INTRODUCTION [1]

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1. CLASSIFICATION AND DEFINITION

Scientific progress in criminology, as in other disciplines, depends on analysis and artificial isolation. For many centuries the consideration of "crime" as distinct from the consideration of "criminals" inhibited the development of criminology and confined discussion on criminal law and its place in society to ethical and philosophical homilies. This condition was analogous to pre-Darwinian evolution and pre-Newtonian physics. It was owing largely to the influence of Lombroso that the criminal became a subject of scientific observation; the necessity for notional classification followed.

Lombroso's classification (adopted by many later writers, including Havelock Ellis and Enrico Ferri) incorporated the following groups: the born criminal, the insane criminal, criminals by passion, occasional criminals, and habitual criminals. The progress of research has established that several of these groups are of no scientific value and has, of course, varied their content considerably. Nevertheless, the insane criminal and the habitual criminal are two of these groups that have stood the test of analytic investigation and remain in the forefront of any modern objective classification of asocial individuals.[2] In particular, the "habitual criminal" has remained the title of a separate group, a group distinguished both legally and theoretically from the mass of criminals. There are very few modern legal systems which do not treat the habitual criminal as a criminal requiring either additional or special sanctions. Similarly, there is no theorist of any standing who has not recognized that however successful the measures he advocates for the majority of criminals may prove, there will be a group with whom all these measures will fail. Normally the term "habitual" is applied to such criminals.

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[1] Reprinted from "The Habitual Criminal" New York, Longmans and Green, 1951 with the kind permission of the publisher and author.

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[2] I say "objective classification" because psychiatric and psychological research increasingly stresses the importance and significance of the classification of all criminals and delinquents into psychological types — a classification in which the offence, which was the fundamental of objective classification, is regarded as but a symptom for purposes of subjective psychological classification.

Who, then, are "habitual criminals"? There is much support for the view that "only jurists ask for definitions. Everybody else knows that a definition can only be properly given at the end of an investigation — and even then only perhaps — because it will of necessity be incorrect. For, as a matter of fact, the science on which the definition is based is never complete."[3] Such a view rests on a fundamental confusion between *nominal* definitions, by which temporary agreement is reached, a practical working resolution made concerning a verbal symbol, and *real* definitions which seek to incorporate an analysis of the verbal symbol. Unless ostensive definition is possible, which is rarely the case in criminology, some sort of nominal or verbal definition of one's basic terms is necessary. Admittedly every such nominal definition "depends necessarily upon one's perspective, i.e. it contains within itself the whole system of thought representing the position of the thinker in question."[4] But this must not prevent us from reaching some working agreement on the terms which are fundamental to this study, the whole purport of which is the search for a real definition of "habitual criminal". As Aristotle affirmed, "the basic premises of demonstrations are definitions."[5] In seeking nominal or verbal definitions, however, we must endeavour to relate them to the actual forces that condition them in reality, so that at the end of our investigation the real definitions that emerge are amplifications, reconstructions and analyses of our nominal definitions.

Persistent Offender, Professional Criminal, Incorrigible Offender, Dangerous Recidivist (Finnish law of 1932), Hardened Offender, Relegable, Habitual Criminal, and many similar terms are used to define certain groups of recidivists against whom various countries are prepared to take special measures to protect themselves, — measures usually involving their protracted segregation from society.

Those countries which make use of this conception of the habitual criminal, define its scope in relation to some or all of the following factors:—

1. Number of crimes committed by an offender (sometimes over a certain period or since a certain age).
2. Type(s) of crimes committed by an offender (sometimes over a certain period or since a certain age).
3. Seriousness of offender's last crime(s) (and sometimes period since commission of previous crime).

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[3] Winkler, quoted by Bonger: *An Introduction to Criminology.*

[4] K.Mannheim: *Ideology and Utopia,* p. 177.

[5] Aristotle: *Posterior Analyticus,* in *Works,* ed. by W. D. Ross, Vol. I, 1928, p. 90 *b.*

4. Number and type(s) of punishments he has undergone (sometimes over a certain period or since a certain age).
5. Extent of danger to public presented by such type(s) of crime.
6. Extent of danger to public presented by such an offender.
7. Age of the offender.
8. Mental condition of the offender.
9. Biological and social background of the offender.
10. Susceptibility of the offender to reformation.

A nominal definition would be too unwieldy were it to include all such factors. Let us, therefore, while bearing these factors in mind, seek the principal conceptions that go to the composition of the species "habitual criminal". The Oxford English Dictionary defines "habitual" as "inherent or latent in the mental constitution" and also defines it as "existing as a settled practice or condition; constantly repeated or continued", and thus includes subjective as well as objective elements, or to put it more bluntly and less accurately, a mental pattern plus conditioning experiences. We shall use "habitual criminal" to include both these elements, and add one more; that the offences with which the community is threatened, when such a criminal is not segregated, are regarded by that community as of appreciable danger to its ordered existence.

The three elements which we include in "habitual criminal" are, then,

(a) criminal qualities inherent or latent in the mental constitution;

(b) settled practice in crime;

(c) public danger.

It will be seen that the ten factors listed above can be divided amongst these three elements.

Before leaving these problems in semantics it is necessary to comment briefly on the three elements in our nominal definition of "habitual criminal".

First, it is important that by the use of the words "inherent or latent in the mental constitution" there is no implication of prejudgment on the relative importance of inherited and environmental factors in conditioning those "criminal qualities". This phrase refers to a condition and seeks to avoid any decision as to the actiology of that condition. Quite arbitrarily let us exclude from the conception "habitual criminal" those certifiable under English law as insane or mentally deficient.

Secondly, there is some support for the view that "settled practice in crime" is not a necessary element of habitual criminality and need not therefore appear in its definition. Supporters of this view hold that we may well be able to recognize and to isolate the "habitual virus" even before that "virus" has been involved in an appreciable number of offences and punishments, or even before the criminal possessing it has become a recidivist, or indeed even before he has faced a criminal court. "Habitual criminal", then, should be defined only in terms of the elements *(a)* and *(c)* above. This is the extreme position taken up by certain modern Positivists adopting a medical approach to criminology and basing treatment-punishment exclusively on the social dangerousness of an offender or potential offender. It completely excludes the conception of *nulla poena sine lege* and would appear to exaggerate the adequacy of our existing knowledge.

Thirdly, it must be appreciated that the danger any particular offence or type of offender is thought to present to the community will vary from one legal system to another.

To recapitulate: an "habitual criminal" is *"one who possesses criminal qualities inherent or latent in his mental constitution (but who is not insane or mentally deficient); who has manifested a settled practice in crime; and who presents a danger to the society in which he lives (but is not merely a prostitute, vagrant, habitual drunkard or habitual petty delinquent)".*

2. THEORIES OF PUNISHMENT

No one theory explains the different punitive measures to be found in Anglo-American criminal law. They can be explained only by the existence of different conceptions, conscious and unconscious, at the time when they were respectively introduced.[6] This is not an adverse criticism of such measures, for frequently subsequent rationalization of practical experience tends more to true justice than any rigid adherence to theoretical preconceptions. On the other hand it might be expected that there would, at the present time, be widespread agreement as to the end we now hope to achieve by our penal sanctions. The contrary is the case. One can still agree with Kenny who wrote that "it cannot be said that the theories of criminal

[6] "The influence of any doctrine or idea depends on the extent to which it appeals to psychic needs in the character structure of those to whom it is addressed. Only if the idea answers powerful psychological needs of certain social groups will it become a potent force in history." Fromm, *The Fear of Freedom*, p. 54.

punishment current amongst either our judges or legislators have assumed ... either a coherent or even a stable form."[7]

Nor is this condition peculiar to our society. Malinowski, considering the reactions to this same problem of the Melanesian inhabitants of a part of the Trobriand Archipelago, wrote: "We have found that the principles according to which crime is punished are very vague", and that this was so because "all the legally effective institutions ... are ... means of cutting short an illegal or intolerable state of affairs, of restoring the equilibrium in social life and of giving vent to the feelings of oppression and injustice felt by individuals."[8]

But because neither the primitive tribe nor a highly complex civilised society seek any single conscious purpose through their penal sanctions, we must not suppose that we are facing an academic and impractical problem. When a court decides what sentence to impose on the criminal convicted before it, even though limited by maximum and minimum punishments fixed by the legislature, it must so decide with reference to some purpose or purposes, conscious or unconscious, articulate or inarticulate. To refuse to define an aim for the sanction imposed is to make Pilate's choice, and to give way to the emotions of others, or indeed to one's own emotional motivations. Herein lies one of the most deep-rooted causes of the fortuitousness of penal sentences by which bigamist A will serve a term of six months' imprisonment, while bigamist B (who adduces equally mitigating circumstances, is of a similar psychological type, but appears before a different bench) will serve a term of three years. My readers will be familiar with many such examples, of which a multiplicity will be found in the case records analysed in Part II of this work. For the legislator, and everyone connected with the penal system, this is a fundamental and challenging problem.

In considering "punishment" one is faced immediately by a semasiological difficulty; there are few words more heavily charged with subjective emotional and intellectual overtones. Let me avoid this by insisting that "punishment" is here used as a symbol for society's official reaction to crime, and does not necessarily connote either the swish of lashes or the soft dripping of sentimental tears. Hanging, imprisonment, Borstal detention, approved school training, probation, fine — these are all "punishment".

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[7] Kenny, *Outlines of Criminal Law*, 15th ed, p. 38. Kenny wrote this in 1902 in the first edition of his book, and it has remained unaltered throughout all editions to the revised 15th in 1947. It is still an incontrovertible contention.

[8] B. Malinowski, *Crime and Custom in Savage Society*, pp. 98 and 99.

Prevention, reformation, deterrence, retribution, expiation, the Kantian argument that punishment is an end in itself, all these mingle in the wild semantic and dialectic confusion which constitutes most discussions on the purposes of punishment. Legislators, judges, prison administrators, wardens, interested members of the public, and prisoners themselves, all express their own particular and widely varying rationalizations of punishment. But to point to this diversity is not to advance a demand for ultimate truth, and "it is doubtful that a wholly satisfactory explanation of the existence of punishment can be made"[9]; it is merely suggested that a compass is desirable by which to guide oneself, even if only for a short distance and over a particular part of the journey. It is this desire that has prompted philosophers and jurists, at least since Plato and Aristotle, to give a great deal of their attention to this problem.

The aim of punishment is concealed by its relationship with the vexed issue of determinism and free-will, "which finds no end, in wandering mazes lost". Certainly the increasing adherence to a determinist philosophy has been contemporaneous with a movement away from a retributive-expiative theory and towards a utilitarian conception of the purpose of punishment. Vengeance, retribution, expiation, atonement have lost much of their conscious influence, but, as I shall show, their present emotional power is great. In an excellent brief survey of theories of punishment Professor Paton contends that "to-day the usual legal approach is utilitarian, for it is recognized that the law cannot attempt to carry out all the dictates of religion or morality, but can enforce only that minimum standard of conduct without which social life would be impossible.[10] For the time being let us accept this conclusion.

However, within a broadly utilitarian approach there are many subsidiary purposes receiving general support and which fall conveniently under three main headings — deterrence, prevention and reformation. It is clear that even those who seek a utilitarian purpose through punishment are far from agreed concerning these subheadings. The contrasting views of some eminent thinkers will prove this point:

> Sir John Salmond: "The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative and (4) Retributive. Of these aspects the first is the essential and all-important one, the others being merely accessory. Punishment is before all things deterrent, and the chief

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[9] Reckless, *Criminal Behaviour*, p. 257.

[10] G. W. Paton, *A Textbook of Jurisprudence*, p. 348.

> end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him." [11]
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> The Most Reverend William Temple, speaking of the deterrent aspect of penal action, affirmed that "it is morally justifiable provided that it is subordinate." [12]
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> Oliver Wendell Holmes, Jr.: "Most English-speaking lawyers would accept the preventive theory without hesitation," and later, "prevention would accordingly seem to be the chief and only universal purpose of punishment." [13]
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> S. and E. Glueck: "For the vast majority of the general run of traditional crimes and criminals, the corrective theory (reformation) ... should predominate." [14]

Not only is the juxtaposition of these views startling, but their existence is of great significance for legislative, judicial and administrative practice.[15] For practical purposes there is supposed to be an antithesis between deterrence and reformation, and there has been a tendency to contend that "there is thus a conflict in each case between the needs of a particular prisoner and the social interest in enforcing the law. What may be the best treatment for a criminal may conflict with the necessity of deterring others. The real problem is therefore to combine the deterrent and reformative theories in due proportions."[16] Sir John Salmond doubted the feasibility of this, contending that "it is plain that there is a necessary conflict between the deterrent and the reformative theories of punishment." [17]

There is a frequent confusion between means and ends. Deterrence *per se* can never fully justify punishment, nor indeed can reformation outside Utopia. The end, as it is frequently stated, is the protection of society. Punishment is certainly not the only social force working towards this end, but it is an important one of them.[18]

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[11] Salmond, *Jurisprudence*, 10th ed., p. 111.

[12] In 1934, as Archbishop of York, in the first Clarke Hall Lecture, published as *The Ethics of Penal Action*, p. 34.

[13] Holmes, *The Common Law*, pp. 43 and 46. It is worth noting that many leading jurists have subscribed to this view, as Kenny says in his *Outlines of Criminal Law*, 15th ed., p. 32: "According to the most generally accepted writers — as for instance Beccaria, Blackstone, Romilly, Paley, Feuerbach — this hope of preventing the repetition of the offence is not only a main object, but the sole permissible object, of inflicting a criminal punishment."

[14] S. and E. Glueck: *After-Conduct of Discharged Offenders*, p. 97.

[15] «Il règne donc une grande complexité dans les buts de la peine; c'est elle qui explique l'extrême variété des moyens répressifs.» Donnedieu de Vabres, *Traité de droit criminel et de législation pénale comparée*, 3rd ed., p. 276, Paris, 1947.

[16] G. W. Paton, *A Textbook of Jurisprudence*, p. 351.

[17] Salmond, *Jurisprudence*, 10th ed., p. 112.

[18] In their acidulous book, *Crime Law and Social Science*, Michael and Adler state a similar conclusion in an inverted way: "Punishment can be justified only as an intermediate means to the ends of deterrence and reformation which, in turn, are means for increasing and preserving the welfare of society." p. 352.

There is a dichotomy in the means punishment uses towards this end, for it functions both in the macrocosm of society and in the microcosm of criminals within society. First, in society as a whole, though its function has not been fully explored, it would seem safe to say that the individual's super-ego, his inner tribunal or conscience, is reinforced, and to a certain extent conditioned, by the existence of formal punishments imposed by society; further, for some people and for some crimes the existence of punishment prevents them as potential offenders from becoming actual offenders, thus having a generally deterrent effect. Secondly, in its relations to criminals, it becomes the function of punishment to reform where possible, to deter where possible, and generally to work on the offending criminal with the aim of rendering society safe from his depredations; in effect, of removing him from the microcosm into the macrocosm.

In fact, "deterrence" is used in two senses: as one of the methods of rendering society free from the criminal activities of an individual who has been convicted of crime, and in the wider sense of its operation on the minds of society at large.[19] It is primarily in the latter sense that Professor Paton and many others have suggested that there is a conflict between deterrence and reformation, though this conflict is also alleged to exist in relation to the treatment accorded those who have offended against the criminal law.

It is my contention that the only reason that there appears to be a conflict between reformation and deterrence is that the former is a relatively recent arrival on the scene. By quoting the heritage of the repressive systems of the past it is possible to make apparent nonsense of the reformative aim, especially as until now it has drawn its experience only from work with, and research on, the most malleable group of criminals, the youthful offenders. To most youths, Borstal training holds a great deal more deterrence than the shorter prison term that might alternatively be imposed.[20] The point implicit in that statement holds true of many of our reformative techniques, and is reinforced by the fact that all such techniques involve individualization, so that the threat of what appears to him to be the most severe punishment will always hang over the potential offender and the potential recidivist. Reformative techniques, with their necessary corollary of individualization of punishment and the aban-

[19] The distinction here drawn is the same as that between "special prevention" and "general prevention" as these terms are used in Continental literature. It is unfortunate that such a useful terminological distinction has not gained currency in this country.

[20] Every asylum for the insane gives manifest proof of the deterrent quality of even the most advanced reformative techniques.

donment of the "price-list" system (by which the offender if he is so minded can, with reasonable accuracy, estimate his punishment should he be convicted of a crime), will if anything strengthen what deterrent effect punishment has on society and on the criminal. Frequently it is the unpredictable quality of punishment that conditions its deterrent force.

The whole answer to this suggested conflict must be sought in classification of offenders and in an attack upon the problem of crime on a wide front, suiting our weapons to their task. Then, indeed, there is no necessary antithesis between deterrence and reform, and we may perhaps slowly exorcise from our conception of punishment its primitive heritage of vengeance. But to do this we shall need greater knowledge of reformative methods, and a greater understanding of the role that deterrence plays in the life of society. Tentatively I would say that the effectiveness of deterrence varies in inverse proportion to the moral seriousness of the offence; such ideas, however, must be put to the proof of future research.

The real difficulty lies not in the reconciliation of deterrence and reformation, but in blending into our utilitarian pragmatic approach to punishment the emotional requirements of the community. If our task is, as was suggested above, the protection of society, then we are undertaking to influence men's actions by means of the threat and actuality of punishment, which involves the exercise of control over the emotional instinctual forces that condition such actions. We must then include amongst those instinctual subjects of our control a very deep-rooted hatred of the criminal, and a very great reliance on him as the butt of aggressive outbursts. Writing shortly after the controversies that surrounded the debates on the Criminal Justice Act of 1948, one need hardly stress this point. As Dean Roscoe Pound said: "Anglo-American lawyers commonly regard the satisfaction of public desires for vengeance both as a legitimate, and a practically necessary, end of penal treatment."[21] Undoubtedly there is almost universal inconsistency between the ends of social protection and punitive retribution.

Our instinctual reactions to crime are two-edged in their operation. They condition the group's opposition to the criminal and thus provide the emotional prop on which punishment rests, and they form the polarities of leniency and severity outside of which the punishing authorities cannot safely proceed. Thus Julius Stone writes: "Failure to visit *what group-members regard* as an adequate evil on violators, intensifies the retributive impulse, sometimes to

[21] *Criminal Justice in Cleveland*, 1922 ed., p. 575.

the point of lynch justice. Conversely excessive severity in relation to the supporting group attitudes tends to place the violator in the light of a martyr. The frequent impossibility of getting juries to convict when the number of capital offences in England was 160, in the early nineteenth century, is well known."[22] These instinctual reactions to the criminal are not even modified by the *lex talionis* and are only controlled by a repression which attaches significance to the façade of a legal system in which the punishment of the criminal has been taken out of the hands of the wronged individual, his family or tribe, and given to a central authority. The punishments this central authority imposes are, however, emotionally tolerable to the community only so long as they do not fall below an inarticulate but nevertheless perceptible pole of leniency.

We are but on the threshold of an understanding of this aspect of punishment, and an adequate psychological investigation of the function of judicial punishment in the lives of those who never come before a criminal court is desperately needed. *Inter alia*, it might well throw an entirely new light on our almost unchallenged conception of punishment as a potent deterrent force. Those psychoanalysts who have interested themselves in criminology have begun to open up this field of the psychology of the punishment community, but until recently only sporadically.[23] A start has been made, how-

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[22] *The Province and Function of Law*, p. 684. It may well be that Part II of the Prevention of Crime Act, 1908, exceeded what group-members regarded as the pole of severity, and that this in no small measure accounted for the failure of this legislation.

[23] For example, K. Friedlander, in the *Psychoanalytical Approach to Juvenile Delinquency*, writes (p. 192): "If progress is to be made in the treatment of offenders it is important to recognize the strength of the unconscious trends which hinder any loosening of the connection between crime and punishment. It is also important to realize that 'common sense' alone is not an adequate weapon against these unconscious tendencies. Common sense is very valuable in all those instances where intellectual judgment is unhampered by unconscious emotions. But it is helpless against influences arising out of our own unconscious. History, not in the field of criminal research alone, is full of examples showing that only expert knowledge can remove prejudice based on unconscious motives. The treatment of the insane before the emergence of psychiatric knowledge is but one example of the crass error of judgment committed by 'common sense'." With this in mind it is interesting to consider Mr. Justice Stable's advice to the new magistrates assembled at Dolgelley on January 4th, 1949: "Have confidence in yourselves. Do not imagine you have to be learned in the law. Do not worry about the law but use your common sense. If you use it and find that it does not tally with the law, then there must be something wrong with the law, because common sense cannot be wrong." I tremble for the sexual offender coming before a magistrate who has accepted this advice and who finds such a case emotionally disturbing.

ever, and a considerable step forward taken by Paul Reiwald's *Society and Its Criminals.*[24]

Though our "idea of punishment has deep irrational roots", and though "psychology claims to detect unconscious motives for the demand for punishment in man's fear, in his insecurity, and even in a sense of guilt which seeks satisfaction in the vicarious suffering of the convicted criminal",[25] there is no reason why we cannot logically examine the conscious superstructure of our punitive system. There is indeed one other purpose of punishment which we cannot overlook. It was presented most forcefully by Malinowski, who found amongst the Melanesians that punishment was used quite consciously to serve the needs of social cohesion within the group. This has been supported as an important aim of punishment by many other thinkers, for example, Sutherland, who contends that "respect for law grows largely out of opposition to those who violate the law. The public hates the criminal, and this hatred is expressed in the form of punishment. In standing together against the enemy of their values, they develop group solidarity and respect for the orders of the groups." [26]

There is at present in criminology a conflict between philosophy and psychology, between law and medicine, between ethics and empirical knowledge — a conflict based frequently on ignorance of one another's disciplines. For example, Dr. John Bowlby writes that as weapons against crime "exhortation and punishment are relatively fruitless and, indeed, unnecessary, since in every man's heart there is as strong a drive to co-operate with others as there is in his body a drive towards health",[27] and Mr. Nigel Bridge replies affirming that "by speaking as he does... Dr. Bowlby betrays his distaste for the problems of good and evil, right and wrong. But these problems are eternal and inescapable".[28] Truly, it is not yet appreciated that "sciences are of a sociable disposition, and flourish best in the neighbourhood of each other".[29] But the reconciliation of this unfortunate conflict is beyond the scope of our subject. It is, however, necessary to point to it before breaking off that section of the problem particularly relevant to the treatment of confirmed recidivists and habitual criminals.

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[24] Translated by T. E. James and published by Heinemann, London, 1949.
[25] M. Grünhut, *Penal Reform*, p. 2.
[26] Sutherland, *Principles of Criminology*, 4th ed., p. 358.
[27] *The Times*, letter to the editor, December 20th, 1948.
[28] *The Times*, letter to the editor, Decemher 24th, 1948.
[29] Blackstone, 1. Comm. 33.

Punishment under the aegis of the criminal law is a jurisprudential problem. It has all too frequently been regarded solely as a problem in ethics.

Professor Julius Stone in his monumental work, *The Province and Function of Law*, defines jurisprudence as "the lawyer's extraversion. It is the lawyer's examination of the precepts, ideals and techniques of the law in the light derived from present knowledge in disciplines other than the law".[30] There is a remarkably close analogy between the conflicting schools of jurisprudence and the conflicting theories of punishment; and understanding will never illumine either conflict while systematization, for its own sake, has such influence, and knowledge gathered from other disciplines is so hesitantly allowed to obtrude. When to theories of punishment the criminologist brings an extraverted interest based on adequate knowledge of those sciences in the light of which such theories must finally be resolved, then perhaps order will emerge from the present chaos in which it is necessary for virtually every writer of a criminological work to make his testament, to propound his approach to the problem of punishment, and to relate his conclusions on this point to the plan of his work. At present the psychiatrist regards society's official reaction to crime as ideally a therapeutic endeavour, the lawyer as *inter alia* vindicating the law and preserving the King's Peace, the writer on juvenile delinquency as a pedagogic problem, and so on. There is a nexus between all such people, but it is far from defined, and it will never be defined while practitioners of diverse disciplines approach the problem of punishment from their own particular premises.[31]

I realize that my contention that theories of punishment must become the criminologist's extraversion demands a definition of the discipline of "criminology" if it is to be a practically useful suggestion. This is a problem beyond the scope of my present purpose. But the minimum requirement for a "criminologist" who animadverts to the purpose of punishment, and uses information gathered

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[30] *The Province and Function of Law*, p. 25.

[31] A good example of this is to be found in Dr. A. C. Ewing's brilliant book, *The Morality of Punishment*, a summary of part of which was published by Dr. Ewing in the Cambridge Pamphlet Series, *English Studies in Criminal Science*, under the title of *A Study on Punishment*. Here the philosopher delves in an incisive and comprehensive fashion into the problem we have been considering; but the influence of his work has not matched its worth. It is the specialist considering punishment from outside as it were, and as such seems unlikely to have much effect until it is related to existing conditions by receiving an extensive admixture of criminological understanding of the problem it considers.

from other disciplines, is a full, personal, emotional and intellectual understanding of the actual functioning of the existing penal sanctions, and of their effect on the individual subjected to them—a much rarer understanding than one might suspect.

In the light of the above definition of the problem of punishment, let us now consider the particular relationship between habitual criminals and the purposes to be served by punishing them.[32]

3. THEORIES OF PUNISHMENT AND THE HABITUAL CRIMINAL

Aristotle's theory of moral accountability, developed in the fourth century B.C., was formally introduced into jurisprudence as a technical concept by Pufendorf who, in his *Elementia Jurisprudentiae Universalis* published in 1660, used the term "imputability" (or "accountability"), the essence of which was that for punishment to be just it must be rationally related to moral culpability. The close links between such a justification of punishment and an indeterministic freedom of will are sufficiently obvious, and the conception of a free choice between various possible courses of action was the essential condition for, and the philosophic basic of, moral accountability, of imputability, and therefore of penal responsibility.[33] "Imputability" was the fundamental tenet of the Classical School of Criminology, and constituted its intellectual rationalization of the emotional force of retribution. The will being free, the criminal's offence being imputable to him, each offence must be regarded as a single event, the result of a distinct and individual choice between the alternatives of keeping and breaking the law. Reinforcing this conception was the force of religious belief which regarded the criminal's offence as a sin to be

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[32] Hardly a criminological or penological work fails to incorporate a chapter on the theories of punishment. There is much in common between them. The most complete English study on this subject it that of Dr. A. C. Ewing, referred to above, while the most readable was written by George Bernard Shaw and published as a preface to Sidney and Beatrice Webb's *English Prisons Under Local Government* (1922). Jerome Hall in his incisive *General Principles of the Criminal Law* adopts what is to my mind the wisest course for the time being in considering the theories of punishment. He relates his analysis of them separately to each fundamental principle of the criminal law which he examines, and does not attempt to define his standpoint generally. Thus, for example, he considers the purpose of punishment in relation to criminal attempt and then later in relation to strict liability, and so on. By doing this he is able to find for each topic a wider area of general agreement than he could were he to define his ethical approach to the whole field of criminal law.

[33] An excellent account of "imputability" is given by O. Kinberg in his *Criminology*, pp. 37-49.

purged before God and man—to be expiated by punishment. The identification of imputability with sin was achieved often with difficulty, as for example in the case of lunatics who, being *"demens et furious, non per feloniam"*,[34] were not regarded as imputable or accountable to the law for their crime, owing to their manifest incapacity to make an intellectual choice between alternative courses, and who were regarded by the Church as possessed of evil spirits or of the devil, and therefore not necessarily burdened with sin for the offences they committed whilst so possessed.

If he were imputable and capable of sin, then expiation was at once the criminal's right and heavenly duty, and it was society's task to overcome any hesitancy on the part of the criminal in accepting his expiatory suffering. Such an approach to punishment excluded any classification of imputable sinful offenders for purposes of punishment, and hence recidivism never arose as a problem in punishment.

Later, when the Classical School of Criminology predominated, punishments were intended to be at once retributive and expiative, and habitual criminality was no problem for a new reason. Punishments tended by their very nature to exclude a subsequent commission of any but the most trifling offences. If the larceny of twelve pence is met by hanging, or, if the court is leniently inclined, by transportation, there is remarkably little scope for the development of any class of habitual recidivists. One might commit many serious offences and in that sense be habituated to crime, but once the ponderous and unsubtle mechanism of the criminal law had one within its grasp there was little likelihood of the continuance of such criminality. Theory fitted practice, for it will be noted that the Classical School concerned itself predominantly with the justification of punishment, not its purpose, and if it were necessary to inflict a second expiatory punishment on the same individual that did not suggest any failure of the punitive mechanisms.

In course of time sentences became less severe. In consequence of diverse factors—the spread of humanitarian ideas; a slight shift of the focus of attention from a preoccupation with the moral gravity of the offence towards the particular offender; the emergence of psychological and sociological thought; and above all, the realization that an amelioration of punishment was not followed by an increase of crime—criminal law in England, as in other countries, has resorted less and less to extreme punishments. Thus habitual recidivism has become a practical possibility.

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[34] Kentish Eyre of 1313 (Selden Society), 1, 81.

This amelioration of the severity of penal sanctions has not ostensibly developed from the idea embodied in the phrase *"tout savoir, c'est tout pardonner"*, but has resulted rather from new moral conceptions, which themselves spring from our increasingly teleological approach to punishment and our increased understanding of the sources of human conduct. The beliefs that have gone to the formation of this approach "whether they appear to the particular judge . . . as correct or incorrect, or even if he is not conscious of them, have still influenced his opinion, consciously or unconsciously, directly or indirectly. And whereas to understand the crime does not mean to forgive the crime, a healthy and necessary striving after understanding has led, with psychological compunction, to milder and milder sentences."[35]

The theoretical developments accompanying and conditioning the teleological approach to punishment were initiated by Lombroso and his disciples of the Italian School. They introduced into criminology a new method, induction based on scientific research, and a new interest, the criminal instead of the crime. Though the criminal stigmata that Lombroso sought to define have been disproved by later workers, notably Dr. Goring in England,[36] and were quite possibly nothing but prison stigmata, it is to Lombroso's everlasting credit that his work turned men's minds to the consideration of the criminal as an individual requiring scientific investigation. The shift of attention from this to the consideration of the purpose and the function of the penal sanctions which pressed upon him followed logically. This incursion of psychiatry into criminology and the insistence that the efficiency of a social institution could only be tested by its beneficial effect on that society, led inexorably to the death of the Classical School of Criminology. In its place there arose from this teleological scientific approach to criminology a School that has come to be called Positivist. In order to complete this sketch of the broad lines of division on the theoretical plane, it is worth noting that from the embers of the Classical School there was born, in the neo-Classical School, a conception of punishment and an approach to criminology posited on deterrence.

Since the Positivist School of Criminology was, unlike its predecessor, scientifically interested in the criminal, it was very much

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[35] Exner, *Studien über die Strafzumessungspraxis der deutschen Gerichte*, Leipzig, pp. 27-8.

[36] The writings of the American anthropologist, Dr. E. A. Hooton, though tending to revivify much of the substance of Lombroso's basic contention, have not supported his conception of criminal stigmata.

concerned to classify him, one inevitable classificatory rubric being the recidivist. And, again unlike its predecessor, being interested in the purpose of punishment and its function within society, the Positivist School saw in the recidivist a manifest failure of that purpose.

Thus it was that the incorrigible offender, the habitual offender, the confirmed recidivist, and the recidivist imposed on a society which regarded its penal sanctions as teleological instruments (and it must be remembered that this was common both to positivists and neo-classicists) the intellectual necessity of inventing special measures to deal with them; and since punishments had become of such a nature that recidivism was physically impossible, this intellectual necessity developed into the practical necessity of introducing such measures into the criminal law so that "a modern criminal code cannot be conceived without (them)."[37]

We thus return to the utilitarian conception of the protection of society as the purpose of punishment. By definition society is not protected from the habitual criminal by normal criminal sanctions. Something more is needed, and we shall in Part I of this study consider the special sanctions that are applied in different countries. In so doing it will be helpful to keep in mind that no penal system has ever rationally pursued its aims, and this for three reasons. First, the rationality of an aim is directly connected with the state of our knowledge (so that, for instance, a group which believes that fire is divine acts rationally in feeding that fire with human sacrifice to avert divine wrath). Seeing errors of "knowledge" in the past, we are naturally sceptical of the true wisdom of our present aims, doubting as we do the accuracy of the "knowledge" on which they are based. Secondly, there is within all of us an attachment to old customs, a reluctance to abandon at least the façade of an institution to which we have adhered in the past. Thirdly, there are hidden personal desires, unconscious motive forces, which masquerade as being for the benefit of society but which distract us from the pursuit of a rational aim.[38] Providing society had expended its best efforts to protect itself from an habitual criminal and had used all the practical means within its power to make him live a life that society

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[37] Timasheff, *The Treatment of Persistent Offenders Outside the U.S.A.*, Journal of Criminal Law and Criminology, Vol. 30, No. 4, p. 459.

[38] Thus to complete the analogy of the fire-worshippers: the three reasons adduced in the text why social aims are not rationally pursued will gradually lessen the frequency of human sacrifice, will make those who are sacrificed be of a type or group not desired by the society, and will lead eventually to symbolic sacrifice of animals instead of humans, and in similar fashion will continue to be modified.

was prepared to tolerate, it would be rational to destroy him.[39] It would certainly be rational to keep him from again entering society. But for the above three reasons, and because, in George Bernard Shaw's phrase, we lack "the ruthlessness of the pure heart" we but rarely proceed to such logically complete conclusions.[40]

Nevertheless, we must strive to protect society from habitual criminals. What, then, are the tools which lie to hand for labour in this field?

4. THE INDETERMINATE SENTENCE

There is much confusion between the *indeterminate* and the *indefinite* sentence. When a criminal lunatic is committed to Broadmoor the period for which he will be detained is indeterminate; when a youth is committed to a Borstal Institution the period for which he will be detained is indefinite. To the former is set no bounds but administrative decision; the latter though also governed by administrative decision functions within limits determined by the legislature and the court—limits which control both the maximum and minimum periods for which youths so sentenced can be detained. A sentence fixing only either the minimum or the maximum term, and leaving the exact date of release to an administrative authority, is likewise indefinite.[41]

The Inquisition occasionally imposed sentences "for such time as seems expedient to the Church,[42] but it would seem that this idea was not publicly advanced until 1787 when, at the home of Benjamin Franklin, Dr. Rush of Philadelphia read a pamphlet on punishment in which he advocated an indeterminate sentence for all criminals.[43]

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[39] However, the German law of September 4th, 1941, which provided capital punishment for certain habitual criminals, was not even a "rational" measure, for the two conditions precedent we have specified had not been fulfilled.

[40] Another factor limiting completely logical measures is well and concisely stated by Professor Julius Stone: "Even the punishment of the criminal, it is recognized, must stop short of denying his humanity, for that denial draws with it the denial of that of members of society generally." (*The Province and Function of Law*, p. 598.)

[41] The terms "absolutely indeterminate" and "relatively indeterminate" are commonly used to represent the distinction we have drawn between indeterminate and indefinite sentences. On etymological grounds the indeterminate-indefinite usage is preferable and is adopted by many American writers, notably by Barnes and Teeters in *New Horizons in Criminology*.

[42] Chrysostom: "I require not continuance of time, but the correction of your soul; demonstrate your contrition, demonstrate your reformation, and all is done." Quoted by George Ives, *A History of Penal Methods*, London, 1914, p. 38.

[43] See Barnes and Teeters, *New Horizons in Criminology*, p. 488.

In the early nineteenth century the work of Obermaier in Germany and Montesinos in Spain proved that the indefinite sentence could indeed function, whilst Archbishop Whately of Dublin, and Livingstone, the author of the Criminal Code of Louisiana, both published works supporting the indeterminate sentence. In 1840, Captain Alexander Maconochie took the first practical steps to implement the indeterminate sentence for adult criminals in the penal colony on Norfolk Island,[44] and his plan was copied and modified by Sir Walter Crofton in Ireland. Though both these experiments eventually collapsed under the weight of official prejudice, they had great influence on subsequent penological developments.

Thus neither the theory nor the practice of the indeterminate sentence is novel. Indeed, for the last seventy years it has been in the forefront of criminological controversy. A huge literature has been built up, and no useful purpose would be served by canvassing the details of the arguments advanced. The broad lines of cleavage are, however, worth mentioning as they have a bearing on the problems of the indefinite sentence.

It is argued, in support of the indeterminate sentence, that at the end of a trial the judge can have scant knowledge of the criminal he has convicted, and none of his probable reactions to reformative treatment. Therefore, the determination of the sentence to which the criminal will be subjected should pass out of the judge's hands, and the offender should not be released until, in the opinion of those who have observed his demeanour in prison and considered his background and the environment into which he will be conditionally discharged, there is some likelihood that he will not again endanger the community. This argument is frequently linked with a demand for the establishment of Treatment Tribunals.[45] Many prison administrators as well as theorists have supported these contentions. For example, the well-known Declaration of Principles of the American National Prison Congress in 1870 contained the recommendation that indeterminate sentences should replace peremptory sentences, and in 1925 at the International Prison Congress held in London, the following resolution was carried: "(i, 3) Indeterminate sentences are the necessary consequence of individualization of punishment and one of the most effective means for the social defence against criminality."

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[44] Maconochie, in arguing for an indeterminate sentence, contended that "when a man keeps the key of his own prison he is soon persuaded to fit it to the lock." Quoted in Barnes and Teeters, *ibid.*, p. 548.

[45] M. Mannheim, *Criminal Justice and Social Reconstruction*, pp. 226-37.

The main point made by those resisting the introduction of the indeterminate sentence is that only by adhering to the conception of *nulla poena sine lege* in its application to punishment can any defence against official abuse be guaranteed to the individual; and to support this they point to the development in criminology under totalitarian régimes where "scientific criminology" was perverted to political ends. In the absence of legal control of punishments they fear administrative arbitrariness. Thus Jerome Hall contends that "the insight of the common lawyer on these vital issues reflects the informed knowledege of Western civilization. In the choice of alternatives, he knows the value of legal control of official conduct, especially when the personal rights of weak individuals are at stake."[46]

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[46] *Principles of Criminal Law*, p. 53. Similarly, L. Radzinowicz in his article, "The Persistent Offender", at p. 167 of *The Modern Approach to Criminal Law*, writes that "unless indeterminate sentences are awarded with great care, there is a grave risk that this measure, designed to ensure the better protection of society, may become an instrument of social aggression and weaken the basic principle of individual liberty."