibility

of the judicial body, but rather to its enlargement. Indeed, it led to theorization of the need for a 'prison tribunal' or a 'sentencing tribunal' long before a similar proposal circulated in the United States in the 1930s, as we saw in the previous paragraph. At the same time, the European criminal procedure places far fewer obstacles in the way of the evaluation of the accused's personality during the trial; it lacks the undue prejudice rule that, as we have seen, fosters the bifurcation of the US criminal procedure into two phases. Techniques, methods, and stages of individualization are different on the two sides of the Atlantic: they are administrative, even within the limits of relative indeterminacy, on the US side, whereas they are judicial on the European side. At the roots of this distinction, there are two diverse conceptions of constitutional safeguards and penal legality. Devised to limit through the force of the law abuses of administrative power (Costa 2007b; Grote 1999; Laughlin 2010: 312–41; Palombella 2009), the *Rechtsstaat* imposes a separation of powers that, in criminal law, forbids any legitimate space for the intervention of administrative bodies because it would mean nullifying the constitutional value of the *nullum crimen nulla poena* principle.

This does not mean, however, that the individualization principle has not deeply transformed substantive and procedural criminal law in Europe, modifying both the duties and the powers of judges to allow them to make the punishment fit the criminal. Further, it does not mean that the European system, which is formally more respectful of the tripartition of functions and which firmly excludes the executive from the administration of criminal justice, is more respectful of civil rights. The principle of legality and the right to a judicial trial, which are fundamental rights of respectable citizens, are not applied in the same manner to dangerous people, paupers, and marginalized individuals, who are punished with penalties that are disproportionately severe—by which the legal system 'wants to kill insects with cannon ball' (Dorado Montero 1912: 66)—or are controlled by means of administrative measures of preventive police (Martín 2009; Sbriccoli 2009c).

In Europe, the introduction of alternative penalties, such as conditional release, suspended sentences, and measures of security for dangerous offenders, has kindled the interest of legal scholars in the safeguards of the sentencing phase and the discretion that should be accorded to judges and prison officers. Once the principle of strict legality and the mechanical application of the

law by the judge are abandoned, it is necessary to find different limits in defence of the individual, as well as to rethink the balance between powers and rights. The constitutional framework of the *Rechtsstaat* is transformed, although its tenets must continue to inform the penal system. The German jurist Berthold Freudenthal, examining in 1918 the conditions of criminal law and the execution of punishment in the modern *Rechtsstaat*, identified the new frontier of the constitutional penal safeguards in the delimitation of the inmate's sphere of rights. The manner in which administrative authorities make decisions about the form and manners of the execution of the prison sentence by operating within jurisdictional margins that lack any legal foundation and that are unclear and inadequate resembles the conditions of the police state (Freudenthal 1918: 503). Regarding the aim of detention, the 'prison law' should be circumscribed and purged of any aspect traceable to an authoritarian, pre-liberal model that is not respectful of civil rights.

In all of the ways to prohibit personal liberty in penal institutions (such as work houses, prisons, juvenile detention centres, asylums for habitual drunkards, and institutions for dangerous habitual and professional criminals), the inmate can never be subjected to unconditioned subjugation to the uncontrolled will of prison officials. The method for making every decision regarding the prisoner's destiny (e.g. disciplinary sanctions, concession and repeal of a benefit), consistent with the *Rechtsstaat*, rests on the justiciability of the administrative power, namely, on the possibility of submitting the prison board's decision to judicial review, before either an ordinary or an administrative court. The judicial protection of individual freedom as well as the guarantee of judicial impartiality and independence must characterize the line of development of the *Rechtsstaat* in its modern form, but it is also what the law on the execution of punishment lacked at the beginning of the century (Freudenthal 1918: 508).

These inherent constitutional tensions of the new penology were clearly pinpointed by Mahmoud Ihsan Zohdi, a jurist who studied at the University of El Cairo, in his book on indeterminate sentencing. As legal indeterminacy of punishment was inconceivable, particularly in the continental legal orders, because 'it would be the abdication of the law, it would lead to anarchy' (Ihsan Zohdi 1927: 197), judicial indeterminacy should also be restrained within the limits compatible with the principle of the tripartition of powers. When the law gives the task of deciding punishment to

the judge, he will always represent the law itself; if he passes an indeterminate sentence, 'he will fail to do his duty and will hand over the criminal, who has been placed under his charge by society, to another authority to which society expressly wanted not to hand over any offender' (Ihsan Zohdi 1927: 198). The very essence of judicial power relies on the fact that it cannot be delegated to the executive branch and its officers because such a delegation would involve the 'denial of the principle of separation of powers' (Ihsan Zohdi 1927: 198).

8.2 Criminological Challenges to the Legality of Punishment

During the nineteenth century, the solemn revolutionary declarations of natural pre-political rights yielded to the statist doctrine of subjective public rights, according to which the absolute of individual freedom found in the notions of general interest and public order a necessary balance, as well as an unavoidable limit. Originally, as De Asúa argued in his fourth lecture at the University of Buenos Aires in 1923 (1928a: 129), there was no conflict between the needs of modern criminal law (which can represent a limit to the freedom of the subject) and the political breakthrough of the eighteenth century because, today, having defeated the belief in natural rights and repealed the pre-state notion of individual rights, 'the theory of individual rights is built within the State, recognising the reasons of public utility that can restrict the exercise of these rights'. The rigidity of the principle of *nulla poena sine lege*, which was the symbol of the anti-judicial attitude of the late eighteenth to early nineteenth century, experienced in the second half of the nineteenth century remarkable mitigations (such as pardons, mitigating and aggravating circumstances, conditional release, suspension of sentences with probation or parole, and juvenile courts).

The new criminal law based on criminology 'is ambitious'. It is not satisfied with the invasion of the old principle of legality via the aforementioned measures, but 'aims at demolishing it through very daring institutions' that, in some progressive countries, have already been enacted, such as the recognition of broader judicial discretion, the indeterminate sentence, and the importance of the dangerousness of the offender (De Asúa 1928a: 132). Both the individualization of punishment and the notion of dangerousness

necessarily rest on the judge's discretion: 'the ghosts return', the risk of the arbitrariness and injustice of the *Ancien Régime* reappears because the magistrate, in choosing the treatment and in deciding the sentence, can commit those abuses that everyone wants to prevent (De Asúa 1928a: 139). The indeterminate sentence, even relative, represents a great peril for the individual freedom because the detention of the unlucky prisoner could be prolonged more than necessary, while the influent inmate, who is able to corrupt the prison officials, could be released early (De Asúa 1928a: 140). Above all, the notion of dangerousness embodies the point of greatest tension between modern penology and the principle of legality. Being the essential criterion for the preventive penal treatment of the individual, this subjective concept implies the impossibility of drawing up a complete catalogue of dangerous situations because it is different in each case. De Asúa argued (1928a: 138) that protection of the individual's rights, embodied in both the definition of the offence (*nullum crimen*) and the corresponding legislative provision of punishment (*nulla poena*), 'receive a blow', which is even more severe in the case of measures of security applied without the commission of a crime.

The defence to the bitter end of the *nulla poena* principle by many European jurists (particularly French jurists, e.g. Garçon 1922: 159) resembles an extreme endeavour to preserve, by means of a rear-guard battle inexorably destined to be defeated, the liberal individualistic model that is unable to resist the pressures of twentieth-century social complexity and is inconsistent with the modern purpose of punishment. Therefore, according to De Asúa (1928a: 138), given the necessary and unavoidable re-examination of the function of legality, 'what has to be considered is up to what point its destruction should continue'.

The new challenges of penology no longer address the solemn proclamation of the principle of legality and its corollaries; rather, they address the justification of its minimal defence (i.e. the preservation of legality), which should be rethought not to nullify the penal safeguards entirely. The full rejection of *nullum crimen nulla poena* can be conceived only by assuming two equally extreme perspectives: one entirely based on social defence, which depicts the offender as a beast; or the other, in which considerations of the individual's quality prevail to the point that the criminal is identified as a patient to be cured or a child to be educated. The key political problem, borrowing again De Asúa's words (1928a: 141), is

'reconciling the individual interest to freedom with the social interest to defence'; namely, it is finding a point of equilibrium between the criminalization process and protecting the individual. In this transition, the principle of legality, reshaped according to the coordinates of criminological positivism, should still play a crucial role in preventing delinquent or dangerous people from being crushed by the punitive machinery or being considered abnormal and thus treated without any safeguards.

8.3 The Individualized Trial and the Judicialization of Punishment in the European Doctrine

In the international debate on individualization, some European jurists held radically positivist ideas, which, unifying repression and prevention under the same duty of social defence, suggested abandoning 'the separation currently irreducible between the judicial branch and the administrative branch, in order to merge them together into a sole order' (Dorado Montero 1912: 62). This fusion would finally put an end to the divide between the activity of the judge who passes the sentence and the activity of those charged with the execution of the judicial decision. These are two functions, as Dorado Montero noted (1912: 62), which, 'at the present time, operate regardless of each other, without the least continuity or unity of spirit, purpose and organisation'. The comprehensive purpose of social defence and the recognition of the principle of individualization should also imply a reorganization of powers in a manner that no longer corresponds to the constitutional balance of the liberal *Rechtsstaat*. The individual interest, protected by the rigid tripartition of powers and strict legality, should yield to the social (and political) interest so that in the choice between corrective or eliminative measures and among substitutive, additional, or complementary measures, both the judicial and the administrative branches are united by the pursuit of the same goal.

The argument advocated by the Spanish jurist was a minority opinion even among reformers. It did not prevail over the view that considered the indeterminate sentence to be a reversion of legal culture because of 'the restoration of an absolute power in the hands of the authority responsible for the execution of the sentence' and, consequently, 'the annihilation of the fundamental principle of the separation of executive and judicial powers'

(Berlet 1912: 15). The prevailing European legal doctrine confirmed the need for the separation of judicial and administrative tasks, attempting to force the individualization of punishment within the safeguarded and constitutionally defined spaces of ordinary judicial jurisdiction and delegating to administrative bodies the mere duty of implementing the decisions of the courts. In Italy, for instance, this approach could be seen in the proposals advanced in the early twentieth century by the reformers Ugo Conti, Eugenio Florian, and Bruno Franchi.

8.3.1 Ugo Conti and the human element at the core of the criminal trial

Conti, in his inaugural lecture at the University of Cagliari in 1905, was in favour of changes in the criminal procedure that allowed for an emphasis on the offender's subjective characteristics, but only if these transformations included an evaluation of both the offence and the criminal (Conti 1906: 8). The conceptual difference between the 'juridical school' and the 'sociological school' lay precisely, in Conti's opinion, in the different importance placed on the fact and the offender. Whereas the new movement considered the human deed only a symptom of the organic condition of the person and an occasion for studying the dangerousness of the subject, the traditional theory firmly believed that the investigation of the fact should precede the study of the criminal, which should be connected to the factual conditions.

For Conti, the scientific evaluation of the 'human element' should model the entire machinery of criminal justice without revising the constitutional balances and prerogatives of the three powers. Judge, prosecutor, counsel, *juge d'instruction*, experts, the new 'scientific police', police officers, and prison officers should be all trained in criminal matters, namely, legal, anthropological, and sociological studies. Inquiry into the accused's personality and the motives of the deed, sometimes with the help of experts, should be mandatory from the pre-trial investigative stage so that the trial relies on facts rather than words, and the courts have sufficient elements on which their decisions can be based. The concrete study of the offender would be continued during the execution of the sentence, and in concert with the criminal judge, the punishment could be reduced, or a complementary measure of security could be applied. The methods chosen by the Norwegian Penal Code

and the Swiss draft penal code are signs of the gradual process of conforming penal laws to concrete facts (Conti 1906: 15).

8.3.2 Bruno Franchi and the individualizing criminal procedure

Franchi (1900b: 649) theorized that individualization could truly become a unitary principle governing the entire criminal procedure to the point that all of the bodies of social defence (i.e. the police, investigating magistrate, judge, experts, and sentencing authorities) 'carry on a coordinated activity, driven by the same principle toward a unitary goal'. It is neither a matter of unifying the penal jurisdiction and administration, nor of separating the guilt assessment and the execution of the sentence; rather, it is a matter of introducing mechanisms that render the ordinary procedure concretely suitable to collecting reliable and scientific information about the offender, leading to an individualized judgment tailored to the convict's characteristics and inclinations gathered *during* the trial (not *after* it, as in the United States). Therefore, Franchi (1900b: 653, 1901) suggested the individualization of the preliminary investigation as a method for shifting to the pre-trial phase the examination of all of the defendant's characteristics (biological, psychological, socio-economic) that could condition the entire course of the trial up until the verdict.

Franchi criticized the in-force procedure because it compressed the space for the evaluation of the accused's personality into only the last phase of the trial, in which the law entrusted the judge with the task of modelling the punishment to the offender without giving the judge the proper cognitive tools to make a motivated decision. In the investigative hearing, in contrast, with the cross-examination of the counsel and the contributions of the experts, but without the publicity of the hearing, all of the necessary information for individualizing the sentence could be gathered in light of state-of-the-art criminology. Thus, according to Franchi (1900b: 658), the reasons for justice, judicial truth, and science would be reconciled; justice would be satisfied due to the presence of a counsel, without which the task of the investigating magistrate would be an unlawful infringement of the citizen's rights; the judicial truth would be reached through equal confrontation between the prosecutor and counsel; and science would be respected due to the presence of the board of experts (Miletti 2007; Rotondo 2008).

The core of his proposal was neither separation nor unification of the trial and sentencing phases or of jurisdiction and administration, but was simply adjustment of the procedural rules to the individualizing principle 'to instil life, give a method, and discipline the figures' of the modern theoretical and legislative trends that assign broad discretion to the judge in passing a sentence adjusted to the offender (Franchi 1900b: 664). As Franchi emphasized in his report for the Fifth International Congress of Criminal Anthropology, the anthropological research that should inform the preliminary investigation is not simply the precondition for the true individualization of punishment; more remarkably, it is the essential balance between the need for social defence and the safeguards of the individual. The personalized penalty is judicially imposed, and the political, legal, and anthropological integration of punishment is achieved by means of a procedure that is coherently dominated by the same principle and applied with the utmost protections of the rights of the citizens and the society. In this manner, the US system, in which the sentence is determined *a posteriori* by prison authorities and which Franchi considered 'anti-juridical, not very liberal and too rash' (Franchi 1901: 171), would be rejected.

When, a few years later, he analysed the transformation of the execution of the sentence after Lombroso and suggested sending habitual recidivists to a farm colony (Franchi 1906: 392), his proposal was grounded on the creation of an 'individualizing' criminal procedure, resulting in measures that fit the criminal. The farm colony (or asylum for the criminally insane) for habitual recidivists, which is preferable to deportation or relegation, is not a punishment, but 'a measure of public security, eliminative and indeterminate' to be applied first to the 'mala vita' (members of the Camorra or Mafia) and then to born criminals, the insane, and those affected by psychic anomalies that make them somehow dangerous (Franchi 1906: 393). However, the application of the farm colony is founded on 'the postulate of the *anthropological integration of criminal procedure*' (emphasis in the original), namely, on the law providing for mandatory anthropological-criminological and psychiatric expert evidence to be offered in compliance with the manners and forms defined by the law (Franchi 1906: 394–5). To provide the strongest protections to the adoption of such a measure that so drastically suspends and diminishes the ordinary exercise of rights, Franchi assumed that the law should predetermine the

amount of recidivism required for introducing expert evidence, as well as the criterion of the wickedness and anti-sociality of the determining motives of all committed crimes. The existence of presumptive legal criteria does not automatically imply the dangerousness of the subject, but it compels the public prosecutor to introduce expert evidence, the purpose of which is exactly 'to shift *from juridical presumption to scientific certainty*' (emphasis in the original) the dangerousness of the recidivist due to an innate or developed psychic anomaly, which Franchi (1906: 400) called 'the anthropological substrate of dangerousness'. Only a solution that, founded on scientific positivism, transfers the adoption of specific measures from the discretionary orbit of the prison administration to the orbit of a judicial decision-maker, with its consequent protections, could truly indicate progress in social defence.

By transforming the trial from an investigation of the facts into an investigation of the organic and psychic conditions of the accused, the principle of legality is changed accordingly. Its nineteenth-century formula is revised to cover with the proper safeguards the new model of the trial, which is oriented towards determining the defendant's dangerousness and choosing the correct punishment for reasons of social defence, rather than the 'traditional' trial, which is oriented towards determining the defendant's liability and imposing a predetermined sentence. If the adoption of the dangerousness paradigm, on the one hand, broadens the field of penal justice so much that it confuses it with the jurisdictions of administrative law and preventive police, on the other hand, it entails the judicialization of all measures of social defence and, consequently, a broadening of the safeguards. The example of the farm colony, Franchi concluded (1906: 405, emphasis in the original), is 'an administrative disposition that, though, because of the protections by which it is surrounded, I would rather call a *judicial-administrative* disposition whose cornerstone is its individualisation'.

8.3.3 Social defence and the new 'Pillars of Hercules' of judges

The constitutional problem of the judiciary's role in criminal law 'in formation' is crucial, even in Florian's thought. If, in the classical system, 'condemning or acquitting were the Pillars of Hercules of the judge' (Florian 1910: 737), now the judge's competencies

also encompass all of the dispositions dictated by the reasons for social defence, including surrogates for punishment such as the suspended sentence,[1] measures of security for acquitted but dangerous subjects, such as asylum for the criminally insane (art. 46 of the Italian Penal Code 1889), and the complements of punishment for convicts who remain dangerous after having served ordinary sentences. The juridical qualifications of the new judicial functions, as Florian explained (1910: 738), are neither theoretical minutiae nor constitutional subtleties, but, on the one hand, they address the fundamental notion of punishment and, on the other hand, they concern the concrete social defence against delinquency, as well as the individuals' freedom.

Florian's thesis was that the exercise of all of these new prerogatives given by law to the judge was a full expression of judicial jurisdiction rather than of administrative power, as others asserted. Now, magistrates could not restrict themselves to ascertaining that the offence with which the defendant was charged existed; the judge must also decide on a case-by-case basis the legal consequences of the crime and the punishment for the offender by issuing dispositions that are 'by their inherent nature' judicial (Florian 1910: 740). The punitive power of the state, compared with the minimum criminal law of classical penal liberalism, covered, in the early nineteenth century, a much more extensive area that included evaluation of the offender's dangerousness, as well as of the application of preventive measures for social defence. These remedies are provided for by the law, and made effective by the judge's verdict, which is always the 'premise and origin' of the execution of the sentence because the administrative power 'begins where the judge's decision is complete and final' (Florian 1910: 740). Florian, opposing the opinions of some leading criminal law scholars (Manzini 1910; Rocco 1907), rejected the attribution of every decision regarding the sentencing phase (such as conditional sentences) to administrative bodies.

Every decision on punishment, whether to suspend it or to replace it with dispositions directed towards acquitted and non-indictable subjects, 'affects substantially the content of the right to punish, the exercise of it and its effects and does not have anything to do with its execution (which is an administrative function)' (Florian 1910: 743). These measures represent the juridical

[1] In Italy, it was introduced by the Law 24 June 1904, n. 267.

consequences of the committed crime, the judgment of which is entrusted to the judges in the exercise of their judicial functions, so they are charged with the evaluation of the conditions of dangerousness. If the new social goals of the state's defensive action require the addition of new measures to traditional penalties, this enlargement of horizons must not curtail the role of the judge, but, rather, must strengthen it. Even the measures of security, which have all of the appearance of punishments and inhibit the enjoyment of individual goods and rights, should remain within the orbit of judicial jurisdiction to balance the risk of the arbitrary compression of individual freedom (Florian 1910: 747, 1914: 63).

Thus, for the Italian reformers, individualizing criminal law and procedures meant admitting that legislation should be based on the positivist notion of dangerousness and should be sufficiently flexible to be adapted to different cases (Altavilla 1915: 88). However, it also meant broadening judges' competencies beyond the borders of the traditional notion of punishment. Even the magistrate's increased prerogatives remained under the shield of the judicial branch, and the judge was compelled to work within the boundaries (although broader) determined by the law because the tenet of the liberalism, according to which any diminution of freedom should be subjected to the principle of legality and be decided through a criminal trial (Salandra 1904: 76), was not questioned. In formulating his unitary theory of criminal justice combining repression and prevention, Silvio Longhi (1911) based the inclusion of measures of security within the field of criminal law on the possibility of applying them only via judicial protections of the same type as those provided for the infliction of punishments. As the positivist Filippo Grispigni noted (1920a: 407–8), the essential characteristic of any criminal sanction (a notion encompassing both punishments and security measures) is that it is applied by judicial bodies because 'in the modern state based on the division of powers . . . the autonomy of the criminal law compared with the administrative law is given solely by the intervention of the judge' as a safeguard against the executive power. The need, for reasons of social defence and for the modern philosophy of punishment, to apply alternative or supplementary measures to ordinary punishment was recognized even by the Italian reformers. However, this recognition did not imply, as in the US experience, a constitutional reinterpretation of the separation of powers.

8.4 Administrative or Judicial Individualization? The Debate at the London Congress (1925)

The opinion of the Italian jurists, based on the maintenance of a decisional role for the judge in the sentencing phase to avoid infringing upon the separation of powers, was followed by the majority of European scholars (e.g. Freudenthal 1908: 295–7, 310–11) and exemplified the growing divide between the model of individualization theorized and applied in Europe and the US system. The Ninth International Penal and Prison Congress, held in London in 1925 and attended by the delegates of forty-three governments, addressed the more concrete question regarding the methods of judicial individualization. The formulation of the fourth question of the first section[2] clearly showed a basic approach opposite that of US administrative individualization and revealed, at the same time, the readiness of the delegates to rethink the procedural rules with the aim of increasing the value of the accused's/offender's personality, but always within the domain of judicial competence.

8.4.1 The US position

The report of Sanford Bates (1925: 338), commissioner of the Boston Department of Correction, defended the pragmatic US choice founded on the compromise among the 'practical, classical, legally formal or social' points of view and the modern 'sentimental, Italian, deterministic or individualistic' notion of punishment. In the United States, he continued (Bates 1925: 341), it was believed that the great progress in penology over the past century was due to the firm conviction that the more each case is considered individually and the single subject is studied, diagnosed, and treated, the more 'we are close to reconcil[ing] the opposing schools'.[3]

[2] See Butler (1926) 604: 'What may be done to forward the judicious application of the principle of individualization of punishment by the judge who assigns the penalty to be inflicted on the offender?' On this question, eight reports were written (by Bates, Butler, Hall, Henry, Renoux, Sasserath, Szent-István, and van der Aa).

[3] Many of the solutions suggested by Bates—such as juvenile courts, the constitution at every court of a psychological laboratory presided over by a psychiatrist, the probation system, and the creation of a commission for classification charged to decide the nature and character of the sentence after the verdict—have all been adopted since the 1870s in the United States.

Notably, the peculiarity of the US approach emerged with reference to the role of the judge regarding individualization. The enactment of any code, whether legislative or judicial, or of any rule aiming to normalize and standardize the punishments passed by the courts was considered absolutely opposed to the theory of individualization. Indeed, the more the accused's personality is studied and treated, the more the authority that fixes the sentence should be granted discretion. The problem of the offender's character, Bates noted, today has the same importance as the proof of guilt. The trial could be divided into five phases: the finding of guilt; the justification of the correct punishment for the proven crime; the fixation of the duration of the sentence; the choice of the penal institution where the sentence will be served; and the type of treatment that will be applied. Only the first of these acts is a judicial matter, and the jury, under the judge's direction, is the appropriate tribunal to make this decision. As far as the type of sentence is concerned, 'it is customary in America to leave the task of deciding up to the prison authorities'. By endorsing the US reformist rhetoric that still prevailed in the 1920s, the delegate from Massachusetts criticized the conservative logic grounded in counterbalancing the danger of the arbitrary exercise of punitive power with the retention of retributivism. To Bates (1925: 352), as well as to the other US delegate Amos Butler (1925: 357–73), the current problem of criminal justice could not be considered the abstract and formal protection of the individual, but was rather 'the calm, scientific, and humanitarian study of each individual case, as well as the intimate connection between the authority that prescribes the cure for the case and the administrative body that carries it out', granting citizens control of these intermediate institutions, as any democratic community requires.

8.4.2 The European position

Conversely, the majority of European delegates and rapporteurs proposed different solutions that aimed to broaden the boundaries of judicial individualization without accepting the US biphasic trial and without curbing judicial jurisdiction in favour of the administrative branch.[4] According to most of the European criminologists,

[4] Among the few jurists who advocated a system based on the US model, see, e.g., the Polish professor and judge Janusz Jamontt (*Actes du…Londres,*

the way to achieve the individualization principle is not the delegation of the sentencing phase to an administrative body of experts in criminology; rather, it is by the transformation of some procedural rules. This idea, already suggested before the London congress by continental reformers (see, e.g., Niceforo 1907: 411–24, in addition to Conti, Florian, and Franchi), is formulated as part of a more sophisticated and comprehensive scheme. The judge should be given new methods to increase his or her procedural knowledge of the accused, namely, to formalise the evidence about the character, way of life, and temperament of the defendant through rules suitable for granting the right to defence and controlling reliability (Gleispach in *Actes du… Londres, Procès-verbaux* 1927: 121). There are two crucial themes of judicial individualization discussed at the London Congress that have important procedural consequences: first, the gathering, reliability, and evaluation of the data on the accused's personality; and, second, control over the judges' decisions, particularly regarding the two principles of *res judicata* and the separation of judicial and administrative powers.

Even though continental jurists, such as Henry and van der Aa, suggested dividing the trial into two parts corresponding to the two forms of individualization, none of them questioned the separation of jurisdiction and administration, and therein lay the great difference with the US reformers. According to the French rapporteur André Henry, professor of criminal law at the University of Nancy, *practical individualization* has two forms. The first, which begins at the moment of the verdict and is provisional, consists of adapting the sentence as closely as possible to the social and individual type of the criminal. It implies a previous inquest to provide the judge with all of the possible information to decide on the penalty and can make use of the progress in the field of psychiatry.[5]

Procès-verbaux 1927: 129). The most radical proposal came from the French magistrate André Renoux (1925: 404), who suggested sending the offender to a prison-clinic, and recommended granting the judge the freedom to apply and even invent the most suitable measure for the inmate within the wide limits imposed by the law. His thesis was criticized by Gleispach (*Actes du… Londres, Procès-verbaux* 1927: 124) because it seemed to jeopardize the *nulla poena sine lege* principle. See also Paul Lublinsky (1925).

[5] The *Code d'instruction criminelle* of 1808, enacted before the rise of the criminological movement, turned out to be inadequate for modern penology because its procedural system was lacking in rules for conducting a true inquest into the morality of the accused (*enquête de moralité*) and was rather founded

The second form, which, as in juvenile criminal law, presupposes a subsequent investigation, allows the judge to ensure the efficacy of the adopted measure; it is a phase of control in which the judge, due to his or her criminological knowledge, proceeds to readjust the sentence as often as the first adaptation proves itself unsatisfactory (Henry 1925: 381).[6] The key point, as Henry emphasized, is judicial control over the sentencing phase: rigid and fixed penalties should be overcome, but the judge could never surrender his or her right to control the execution of the sentence in its different forms. The judicial decision about the accused's guilt should be final; thereafter, however, even the execution of the sentence and its control should remain under the competence of the judge, and this marks a deep divide between European penal modernism and its US counterpart.

Similarly, Simon van der Aa, professor of criminal law and judge in Groningen, admitted that for more complete individualization, the criminal trial should be divided into two parts, presided over by the same judge: one for deciding on the facts and the guilt of the accused; and the other for deciding the punishment or the measure to be inflicted on the offender. However, unlike his US colleagues, he remained convinced that despite everything, the judicial branch was 'the better equipped and the more appropriate branch to be invested with this heavy task and formidable power to impose sentences' (Aa 1925: 421). The entire preliminary investigation, according to van der Aa, is directed towards the limited target to prove whether the alleged crime has occurred and whether the

on evidence of the defendant's bad reputation (Tanguy 2007). The police record (*casier judiciaire*) created by the laws of 5 August 1899, and 11 July 1900 was useful for collecting data about recidivism, but it did not shed light on the offender's overall life or the measure of his or her wickedness. In the silence of the law, French judges practically adopted a judicial system for gathering information on the accused's character via a ministerial circular (14 May 1873) establishing a model of individual record (*notice individuelle*) that should be completed by the Public Prosecutor and mandatorily attached to the dossier.

[6] The laws on recidivism and relegation (27 March 1885), on conditional release and the methods for preventing recidivism (14 August 1885), and on aggravating and attenuating circumstances (26 March 1891) demonstrate that the French legislation of the late nineteenth century rested on this type of individualization. Nevertheless, there was much to be done to realize 'a rational individualisation of punishment and not a purely mechanical adjustment of repression' (Henry 1925: 382).

accused is responsible for it. To let the individualization principle prevail practically, the procedure should be modified and new methods should be introduced to give the judge the opportunity to know the convict's anamnesis, present condition, social status, and character: private and official sources should be made available to the magistrate, their collection should be regulated by law, and experts' reports should be examined when useful.

As Conti, Florian, Franchi, and other European jurists had argued before, the London Congress's delegates and rapporteurs corroborated the opinion that the best method to realize concretely the principle of individualization entailed the enactment of procedural amendments allowing the judge to impose a sentence that is truly tailored to the offender.

8.4.3 The concrete judicial individualization and its risks

In accordance with the prevailing view of European delegates, the long and articulated resolution on the fourth question adopted by the assembly at the London Congress expressed, therefore, the need for important reforms in the criminal procedure of all of the countries so that the judge, 'before imposing any sentence or penalty, should inform himself of all the material circumstances affecting the character, antecedents, conduct and mode of life of the offender and also any other matters which may be necessary for the purpose of properly determining the appropriate sentence or penalty' (Butler 1926: 604). To achieve this goal, the assembly formulated some desiderata, referring to the need to increase the available choices of penalties and measures of security; the specialization of the courts (at least the juvenile courts); the study of criminological disciplines for all criminal judges; the duty for the judge, before determining the penalty, to have full knowledge and obtain information of the accused's physical and psychic conditions, social life, and motives for the crime; and, finally, the division of the trial into two parts: 'in the first, the examination and decision as to his guilt should take place; in the second one, the punishment should be discussed and fixed. From this part, the public and the injured party should be excluded' (Butler 1926: 605).

In the European jurisprudence of the 1920s, the methods to render the principle of individualization more concrete and effective did not require, as in the United States, measures oriented towards ousting the judges from the sentencing phase because of

their lack of criminological knowledge and replacing them with an administrative body. In contrast, the proposed reforms were based on the 'principle of continuity of the judicial function even in the execution of the sentence' (Grispigni 1920a: 423); namely, their target was to extend the judge's discretion, as well as the available evidence about the offender's personality. The cornerstone was that every kind of individualized measure, even a measure of security that is administrative in its essence, had to be judicialized (see Hafter 1925a: 233–4). However, the second stage of the prevention proceeding, as with the repressive proceeding of the first stage, should be judicial, but with different rules from the ordinary trial and with a lessened guarantee (Rosenfeld 1930: 121–3). The publicity of trials might be avoided based on the notion that it might be detrimental for the convict himself, evidence regarding the offender's personality not directly related to the offence would be admissible, the presumption of innocence would be useless (Garofalo 1880: 24; Longhi 1914), the principle of *res judicata* would be replaced by the need for periodical revision of sentences, judges should be more specialized in criminological knowledge, and, finally, a body of experts would be essential. Beyond the proposals aiming to provide protections even within this sentencing proceeding (a process of security or of temibility) and for the activity of the bodies (judicial or mixed) entrusted with evaluating a person's personality, it was clear that the main safeguard of cross-examination was vanishing to leave room for experts, psychologists, and criminologists. As Radbruch noted (1992: 305), the proceeding took on inquisitorial traits, and an inquisitorial body entered into the trial. The analysis of the offender's personality as the main target of a criminal trial changed the rules of evidence entirely and increased judicial power by introducing rules that stood in open contradiction with 'the spirit of our criminal procedure' (Radbruch 1992: 306). To avoid undermining the constitutional consistency of the criminal law system, it was thus necessary to find a way to harmonize the inquisitorial bodies that were the fruit of the criminological reform movement with the adversarial features of the criminal trial.

An example of this approach can be seen in art. 132 of the 1930 Italian Fascist Penal Code, by which the judge was vested with remarkable discretionary power in the determination and individualization of punishment. It was, in Ancel's opinion (1936: 258), the result of the movement, characteristic of Continental Europe, that

led to an 'indirect and curious' renovation of the idea of legality expressed by the formula *nulla poena sine lege*, which took the shape of extended judicial control over the execution of the sentence or of a sentencing code aimed at regulating the convict's legal status. Ultimately, the effect of individualization generates a legalitarian reaction to counterbalance the greater flexibility of the sentence by means of the broadening of the judicial jurisdiction on sentencing, which should now be personalized and subjected to progressive adaptations according to the offender's variable temibility. Because the imposition of the sentence loses 'its first strictness' and because the judge, by applying the law, does not fix once and for all the prisoner's condition, 'it seems absolutely natural to involve the judge in the execution of the sentence' (Ancel 1936: 258).[7]

8.5 Conclusions

In Europe, the impact of criminology on the principle of legality mainly took the form of a demand for transforming the trial. The entire mechanism of criminal procedure, not just punishment, must be individualized through rules that aim to extend the investigative power of a judge to collect all of the character evidence available. A fair adjustment of a sentence to an offender's personality and dangerousness could not be limited to the final stage of the process, but it should inform every moment of the trial and orient the activities of the parties involved. In a procedural framework based on the distinction between preliminary investigation and trial, the offender's background, inclinations, family life, and job, among other considerations, must be investigated from the beginning of the legal proceedings with contributions by a board of experts in criminological matters through involving the counsel and the judge. Even in proposals to individualize the entire criminal proceedings, the European reform movement clearly showed its preference for judicial individualization, in contrast to the US administrative individualization; this was also clearly demonstrated at the International Prison Congress held in London in 1925.

[7] The implementation of the principles of social defence, through necessary reform of criminal procedures, is a topic that continued to be discussed in the post-war period by having recourse to the same arguments debated at the beginning of the century; see, e.g., de Vincentiis (1947–48); Graven (1950); Rolland (1954); Santoro (1947); Versele (1948); and Vouin (1954).

However, the dual-track system and institutionalization of prevention proceedings, where measures of security are judicially applied, raised additional questions of constitutional balance. Not only was the tenet of legality of punishment revised through expanded judicial powers and through the possibility of a supplementary preventive detention, but inquisitorial elements were also reintroduced into the trial by analysing the offender's personality as the main target of a criminal proceeding.

The development and implementation of criminological theories entailed a rethinking of the constitutional system of checks and balances designed by the *Rechtsstaat* framework in criminal law. The goal of social defence as well as the centrality of prevention modified the old liberal equilibrium. In this chapter, I have addressed how the claim for more extensive judicial powers brought changes to criminal trials that implied a redefinition of the boundaries between individual safeguards and state prerogatives. The importance of the systemic, constitutional fallout from the penological reform movement will be corroborated in the following two chapters with reference to the search for a new equilibrium between jurisdiction and administration and between legality and individualization.

9

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.

10

The Constitutional Conundrum of the Limits to Preventive Detention

In the late 1920s and early 1930s, when the tenets of equality and certainty of punishment seemed to have been abandoned, jurisprudence looked for other protections against the discretion required by the flexibility of penalties. In this chapter, I will analyse, first, the concerns over the unbalanced constitutional risks of individualization expressed by some European jurists, who feared that the *Rechtsstaat* was being jeopardized by the growing administrative power in sentencing and the dual-track system (section 10.1). In their arguments, the issue of the limits of penal law and of the boundaries between criminal law and criminal policy was clearly tackled as a constitutional question.

Next, I will focus on the theorization of an authoritarian criminal law in the early 1930s by fascist and Nazi jurists (section 10.2), emphasizing how this doctrine exploited the contradictions and unrealized promises of criminology to criticize the erosion of the separation of powers brought about by the reform movement and established a retributive system in which social defence was mainly based on retaliation and deterrence. Section 10.3 examines the introduction and utilization of preventive detention made by the Nazi regime. In the United States, the rise of authoritarian and then totalitarian criminal law raised concerns about the dangerous implications for individual rights of some criminological theories. In the mid 1930s, Jerome Hall openly questioned the inherent dangers of the abandonment of the legality of punishment and demanded a return to the *nulla poena* principle (section 10.4).

I will finally consider (section 10.5) the legacy of the criminological movement to totalitarian regimes, focusing in particular on the problem of continuity or discontinuity between penal liberalism, penal modernism, and totalitarian penal law.

10.1 Necessary Limits to Individualization in the European Legal Culture (Late 1920s and Early 1930s)

In 1927, Alfred Overbeck's inaugural lecture of the academic year at Freiburg University concerned the limits of individualization. He analysed the profound differences between criminal law-based (*strafrechtliche*) individualization and criminal policy-based (*kriminalpolitische*) individualization. The first was an expression of the traditional penal model of liberalism, although it was made more flexible by the valuation of factors connected with the personality of the offender. The second notion drew upon positivistic theories of preventive criminal law, the dangerousness of the offender, and social defence that 'under the outbreak of unlimited judicial discretion, threaten[ed] to stifle criminal law considerations' (Overbeck 1928: 6). Within this new paradigm, according to which the assessment of offenders' personalities should change in addition to weighing individual interests against social interests, the criminal-policy-based individualization had no alternative but to leave every decision on sentencing to the discretion of the judge. In Overbeck's opinion, the possible faults of criminal policy were not fewer than those of traditional criminal law, and a balance had to be maintained between the two contrasting approaches. The many theoretical contrapositions between these two methods concerned key principles and institutions of criminal law.[1] The repression of crime (*Verbrechensvergeltung*) and the prevention of crime (*Verbrechensverhütung*) outlined two completely different domains of penal intervention. These two rationales stood next to one another with independent legitimacy, and it was useless to debate which was prevailing. The aim was rather to find a fair compromise that recognized that criminal law progress stemmed

[1] These principles were the following: the taxonomy of criminals against strict definitions of elements of an offence; different theories of culpability, attempt, and complicity in relation to the criterion of temibility; the importance of the victim's role; remission of punishment; the application of measures alternative to detention; and the manner in which sentences were executed. Overbeck (1928: 10) rejected the idea of indeterminate sentencing as the basis of the *kriminalpolitische Individualisierung* because of the uncertainty of the duration of punishment, the difficulty in classifying criminals, and the state's lack of resources and instruments in carrying out the appropriate treatment.

from fidelity to tradition because criminal-policy-based individualization could be resisted only insofar as it was contested by criminal-law-based individualization (Overbeck 1928: 22).

European penology, with totalitarian exceptions, always preferred to maintain individualization within the limits of legality and judicial justice. The principle of individual prevention (*Individualprävention*), as Drost argued, tended to shift the barycentre from law to courts and executive officers, with a consequential increase of discretion that is without precedent in post-Enlightenment legal systems. The criminal trial modelled on the idea of special prevention had neo-inquisitorial characteristics and, above all, weakened 'the legality of the judges' (Drost 1930a: 199). The renunciation of the general and abstract definition of elements of offences in light of the variety and peculiarity of each case as well as the abandonment of penal uniformity in the name of personalization of treatment caused 'the complete relinquishment of general norms, would have been the dissolution of legal thought, would have been anarchy' (Drost 1930b: 21).

In the early 1930s, penal individualization continued to raise questions regarding the boundaries (*Grenzen*) and limits (*Schranken*) of penological reformism. Drost firmly believed that 'only the law' could be the cornerstone of the criminal law system and that only the law could guarantee individual freedom and prevent social anarchy. As the dominant form of any legal system, therefore, the strength of the law had to be preserved. Social transformations that had led to overcoming the 'state of law' turned out to be increasing applications of 'fluid legal concepts' and an increasingly marked violation of the principle of legality. Thanks to the spreading of laws whose enforcement implied broad discretion compared with the binding regulations of administrative-bureaucratic activity, judicial power purported to make law as if it were the legislature. This movement drove the cancellation of 'the boundaries between law-making and application of the law' and aimed to cancel even those 'between justice and administration' (Drost 1930b: 22). If, indeed, criminal judges had been asked to impose individualized measures on the basis of a criminal-psychological diagnosis of the dangerousness of offenders and a prognosis of their rehabilitation rather than verifying the correspondence between facts and norms and simply applying the consequences provided for by law, then there would be no application of law in its usual meaning, but merely 'rough administration'.

As Drost remarked (1930b: 22), the separation of powers was vanishing, and 'the *Rechtsstaat* was on the point of being transformed into a social administrative state'. The prevailing aspiration to individualize norms demanded the abandonment of the old liberal notion of freedom *from* the state and implied the search for a new balance between freedom and social ties, between the individual and society. However, Drost's opinion (1930a: 212) was that the boundaries of *Rechtsstaat* and the separation of powers could not be replaced by a general 'criminal law of prevention' that was based on principles that were 'misleading, politically dangerous, and improper for criminal policy'.[2] The challenge of criminology, as Drost argued (1930a: 199), consisted of bringing together measures of special prevention and guarantees of the rule of law or of *Rechtsstaat*. The problem emerged when the goals of criminal policy clashed with settled political and constitutional limits. Curtailing judicial powers in favour of administrative powers in the sentencing phase as well as the melding of judicial and administrative functions jeopardized the dogma of the separation of powers on which the *Rechtsstaat* was founded (Drost 1933).

Modern criminal policy, as Drost summarized (1930a: 215), existed in a state of conflict: on the one hand, the widening of judicial discretion for the sake of individualization, and on the other hand, the legal constraints of arbitrariness in favour of individual rights. Criminal policy—in substantive as well as procedural law—pressed for a prevailing reforming approach. Conversely, the ideas of the *Rechtsstaat* embodied the principle of limits (Drost 1930a: 226). In the 1930s, the dilemmas aroused by criminology remained to be faced and the rise of totalitarian regimes made finding a solution more difficult.[3]

[2] The constitutional concerns about penological issues can be seen, e.g., in the discussion on preventive detention (*Sicherungsverwahrung*) within the German Parliament in the late 1920s; see Müller (2004: 198–205).

[3] Reviewing Drost's book, Max Radin (1931: 633) recognized that the tenets of the Classical School were overcome 'and the "Free Law" movement in Germany and France took as its principle the cardinal doctrine of modern criminology that acts cannot be standardised and that punishment must be individual'. However, he stressed that criminological theories could not simply mean a return to a pre-Enlightenment model and noted that there was 'no sympathy or affinity between the theories that issued in the torture chamber and the stake, and the ideas that animated Liszt and Saleilles, Lombroso and Ferri'.

As the Spanish criminologist Quintiliano Saldaña correctly argued, this was a turning point in the relation between criminal science and criminal policy. The substantial number of criminals and patients, those to be treated with punishments and security measures and those to be cured with medicines and hygienic measures, resulted from liberal-retributive systems that waited for the commission of a crime before punishing it and waited for the disease before treating it. This method, however, allowed the individual 'in possession of its precious rights' to lead an anti-social or anti-hygienic life that would almost certainly lead to crime and disease. Within this framework, the problem of punishment and social security measures belonged to the field of public law and political choices because 'a political regime is always the condition of a penal regime' (Saldaña 1927: 41–2). Within the liberal system that was based on repression, even measures of security would be nothing but disguised forms of punishment. Conversely, if an anti-democratic regime would prevail, then the realm of security measures would dawn, and it would be clear that penal philosophy is just a part of political philosophy. As Saldaña critically noted (1927: 42), criminal law scholars everywhere demanded that punishment be replaced by security measures, but they most likely were 'ignorant of the legal bearing of their scientific request, the political consequences of their penal doctrines'. They seemed not to understand that by denouncing the failures of retributivism, they were also launching an attack against the core of the system, 'against a sacred regime'. Reformers clearly avowed their preference for prevention, but it was impossible 'to obtain the prevention of an offence, without touching the individual rights' (Saldaña 1927: 42).

In 1933, Exner analysed the development and prospects of criminal law in Germany in light of criminological transformations in the late nineteenth and early twentieth centuries and noted that the progressive abandonment of the penal system that was founded on the principles of liberalism and individualism was moving in the direction of changing 'this liberal criminal practice into a social one' (Exner 1933: 258). This tendency could be understood positively, by emphasizing the idea of the educational treatment of corrigible offenders and the protection of society against incorrigible offenders. However, turning away from liberalism and individualism also had a drawback that consisted of 'the partial abolition of many a guarantee of individual freedom, which formerly was

considered as indispensable' (Exner 1933: 259). Among these negative repercussions, Exner noted (1933: 259) '*the extension of judicial determination* by which the individual, more than previously, is exposed to the judgment and therefore to the eventual arbitrariness of state organs' and the extension of administrative powers.[4] Above all, the departure from liberalism was evident in criminal procedure in the abandonment of the jury, limitations on procedural rights, restrictions of publicity of the trial, cut-offs of the right of appeal, limitations of the judge's power to use the defendant's arguments, and the greater power given to the state attorney. Exner (1933: 259) prophetically concluded that 'if the time does not deceive us, the convictions, which dominate a large part of the German youth, will strengthen this development of the German practice of criminal law toward a direction opposite to individualism'.[5]

10.2 The New Authoritarian Paradigm

Clearly, the matter was no longer (simply) penal, but had become constitutional and involved the choices of governments and parliaments. The strategy to embrace a penal policy truly oriented towards prevention extended well beyond thin conceptual distinctions between punishments and security measures and rested on the conception of the relation between political power and individual freedom. Among criminalists and penologists in the interwar period, there was the awareness that the liberal model had reached breaking point. It had been modified by the individualization and criminalization processes. Nevertheless, the path towards criminological reforms was never entirely completed because of the movement's inherent theoretical contradictions, its tensions with liberal tenets, the lack of reliable scientific criteria to evaluate offenders, and the poor criminological knowledge of many judges and prison administrators. The reform movement's incomplete achievements, whose grounds I have analysed in the previous chapters, triggered

[4] Emphasis in the original.

[5] Nevertheless, he considered the radical change of the principles governing criminal procedure to be one of the merits of German criminal justice compared to the US system. Indeed, US criminal procedure 'ha[s] tried to realise in a grotesque way the procedural theories of liberalism, whereas we are on the point of redeeming more and more our procedure from this set of ideas' (Exner 1935a: 358).

in Italy and Germany the rise of a penal culture that strongly criticized the failures caused by the combination of individualism and individualization. The restoration of a more formalistic and normativist approach to criminal law as well as of retributivism and just deserts marked a clear contraposition to the criminological ideal of a criminal law integrated by other social and scientific disciplines.[6] Above all, penological progressive reforms were accused of being the cause of the excessive leniency with which criminals were treated and of weakening the power and authority of both the law and the state.[7]

In 1933, Georg Dahm theorized the foundations of a new authoritarian criminal law system, first in a seminal pamphlet written with Friedrich Schaffstein (Dahm and Schaffstein 1933) and then in another article published in the same year (Dahm 1933). Both Schaffstein and Dahm would become, in the following years, the main theoreticians of the Nazi criminal law and of the *Tätertyp* theory, but here I am only interested in analysing the arguments used by Dahm in 1933 to make the case for an authoritarian criminal law paradigm. Dahm (1933) argues that the fundamentals of criminal law have become uncertain and that it is no longer a matter of different schools, but of a more radical contraposition between liberal, socialist, and authoritarian theories of criminal law. The time is ripe for an overall rethinking of the penal law system that aims to replace formalism with a teleological perspective. He considers this change a necessary reaction against the crisis of criminal law, whose main feature is the dissolution of the principle of separation of powers. In brief, his argument is that the criminological movement, by putting too much emphasis on special prevention, has increased the discretion of the judiciary, but this discretion has been wrongly used only in favour of the

[6] In Italy, this theoretical and methodological change was inaugurated and mainly developed by Arturo Rocco (1910, 1911) and Vincenzo Manzini (1900); see Grossi (2000: 83–8).

[7] The reaction against Exner's book (1931), which analysed criminal statistics and showed a tendency to decrease imprisonment compared with an increase in the crime and recidivism rates, gave a further push to criticisms against criminological humanitarianism and leniency in favour of a claim for a return to certainty and 'just deserts' policies. Even if the cause of these statistics was ascribable to the courts that wrongly applied criminological theories in a non-scientific manner, the reaction against their interpretations ran counter to criminological schools (Baratta 1966: 54–5; Frommel 1987: 25–31).

offender. Moreover, the growth of judicial power has coincided with a decrease of its authority due to the increasingly substantial influence of administrative power in the management of criminal justice. The spread of the special-preventive ideal fostered by reformers turned out to be a unilateral tendency towards mitigation of punishment because of the two sides of prevention, that is reformation and security, only the first has really been implemented. The grounds for this uncritical leniency can be found, according to Dahm, in the ruinous alliance between liberalism and socialism.[8]

The two main political doctrines of the post-war period had found a compromise that granted the individual the greatest privilege, but that was inconsistent with the historical conditions determined by the effects of the war, high inflation, and unemployment. The remedy to this degrading condition of criminal justice, which was caused by the crisis of the separation of powers and was related to the stuffy notion of the state as an institution far from (or an enemy of) the individual, was a return to general prevention, namely to retaliation and deterrence. Rather than giving the judge even more power and following the path of special prevention, Dahm claims a restoration of the tripartition in criminal law, which, in his opinion, implies the duty of the state to react strongly (even if not brutally) against offenders to generate a popular sentiment of justice. In this phase, Dahm's authoritarian view—this is the point I wish to stress—is based on a reactionary criticism of the excesses of prevention caused by the too-wide discretion that criminological theories have attributed to the judiciary, a discretion that was mostly misinterpreted by the judges themselves as a mitigating tool. It is not by chance that in his article, Dahm praises the fascist Rocco Code as a model to be imitated due to its return to

[8] According to Dahm (1933), social ideas of criminal law could develop only within the boundaries of the liberal ideal of freedom. Therefore, penal liberalism could accept the idea of re-education and could also renounce the certainty of punishment, but only on conditions that the principle *nulla poena sine lege* was maintained, that free will was not questioned, and that all offenders were supposed to be 'reformable' (a condition that implied, e.g., the rejection of the idea of a genetic predisposition towards criminality). The idea of a forced reformation of criminals was, in Dahm's view, clearly a social idea, neither liberal nor individualistic, and the individualization of punishment was created solely for the sake of social security rather than reformation of the individual. Dahm considered the statement according to which the individualization of treatment was an expression of an individualistic conception of criminal law to be completely false.

a repressive, retributive ideology. But the Rocco Code, an expression of what is known as the 'school of legal technicism', was basically a reaction against the Positive School of criminology, despite Ferri's efforts to show the opposite.[9]

According to Dahm, the authoritarian criminal law theory aimed not to undermine the principle of separation of powers, but rather to restore it. Dahm's interpretation of (the faults of) criminology, if critically historicized, is not completely reliable. For instance, asserting that the criminological movement emphasized prevention to the detriment of repression is correct. However, the assertion that the rise of special prevention implied a general leniency in sentencing is not also correct. What seems to be true in Dahm's analysis is the fact that criminological theories of individualization and social defence had deeply affected the separation of powers, making the criminal law system of the 1930s much weaker against the rise of authoritarian and totalitarian regimes. The more these regimes argued for a return to the tripartition, the more their rhetoric was effective.

10.3 The Authoritarian Use of Preventive Detention

The dual-track system was implemented in the 1930s in almost all European and Latin American legal orders, but it continued to be the source of many objections. From a theoretical perspective, as Radzinowicz argued, its general success in Continental Europe could be explained by the influence of the Classical School and its tenets of proportionality and free will. Practically, the twofold system was not only 'irrational', but also 'undoubtedly contributed

[9] In 1926, Ferri (1926a: 241) argues that between fascism and the Positive School, there is a relation of 'apparent antagonism but final consensus' and that, even though fascism originally imposed itself as an anti-positivist movement, there was a theoretical as well as practical agreement on the most important issues. These affinities could be epitomized in four main ideas: strong criticism of penal liberalism and individualism; substitution of the notion of dangerousness for that of criminal liability based on free will; an emphasis on prevention (in particular of special prevention); and individualization by means of judicialization of the execution of sentences. Nevertheless, even though fascism enacted measures that the criminological movement had claimed for decades, those same measures neither were a characteristic trait only of the fascist penal system nor can be considered authoritarian solely because of their implementation by an authoritarian regime.

to paralyse the whole system' because judges were often inclined to not apply preventive detention even in cases in which it would have been useful because they were 'liable to consider it unjust to inflict a double repression' (Radzinowicz 1939: 72). Moreover, it caused 'a number of serious difficulties to arise in the field of penitentiary practice' because the difference between a prison term and preventive detention did not find real correspondence in the organization of the institutions. Because of the similarities between the two types of penal detention, every attempt to realize the dual-track system in Europe failed, and 'in the majority of cases preventive detention institutions have coincided with ordinary prisons' (Radzinowicz 1939: 72–3). Finally, the application of indeterminate sentences of preventive detention to certain categories of persistent offenders in an absolute form, as in Denmark, Norway, Hungary, Finland, Poland, Italy, and Germany (life term), or in relative form with high minimum and maximum terms, as in Holland, Belgium, Latvia, Yugoslavia, Denmark, Sweden, and Great Britain, aroused serious problems of penal policy.

The introduction of indeterminate sentences implied that: the administration of criminal justice shifted 'from the plane of law to that of administration pure and simple'; enormous authority had been given to the prison administration; the liberation of the offender rested on a diagnosis of dangerousness 'made under the artificial conditions of prison life'; and very long sentences were enforced 'although their reformative influence might be very problematical' (Radzinowicz 1939: 74). Radzinowicz critically remarked (1939: 74) that if an indeterminate sentence was not applied with great attention, there was the danger 'of a measure (the object of which is to provide a more effective means of the protection of society) becoming an instrument of social aggression and causing a weakening of the basic principle of individual liberty'. These doubts and dangers made judges reluctant to impose indefinite punishments, particularly in those countries in which the administration of penal justice was grounded on the doctrines of liberalism (e.g. Norway and the United Kingdom; see Morris 1951; Pratt 1997: 72–4).

Even in Nazi Germany, in which the law of 1933 against habitual dangerous offenders 'put terrible weapons in the hands of the judge' whose duty was to combat crime (Wilke 1937: 1240), Freisler, who was Secretary of State at the Ministry of Justice of the *Reich*, noted that the indeterminacy of preventive detention

'created difficulties founded on the psychology of judges that we are trying to combat' (Freisler 1938: 1107). The law of 24 November 1933 added to protective custody (*Schutzhaft*) the judicial confinement of security (*Sicherungsverwahrung*), a security measure to be applied to habitual offenders based on their dangerousness that was indeterminate, supplementary to punishment, and to be served in an institution than could be connected with a prison but in a less repressive way than that of penal servitude (Gellately 1996; Gruchman 2001: 838–42; Müller 1997, 2004: 278–84; Sebald 2008: 246–60).[10] The Nazi legislator, following the example of many other European codes, adopted the double-track system (*Zweispurigkeit*) and rejected the replacement of punishment by measures of reformation and protection suggested in other previous draft codes (in 1919 and 1930).[11] The single-track system (*Einspurigkeit*) indeed was certainly more consistent with criminological ideas, but it contrasted with the Nazi emphasis on retaliation and deterrence as the main rationales for the authoritarian criminal law (Schaffstein 1934). As Mannheim (1935: 532) commented soon after the law's enactment: 'It is the special merit of the new statute that it has at length energetically grappled with a subject the legal settlement of which had been for a long time considered as absolutely necessary.' As we have seen, the German system was not so different from many others. Moreover, in line with the European approach, the Act of 1933 attributed to the courts, rather than to administrative authorities, the power of passing a sentence of preventive detention and of licensing. In

[10] Art. 1 of the Law provides that punishment should be aggravated if the offender has been convicted as a 'dangerous habitual criminal'; the requirements for being labelled 'dangerous habitual criminal' are provided by the law, but the conception is rather elastic and the judge can always act at his or her own discretion. Art. 2 provides that the court declaring a person to be a 'dangerous habitual criminal' is bound to pass a sentence of preventive detention in addition to the punishment, 'provided that the protection of the public requires such a measure'. The statute also introduces important reforms with regard to insane and feebleminded offenders and provides for the castration of dangerous sexual offenders (in connection with the Law for the Prevention of Hereditary Disease in Posterity, enacted on 14 July 1933).

[11] On the Nazi project of the criminal code, which aimed to realize Liszt's idea of granting the judge the possibility of imposing indeterminate sentences and supplementary preventive administrative measures, see Gerland (1929: 30, 32), who noted that these measures went 'a long way towards nullifying the rule *nulla poena sine lege* if they d[id] not altogether abolish it'.

adherence with criminological theories, the notion of dangerousness was the basis of the law, and the deed was conceived of as a symptom of dangerousness that was typically defined by law, but could also be determined by the judge (Exner 1934: 633–40).

Nevertheless, Mannheim also recognized the potential dangers inherent in this reform. First, the core of the law rested on the court's interpretation of the notion of 'dangerous habitual criminal', which was, however, rather vague and would have been determined by the reports of prison authorities who had to carry out the treatment. Second, 'the administration of the new statute will thus evidently depend—although often unconsciously—upon the criminological ideas which prevail among the circles of the judges and prison officers' (Mannheim 1935: 534). The German criminological movement of the 1930s was deeply affected by the totalitarian political turn: by means of an odd theoretical synthesis of biological, racial, and sociological elements as well as between the fact-based restoration of individual responsibility towards the community (*Tatprinzip*) and the personality-based elimination of elements that are detrimental to the people and the race (*Täterprinzip*) (see Baumann (2006: 98–106); and Mezger (1934: 203)), the combination of punishment and measures of social protection enacted by the totalitarian state seemed 'from many points of view to bear the marks of artificiality, vagueness and excogitation' (Mannheim 1935: 536). The racial improvement of the state by means of criminal law clearly foreshadowed the risk of a politically repressive exploitation of criminological theories by the Nazis. Third, on the basis of the failure of the Prevention of Crime Act in the United Kingdom, Mannheim (1935: 536–7) questioned the logic of the dual-track system, 'as long, at least, as there is no proof of any actual differentiation in treatment of the inmates of prisons and Preventive Detention Institution'. Two years after its implementation, when the authoritarian turn of Nazi criminal law was already evident but the worst had yet to come, Mannheim's conclusive considerations of the law of November 1933 are critical, but not entirely negative, and replicate the usual contradictions inherent in many criminological reforms (Mannheim 1935: 537).

The soundness of the German Habitual Offenders Law rested entirely on its (more or less rigorous) judicial interpretation and, as with the whole legal order, would have been deeply affected by the Nazis' political choices. In his speech at the International

Congress of Criminology in Rome in 1938, Freisler encouraged judges to overcome their inner obstacles caused by the introduction of the dualistic principle and by the fact that they were asked to do something more than simply impose sentences. Indeed, the task of imposing a determinate measure was contrary to the indeterminate confinement of security that aimed to realize penal justice with the good of the nation as its main target. Clearly, the *Sicherungsverwahrungen*, which were based on dangerousness rather than responsibility, gave the judge a discretionary power that he did not have when he was strictly bound to law. The *Führer* explicitly remarked on the change in an address given before the *Reichstag* on 25 March 1935, declaring that the inflexibility of the judge on the one side should be balanced, on the other side, with the elasticity in making decisions in the interest of the protection of society, because 'the core of the attention of the lawmaker should be not the individual but the nation' (Freisler 1938: 1108). The fragility of the system's safeguards and its political exploitability were proved through the huge recourse to preventive detention during the Nazi period, which saw two peaks: one in the first two years; and the other in 1938, before the Second World War multiplied the extra-legal possibilities to exclude and kill dangerous offenders (Baumann 2006: 84–8; Dessecker 2004: 97, 2009: 8).

10.4 Jerome Hall and the Call for Legality: The US Trajectory of Individualization

In the United States, the definitive decline of the rehabilitative ideal in the 1970s (Allen 1981; Frankel 1973; Garland 2001; Von Hirsh 1983) was anticipated in the bitter observations of some forward-looking scholars about the perils of a system of administration of justice that aimed to abandon the principle of legality in the name of a desirable but ultimately unattainable individualization. As the ambitious proposals of Ferri's project in Italy vanished under the hegemony of the new technical school, so the model of the criminological code in the United States gave way to a more judicious defence of legality in terms of both crime and sentence. In 1937, Jerome Hall critically remarked that there had been a gradual erosion of the meaning of the principle of legality in both Europe and the United States. Hall posited that this erosion had occurred regarding both the *nullum crimen* component,

which was attacked by positivist theories that relied on the substitution of dangerousness for responsibility and on crime as a symptom of temibility, and, above all, the *nulla poena* component, which was nullified by measures such as indeterminate sentencing, probation, and suspended sentences. Nevertheless, this double erosion, according to Hall, greatly jeopardized individual safeguards. The two parts of the Latin brocardo had to be necessarily interconnected; otherwise, the risk was to replace punishments entirely with measures of social defence. The annihilation of legality by both Nazi and Communist (Cossutta 2007) regimes revealed how dangerous the repressive exploitation of criminological ideas could be. For this reason, the *nulla poena* had to be defended as a fundamental principle of democracy. With the proximity of totalitarianism and the Second World War, it was not the time for theoretical parsing between the schools. As Hall noted (1937: 192): 'In an age when democracy can no longer be assumed, but must be deliberately conserved—or perhaps, even achieved, the writings of both schools of thought should be completely re-examined', and it should be clear that 'criminology cannot profitably ignore politics or law, unless it desires to run the danger of fostering evils far greater than those it seeks to eliminate'.

Hall (1937: 184) disputed the rationale of the bifurcation of trial and sentencing, with the consequence that 'presumably, the "anti-social" person will in some sort of proceeding be declared "dangerous" and placed in the hands of the sentencing tribunal. Not punishment but only measures of "social defense" are to be applied.' Hall unveiled the risk of weakening the legality *in* and *of* punishment, namely, of a punishment entirely absorbed into measures of social defence and delegated to sentencing boards consistent with a tendency that was gaining ground in Germany and Italy, and also had supporters in the United States. The principle of legality, however, should not be divided as 'the two rules are inextricably interwoven'; legality of punishment could not be abandoned in favour of an indefinite treatment or an indeterminate social defence, behind which a true punishment could be hidden that might be 'perhaps of a repressive sort' (Hall 1937: 183, 185). The historically demonstrated danger of departing from the *nulla poena* (i.e. of entrusting the execution of sentences to administrative bodies) was the authoritarian degeneration of criminal justice because 'the abolition of *nulla poena* provides a sieve through which can flow

not only humanity and science but also repression and stupidity' (Hall 1937: 189).[12]

The repudiation of the *nulla poena sine lege* rule in Germany and the Soviet Union stemmed from exaggerations in revolutionary ideologies. These experiences persuaded even such a reformer as Marc Ancel (1936: 269) that the unlimited growth of individualization, which might bring about a 'penal civilization', could also jeopardize the entire legal system and lead to 'a complete abolition of criminal law itself'. Instead of being hailed as progress, the tendency to reject the *nulla poena* seemed to many European jurists to be a return to a past condition—one which they considered to be definitively overwhelmed (Ancel 1937; Calamandrei 2008). In 1960, Hall labelled the Lombrosian and positivistic arguments in favour of abandoning the principle of legality for social defence reasons 'fantastic' and 'ominous'. In the United States in the 1950s, proposals still existed which limited the judge's role exclusively to the trial and delegated the sentencing phase to a body of experts. According to these theories (which, in Hall's opinion, derived from the arguments of Italian and European reformers in the late nineteenth and early twentieth centuries), the notion of punishment should be eliminated, and the board of psychiatrists and criminologists should assess only the dangerousness of antisocial individuals (Menninger 1959). The principle of legality, however, 'signifies that only after a thorough inquiry directed by rational procedure and aided by the long experience crystallised in precise rules of criminal law can defensible judgments be reached regarding the dangerousness of any one' (Hall 1960: 51).

As Hall argued (1960: 57), in the name of social defence, it had been claimed (and sometimes achieved) that legal limits of judicial or administrative power should be abolished and experts should be entrusted with the task of determining who was a criminal and how he or she should be treated without considering that this type of uncontrolled discretionary power was irreconcilable with the fundamentals of criminal law and that the *nulla poena* represented 'the peak of all the values expressed in criminal law'. To Hall (1960: 58), the revolutionary and provocative message of the Positivist School certainly helped shift attention from crime

[12] After first being open to individualized punishment (Hall 1935), Hall became very critical of individualization methods; see Hall (1960: 58, 1963). On Hall's legalitarian turn, see Green (2010: 263–4).

to criminals and their personalities, but if it was applied without checks and balances, it might turn into a repressive and authoritarian degeneration that was incompatible with the principle of legality embodied in the rule of law. 'Positivist ideologies', as he noted (Hall 1945: 346), were both 'invalid and, also, dangerous to democratic values', as Ferri's transition from socialism to fascism had revealed (see Musumeci 2015: 45–7). 'The influence of Positivism' on criminal law 'has been a major disaster' because 'its dogmas biased not only theories concerning prevention, but, also, combined with its determinism, stigmatised punishment as vengeance—at the same time opening the door to unmitigated cruelty in the name of "measures of safety" ' (Hall 1945: 348–9).

10.5 Fertile Ground for Totalitarianism?

In a few years, criminologists such as Drost, Hall, and Radzinowicz came to the same conclusions. They criticized the indeterminacy of any custodial sentence, whether it be punishment or preventive measures of security, and identified the risks that it entailed for democracy, together with the dangers it posed for individual freedom. The potential exploitation of individualization as a repressive means of social defence by totalitarian regimes exacerbated the ambiguities that had characterized the criminological reformism since its beginnings in the nineteenth century. Even purpose-oriented penal theories, in addition to the systems of special prevention and social defence that were the cornerstones of criminological movements between the nineteenth and twentieth centuries, turned out to be fertile ground in which totalitarianism could easily take root. As argued (Ferrajoli 1996: 259; Sbriccoli 2009d; Vormbaum 2013: 41–2), Nazism and fascism did not break with the tradition of penal liberalism, but represented a sort of 'radicalization' and 'syncretism' of ideas that were already embedded in legal culture. As Radzinowicz noted (1991: 91), on the 'road to catastrophe', the Soviets and the Nazi legislators, in addition to fascist legislators, imported and 'ruthlessly expanded' certain ideas put forward by the Positivist School or thematized by the IUPL, such as the state of danger, measures of social protection, and measures of security, commenting, 'it is painful to note how the two "Evil Empires" shared in the spoils of some of the end-products of the modern criminological doctrine'.

Nevertheless, it would be misleading and simplistic to trace the cause of totalitarian penal systems to criminological theories (Baratta 1966; Stäcker 2012: 151–60). The dilemmas and contradictions of criminology that arose since its origin gradually undermined the bases of penal liberalism and weakened the fragile equilibrium of the certainty of the law and the individual guarantees on which it rested. Politically totalitarian regimes exploited the most authoritarian side of social defence and compounded the crisis of penal individualism, but they went well beyond the reform and individualization movements investigated here. If there were inherent perils in the theories of reformers such as Ferri, Garofalo, Liszt, and van Hamel, whose main idea was to rationalize rather than humanize criminal law (Radbruch 1998: 230), there were also essential differences between totalitarian criminal law and criminological theories. Let us cite just a few examples. To begin with, the kind of individualization adopted by the Rocco Code was very limited compared with the more extreme administrative individualization put forward by the criminological movement at the turn of the nineteenth century. As Alfredo Rocco (1930: 6) wrote in presenting the final draft of the Code, it endorsed judicial individualization by giving judges the power to adjust any rigidity of the law and to judge with equity by means of mitigating and aggravating circumstances: however, this choice sounded much more conservative than any true individualization suggested by criminologists. Second, the Nazi criminal law system espoused the idea of a predisposition to delinquency rather than that of the social environment, and it was authoritarian but not social (in Radbruch's terms). Because the individual surrendered himself entirely to the racially characterized nation-state, the personality of offenders, their classification, and their individualized treatments were completely neglected in favour of a political conception of crime and a terrorist-selective criminal law that emphasized the offence rather than the offender (Radbruch 1998). According to Radbruch, the core starting point of criminology since Lombroso's and Brockway's theories (i.e. the centrality of criminal man over crime) was refused. The final authoritarian turn of German criminal policy in 1933 marked a shift from the naturalistic and criminological approach to punishment based on considering scientifically objectifiable elements to ethical and political considerations that aimed to strengthen national solidarity and cohesion (Baratta 1966: 53–4).

Moreover, both the Italian fascist code and the Nazi scholars neglected the idea of legal responsibility suggested by Ferri: 'the notion of penal legal responsibility', as Alfredo Rocco (1930) noted in his report, based on individual mental capacity and on the consciousness and voluntariness of action 'will continue to dominate today, so as it has dominated for centuries, the system of our penal legislation'. Similarly, Wilhelm Sauer (1939), in describing the criteria that should be followed by German judges in deciding punishments, emphasizes the importance of considering the offender's criminal intention. Sauer remarks that the new German realistic concept of guilt keeps together the traditional past-oriented notion of responsibility and the modern future-oriented idea of reformation, or, in other words, the moral condemnation of the offender's malice and subjective social dangerousness. According to the evaluations of Radbruch and Sauer (the first an opponent of National Socialism, the second a supporter of it), Nazi criminal laws represented a conservative step back from criminological theories rather than a development of them. In this sense, the position of Hans Frank (1938) against 'the confusions of the so-called psychoanalysts, Marxists, and flatterers of the criminal world', which are to be deplored and considered as 'ridiculous aberrations of a former time', seems to confirm the divide between criminology and totalitarian criminal law, a divide that could be summarized in the difference between the paradigms of the 'criminological' and 'normative' types of offender (see Dürkop 1984: 108–11).

If we look at the Rocco Code and the Nazi criminal laws, what Ferri celebrated as a victory of the positivist criminology seems rather to be a reversion to a retributive, repressive rationale of punishment (Lacchè 2015; Skinner 2013: 447–52). Many tenets of criminology were betrayed, and measures that had been thought to facilitate the reformation of the criminal were transformed into methods of bare neutralization or elimination. It is true that penological and criminological reforms had always been characterized by an ambiguous swing between social defence and reformation of the criminal, but totalitarian criminal law did more than simply exploit the darker side of criminology: it distorted and changed it deeply.

The Nazi law of 28 June 1935, by modifying § 2 of the German Criminal Code, dismantled the principle of *nullum crimen sine lege*, allowing the judge to punish whatever act deserved to be punished according to the sound popular sentiment (*gesundes*

Volksempfinden) and allowing analogies.[13] The law may represent one of the worst episodes of penal totalitarianism, and it broke a barrier for the first time since the modern era of legality began.[14] Criminology had nothing to do with that law. De Asúa notes that such voluntarism distorted Liszt's (and the more generally criminological) idea that the criminal rather than the crime should be punished because it looked not at the offender's personality, but at the offender's criminal intent as it was revealed by external behaviours and deeds (De Asúa 1947: 113). This law, for the first time in modern criminal law, openly subverted the principle of *nullum crimen sine lege* and the boundaries between the legislative and judicial branches. Conversely, the problems of the constitutional effect of criminological theories on the separation of powers, the gradual erosion of this principle, and its consequences for the rise of authoritarian regimes address the *nulla poena sine lege* principle. I have argued that this outcome is the less visible but most problematic result of the criminological movement. By rethinking the allocation of sentencing powers to better adjust punishment/treatment to the personality of the offender, criminologists undermined the principle of the legality/certainty of punishment, thus broadening the discretion of the judiciary and, above all, the jurisdiction of the (prison) administration over individual freedom. As my examination suggests, the debate on the judicialization or administrativization of sentencing powers stood at the core of the international criminological movement. One of the most dangerous characteristics of criminology in terms of its contribution to the rise of totalitarian regimes lies neither in its emphasis on the criminal's dangerousness and personality nor on the priority given to prevention,[15] but in the less manifest weakening of the balance between sentencing constitutional powers.

[13] Except for the isolated opinion of Giuseppe Maggiore (1939), who theorized about the advent of a totalitarian criminal law like that promulgated by the Nazis in 1935, fascist Italian criminalists did not openly question the formal validity of the rule *nullum crimen nulla poena sine lege*, but actually accepted the substantive debasement of the principle (Sbriccoli 2009d).

[14] See, e.g., soon after the law's enactment, the very critical reactions of Honig (1936), McIlwain (1936), and Preuss (1936). See De Cristofaro (2007); and Rüping (2007).

[15] These theories neither were a characteristic trait only of totalitarian penal systems nor can be considered authoritarian solely because of their implementation by an authoritarian regime. As we have seen, many reforms based on social defence, prevention, and dangerousness had been enacted since the late

The ‘exploitation of criminology’ made by totalitarian regimes exacerbated the inconsistencies of modern penology, and even after the restoration of democracy, some ambiguities rose to the surface again. Criminological theories cannot be accused of having prepared the ground for anti-liberal, repressive, totalitarian penal systems, as if these theories were a ‘foreign body’ against which liberalism had battled until the rise of totalitarian regimes. My suggestion is to consider criminology as an inherent part of the penal culture of the late-nineteenth- early-twentieth-century liberalism, as a by-product of that same liberal penal culture to which the Classical School also belonged and which also had authoritarian traits even before the rise of totalitarian regimes. Although scientific criminology and liberal penal thought struggled for decades on many issues, and the ‘new penology’ presented itself as revolutionary, they finally found theoretical and practical compromises (Wetzell 2004: 74–5), among which preventive detention as a means of social security is perhaps the most striking example. The opposite ‘schools’ were, as Sbriccoli put it (2009b), types of what he defined as ‘penalistica civile’—that is, a culture of criminal law committed to ‘civilize’ the entire society by means of a more civilized criminal law system. Both fascist and Nazi criminal laws radically changed this paradigm because the political conception of a totalitarian ethical (and even racial) state—in which the community, rather than the individual, is the central point of state interest—entailed a different penal policy.

10.6 Conclusions

The rise of authoritarian regimes made concerns over the possible constitutional risks of individualization and preventive detention even more serious. Sentencing discretion and administrative sentencing powers undermined not only the legality of punishment, but, more broadly, the architecture of the *Rechtsstaat* based on checks and counterbalances. In the late 1920s, both champions of penal liberalism and ideologues of authoritarian criminal law

nineteenth century in many states without being labelled ‘authoritarian’; on the contrary, they were presented as a sign of progress and a step forward, towards a more modern and humanitarian penal system. Each of these points was a tenet of criminological theories, but none of them can be considered per se a vehicle of authoritarian changes in criminal law unless we consider the entire criminological movement as authoritarian or totalitarian.

targeted the crisis of the division of powers brought about by the criminological movement. The former claimed new limits to individualization and stressed the need to judicialize the sentencing phase to protect individual rights. The latter criticized the too-broad sentencing authority given to judges and administrative bodies to individualize penalties and rehabilitate offenders because this power had led to an undue and unmotivated leniency. In this way, criticisms against the methods of modern penology and their unsatisfying application were raised by the conflicting arguments of those who demanded more safeguards for the individual against uncontrolled sentencing discretion, and, conversely, of those who claimed a return to retaliation and deterrence as a way to impose the superiority of the state over the individual.

Both of these arguments exacerbated the original, inherent, and unsolved contradictions in the criminological movement and indeterminate sentencing that we have described in the previous chapters. The same paradoxes of penal modernism make the historical interpretation of the relationship between criminology and totalitarian regimes complex and not univocal. Fascism and Nazism certainly exploited some ideas and methods theorized by criminologists (the sterilization of dangerous criminals and the extensive use of preventive detention are two striking examples), but, by doing so, they were also betraying the ideals and purposes of penal reformers. The problems of the legitimate limits of social defence, the use of preventive detention for dangerous offenders, and the allocation of sentencing powers will continue to raise questions for criminal law scholars even after the fall of totalitarian regimes.

11

Conclusions

I have provided a comparative historical investigation of the impact of the criminological movement on the rationale of punishment. The challenges raised by the growth of the rehabilitative ideal, the theory of social defence, and the principle of preventive justice reshaped the liberal penal system, but the search for a difficult theoretical compromise with retributivism and the practical inefficiencies of the reformatory system not only left many problems unsolved, but also aroused new dilemmas and inherent contradictions in the administration of criminal justice. By following the different trajectories of the criminalization process between the 1870s and the Second World War, it is possible to sketch out some of the key issues that characterized the penological debate of that period and that, once again, currently seem to be questions of topical interest.

11.1 Individualization, Social Defence, Prevention: The Roots of Two Penological Identities

We have seen how the individualization of punishment became the cornerstone of modern penology, whose meaning rested on different conceptualizations and was embedded in varied legislative solutions. Its core feature, nevertheless, undermined the liberal retributivist notion of fixed punishment proportioned to the offender's guilt and the seriousness of the offence and opened the door to an extensive debate on the need for indeterminate and future-oriented sentencing. The cultural and methodological divide between the US and European penologies led to two conceptions of indeterminacy that took the shape of indeterminate sentence laws in the United States and measures of security in Europe. These institutions had common traits and premises: they were based on the notion of the offender's dangerousness, they had a special

preventive purpose, they were aimed at the reformation of prisoners (wherever possible) or at their neutralization, their length could not be fixed by law, and they required the contribution of experts in the new, scientific criminological knowledge. However, these two types of preventive detention were also characterized by significant differences, both theoretically and practically: the European dual-track system provided for supplementary detention after the ordinary punishment, whereas US indeterminate sentencing was a single-track method; the European measures were applied by courts and were judicial, whereas the US processes were essentially administrative; and the European method to evaluate the offender's personality was mainly achieved by means of an individualized criminal procedure, whereas the US solution rested on a biphasic trial with a separation between the guilt and sentencing phases. I have provided an interpretation of this penological divide in terms of historical constitutional characteristics of the Rule of Law and the *Rechtsstaat*.

The process of the formulation and implementation of preventive detention on both sides of the Atlantic aroused serious dilemmas that were never clearly solved and whose legacy impinged upon the post-war period and is still recognizable today. Let us cite a few examples. The first set of problems concerns the constitutional legitimacy of preventive detention. From the very beginning, the constitutionality of US indeterminate sentencing was questioned because of its infringement upon the separation of powers. The fact that a prison board could be responsible for the length of a prisoner's detention seemed to violate the basic rule according to which punishment should be provided for by the law and applied by a court. Can the freedom of a fellow citizen depend on the decision of an administrative body? The affirmative answer was grounded on the argument that the legislature defined a wide range of detention with a minimum and a maximum, and the judiciary retained its prerogative to condemn the accused: the execution of a sentence was better carried out by a body of experts relying on scientific criteria to evaluate periodically the inmate's character and reformation. Nevertheless, the limits on the prison board's jurisdiction were not clearly defined, and, above all, the lack of criminological knowledge among its members, the lack of uniformity of the criteria applied to predict the dangerousness of an offender, and the unreliability of the prognostic factors applied thwarted all attempts to implement a consistent reformative

system. Thus, the system was theoretically correct, but wrongly applied in practice: in the continuing effort to solve this contradiction, the system has remained in place, as has its inconsistencies.

Indefinite preventive detention aroused even more constitutional objections in Europe: administrative sentencing powers contrasted with the *Rechtsstaat* and the principle of legality and jeopardized individual rights. To avoid any infringement of the separation of powers but at the same time to use an indeterminate measure to protect society from dangerous and unreformable criminals, the dual-track system elaborated a sophisticated distinction between punishment and security measures and judicialized the imposition of these supplementary preventive dispositions. Even this solution, however, left the basic dilemma unsolved: was the theoretical difference between punishment and measures concretely realized? How was it perceived by the detainees? Was it really different in manner of execution and purpose? Or was it rather a double penalty, a simple nominalist variation without any true perceivable change? And, above all, what types of substantial and procedural guarantees were granted to the detainee for security reasons to make this preventive detention consistent with an individual's constitutional safeguards? The creation of special sentencing tribunals did not provide, per se, adequate protection for (labelled) dangerous subjects, and the inconsistencies in hybrid measures, which were inherently administrative and flexible but subject to some penal regulations and disciplined by penal codes, still stood. The theoretical effort to combine individualization and social defence with legality generated inherent tensions that have become a peculiar and permanent trait of European penology up to the present time. The very notion of dangerousness, which as Pratt (1996a: 67) noted has become 'both a creation of modernity . . . and an unsolvable problem for modernity', was rather vague, not easy to assess, and based on disputed scientific criteria (see also Pratt 1996b, 2000).

11.2 The Conflict between Individualization and Individual Safeguards after the Second World War

The conflict between individualization and legality and between discretion and guarantees continued to be the unsolved question of penology and criminology even after the Second World War.

Indeed, if the achievements of the reform movement in its different rehabilitative and preventive approaches seemed unquestionable, criminal law science (particularly after the totalitarianisms) was aware of the need to balance reforms with the fixedness of some principles of penal liberalism, particularly as far as judicial and administrative discretion was concerned. In Italy, for example, the antinomies of the dual system characterizing the Rocco Code and of the principle of social defence were accentuated soon after the fall of fascism with the enactment and enforcement of the Constitution of 1948. Bettiol (1952: 183), one of the most penetrating jurists of the post-war period and member of the Constituent Assembly, refused to found criminal law on a preventive rationale, which would have led to the unification of punishments and security measures, and remarked that 'between the criterion of repression and that of prevention there was not only a difference of time but also an *ontological* difference'. The rehabilitative aim of punishment provided for by art. 27 of the Constitution did not intend to renounce its retributive function, and preventive measures should always be balanced by the principles of legality and determinacy 'because from indeterminate sentence to measure of security the leap is not so great' (Bettiol 1952: 188). Indeed, as Bettiol explained at the Constituent Assembly, it was important to subject measures of security to the principle of legality because, being indeterminate, they encroached upon individual liberty more than punishment. Measures of security echoed the police state and were therefore not completely consistent with the principles of a liberal constitution (*Assemblea Costituente* 1970: 899). According to Bettiol (1952: 189), they represented a ' "foreign body" within the framework of a democratic constitution and of a retributive—and therefore democratic—criminal law'.

As in the criminological wave of the late nineteenth century, the main penological problem remained that of the 'alternative between *arbitrariness* and *legality*' (Nuvolone 1969a: 447).[1] The modern idea of criminal justice was extremely different from that of Beccaria, which rested mainly on the objective seriousness of crimes because the principle of individualization of punishment could not be disregarded in both the trial and sentencing phases (Nuvolone 1969a: 451). The never-ending search for a balance between penal guarantees and criminological reforms that is

[1] Emphasis in the original.

basically the underlying theme of all the criminalization process here investigated could be summarized in the passage from procedural legality to judicialization because 'to protect the freedom of citizens, the principle of legality should give way to the principle of judicial justice whenever the claims for social defence no longer allow to apply the principle of legality' (Nuvolone 1969b: 317). The opinion of jurists such as Bettiol and Nuvolone essentially confirmed a recurring argument of criminologists and penologists (e.g. Cantor, Conti, Cuche, De Asúa, Florian, Freudenthal, Glueck, Longhi, and Sellin) in the late nineteenth and early twentieth centuries and summarized one of the peculiar features of the continental criminalization process, namely the compulsoriness of judicial protection for whatever act that is restrictive of personal liberty (Nuvolone 1962: 166). The principle of jurisdictionality was understood as an expression of the modern idea of *Rechtsstaat* that presupposed a 'relation of alterity' between state and citizen and therefore the full legal capacity of the citizen in respect of every form of state power: the right to a fair hearing, as well as the right to the statements of the grounds for the judgment, are consequences of this principle. As many reformers had argued since the introduction of indeterminate sentences and preventive detention, given the logical impossibility of maintaining the strict traditional principle of legality for security measures, the condition for their acceptability depended on the introduction of a 'trial of security' that was separated from the ordinary jurisdiction, but was provided with all the safeguards of an ordinary trial (Nuvolone 1962: 175).

11.3 The Current Constitutional Tensions of Preventive Justice

Due to both their methods of application and the criteria used to evaluate dangerousness, security measures in European legal systems continue to raise the same unsolved dilemmas of individualization (Ottenhof 2001; Plesničar 2013). Let us consider the new French discipline of the *rétention de sûreté* passed in 2008 (Wyvekens 2010), the *misure di sicurezza* enacted in Italy (Pelissero 2008), the *Sicherungsverwahrungen* (incapacitative detention sentences) implemented in Germany (Kaspar 2015), and the Imprisonment for Public Protection sentence (IPP) introduced by the Criminal Justice Act 2003 and modified by the Criminal

Justice and Immigration Act 2008, as well as other forms of preventive detention, passed in England and Wales (Ashworth and Zedner 2014: ch. 7; Epstein and Mitchell 2009; Gledhill 2013; The Howard League for Penal Reform 2007),[2] all of which are now raising the same fundamental and constitutional questions (Albrecht 2004; Keyzer 2013) that were discussed from the beginning of the dual-track system. Although the constitutional safeguards are currently stronger (or are expected to be so) and further protections that are more effective than that provided by national courts are granted by the European Court of Human Rights (ECtHR), the dual nature of preventive detention and its uncertain penal or administrative character represents one of the most complex challenges for penal science.

From our legal-historical perspective, the most striking point is the continuity of the concerns considered and the recurrence of the arguments regarding security and rights: if, for example, we read the comprehensive and well-documented report written by Nicola Padfield on behalf of the European Committee on Crime Problems and the Council for Penological Cooperation (Padfield 2010), we realize that the main critical points addressed are not so different, in their essence, from those presented by Ancel's report on indeterminate sentencing in 1954 (ch. 6) and addressed even before then in the international penological debate that we have investigated here. Similarly, the substantial notion of penalty adopted by the ECtHR (see *Welch v. the United Kingdom* (1995) and *M. v. Germany* (2009): §§ 120, 126) indicates the original risks inherent in the hybrid concept of preventive detention and reveals the never-solved problem of the real difference between penalties and measures of security because the label given by a legislator and 'minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence . . . cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order' (*M. v. Germany* (2009): § 127). The problem of substantial (and not formal) compatibility of preventive detention with the fundamental rights of offenders (Drenkhahn et al. 2012), even though the cluster of these rights is now better defined and protected by a multi-level judicial

[2] Similar constitutional problems were posed by the discipline of mandatory life sentences (see, e.g., Padfield (2002, 2003)) before the Criminal Justice Act 2003.

system, is certainly not new, as it has been clearly thematized by criminologists since the late nineteenth century. We are now experiencing new, more sophisticated facets of the basic theoretical and practical dilemmas posed from the beginning by social defence theories, namely, the justifications and limits of the preventive rationale (Ashworth and Zedner 2011, 2012, 2014: ch. 11) and the difference (if any) between preventive detention and punishment (Husak 2013) within the framework of the 'preventive state' (see, e.g., Steiker 1998).

Similarly, in the United States, in which indeterminate sentencing remains in place in half of the states and in which 'the most powerful decision maker in prison cases is the parole board at the back end of the system' (Reitz 2012: 273), problems and inconsistencies in the enforcement of this method are the same as those of its origins and of its more than 100-year-old history. As Reitz argues (2012: 277), 'from its origins, there has been a deep tension in underlying policies, and the potential for "soft" and "hard" treatment, within the indeterminate framework', and this tension remains unresolved. The lack of reliable instructions or standards of predictability in inmates' rehabilitation for paroling authorities—as well as 'procedural shabbiness' and the inadequacy of safeguards in the 'procedural accoutrements of parole release' that concern, for example, the rules of evidence, rights of confrontation that prisoners have with regard to witnesses, and lack of review process—reopen the questions of boundaries between discretion and guarantees, and administrative and judicial prerogatives.

11.4 The Critical Contribution of Comparative Legal History

If, indeed, the need to base the duration of prison on risk predictions is undisputed in the United States, 'the core policy questions of indeterminate versus determinate sentencing is whether parole boards are the best agents of government to perform the function, or whether it ought to take place in open courtrooms' (Reitz 2012: 281). Even those who contend that 'properly constituted indeterminate sentencing is both a morally defensible method of preventing crime and the optimal regime for doing so' (Slobogin 2011: 1129–30) argue that its legitimacy has to rest on

'constitutionally sound tenets' to avoid its historical shortcomings.[3] More broadly, the questions of allocating sentencing powers and of checks and balances in the sentencing process remain at the core of the constitutionality of the US criminal justice system (Barkow 2006; Bierschbach and Bibas 2013; Stuntz 2011; Tonry 2012). Unsurprisingly, the problem is not at all a new one, but can be traced back to the beginning of the debate on indeterminate sentencing and preventive detention.

For their parts, European jurists are sometimes looking back to continental legal history in search of interpretive arguments or legitimizing discourses to describe or support the ongoing process of Europeanization of criminal law (Bernardi 2002: 529–36). Roman law, medieval *ius commune*, or the Enlightenment are seen as the possible foundations of a European identity in criminal law going beyond national peculiarities. The case of preventive detention reveals that, at least in some cases, the origins of a European penological identity are not so remote, but rather near and yet still unexplored. The present of sentencing problems is rooted in its unsolved dilemmas of the late nineteenth and early twentieth centuries. Both the US and the European penal systems are facing questions and devising solutions that are not 'new', but whose legal history is often disregarded as a pointless erudition. Comparative history of criminology and penology cannot solve these problems for certain, but hopefully it can contribute critically to the discussion.

[3] According to Slobogin (2011), the state's power to impose preventive detention should be governed by seven principles to be considered constitutionally legitimate, namely: legality; risk-proportionality; least drastic means; criminal justice primacy; proof of risk on probability estimates; subject-first rule; periodic review; and due process. Many of these tenets, as we have seen, were theorized beginning in the 1870s by the advocates of indeterminate sentencing.

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