E. In Sum

A point of worthy mention: the Philippine legal system is not barren of any legal remedy available to a deprived legal possessor or owner of land when the timely repeal of P.D. No. 772 is effected.

The remedies of ejectment, more particularly the actions for forcible entry and unlawful detainer, are readily available and have been enhanced by the Rules on Summary Procedure issued by the Supreme Court. The Revised Penal Code has express provisions on violent usurpation and illegal trespass.

Society's rejuvenated abhorrence towards professional *squatting* is an imposing presence through the heavy sanctions imposed by the UDHA.

Our laws will still be replete with measures which reinforce the basic rights of ownership and possession and with remedies for violations thereof.

POSTSCRIPT

What it takes to rid ourselves of the oppressive criminalization of many is simple: repeal P.D. 772 and flush it out of legal existence.

The State has within its sovereign power the will to advance the aspirations of social justice as embodied in the Constitution; to pursue genuine urban land reform; and to uphold the dignity of all Filipinos, including the urban poor.

Ka Pepe Diokno would have engaged us in this wise:

> Nature, chance and accident do cause differences; these differences do produce inequalities, and though we are achieving more and more control over nature, we cannot change nature, nor eliminate chance or accident. But we can change human relations and action; and therefore, we can see to it that whatever inequalities remain in our society are not caused by our relations with each other or our actions toward each other.[138]

[138] Diokno, "A Filipino Concept of Justice," from A NATION FOR OUR CHILDREN, at 30 (1987).

THE HISTORY OF PENAL LAW

LORENZO U. PADILLA*

I. THEORIES ON CRIME AND PENALTY

A double purpose or design underlies the epigraph forming the rubric of the present article: the study of the foundation and the end of penalty, and that relative to the justification of the right to punish. This double consideration is not essential according to some treatise writers, who leave for the part of penology all references to the justification of the penalty and install in the first part or introductory all that concerns the right to punish, more commonly known as connected with the *jus puniendi*. It is considered that, on the purer terrain of principles, the separation of the themes or the assignment of proper places has better logic and correctness. However, this circumstantial union of those questions may be admitted because they are practically cross-linked and united that the explanation of one would, as a consequence, necessarily lead to the other.[1]

A. General Considerations

All civilizations that had come before have contemplated the panorama of crime and its punishment, or the human conduct that contravenes the law established by the State protecting juridical goods, and its reaction against the violator of its norms. All the world beholds the eternal spectacle between a rebellious individual going against the law and of the power that forcefully strikes those who would do damage against persons or things in the manner proscribed by the criminal legislations. Across the centuries, there may have existed contrary doctrinal criterion, and, it may be added that there would have been a picture of a community without authority. But when one contemplates of a body politic, of whatever complexion may be desired, the truth of life and of reason thrusts forward existence of penal law. It is for this reason that some authors have said that although some things observed may not necessarily justify it, the penal law has lived, and is constantly living, and is always seen in life. This

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[1] FEDERICO PUIG PEÑA, 1 DERECHO PENAL 26 (1958) [hereinafter PEÑA].

could be the reason to study the foundation of its existence or of the right of the State to impose its sanctions.[2]

Notwithstanding the foregoing considerations, one may accept a simplistic vision of the problem. But when one treats of infusing a higher juridical essence to the diction, when one treats of solving questions in the light of the juridical order, then there arises a need to penetrate deeply into their entrails. However, there is also an absolute need to confine the inquiry within the terrain of philosophy as it goes further than one may want to go. It should suffice, therefore, to study the questions in the field of living law. On this, the justification of the law on punishment is very clear, as a matter of general principle. It exists, and should exist, because without it, the State could not subsist. The civil power cannot perform the fundamental mission of governing the people. The realization of the common good, the general welfare, would be but a sweet dream, so to speak, but very unreal and non-existent. This is because very little well-being can exist if every member of that body politic could do whatsoever he or she may please even if it be to the detriment of the people. It is necessary for the State, it is imprescindible from the law, as a general directing norm of the community. The existence of a penal law, as a consequence, is unavoidable, in order to determine the sanctions that should befall those who would transgress the juridical order.[3]

But the State should not impose the penalty upon idiots and insane persons, among others. Reason requires that they be excluded from punishment. Reason also requires that penalty be established by competent authority and should, above all, contain an orientation, that the State must follow in the establishment of sanctions: an end to be pursued in the imposition of the penalty, consistent with its mission to the body politic.[4] Diverse views on this matter have been presented by various authors across time and these have constituted an important Chapter in penal schools.

B. The Penal Schools

The term "penal schools" is understood to refer to the ensemble of doctrines which seeks to explain the end which ought to guide the State in the establishment of penal sanction. In reality, the name has a broader

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[2] *Id.* at 26-27.

[3] EUGENIO CUELLO CALON, DERECHO PENAL 47 (1951) [hereinafter CUELLO CALON].

[4] PUIG PEÑA, *supra* note 1, at 26-27.

scope, so that together with what may be called "fundamental", are scientific groups seeking to resolve many problems of a scientific or technical order raised in the penal discipline.[5]

C. The Various Penal Schools and Their Representatives

The more important of these schools have been called Classical, Correctionalist, Positivist, Critical, and Sociological.[6]

1. CLASSICAL SCHOOLS

All scientific movements which were initiated with Beccaria[7] and which found its highest point in Carrara[8] and in Pessina,[9] has been baptized by Ferri[10] with the name "Classical School", to chronologically distinguish it from the new and more radical tendencies implanted by positivism.[11] This penal movement certainly has a unitary sense. Though its theorists differed on some points, particularly regarding the nature of the penalty, there is nevertheless an ensemble of materials and common lines within its bosom[12] which gives harmony and unity to the scientific

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[5] *Id.* at 27-28.

[6] *Id.* at 28.

[7] *See* Lorenzo U. Padilla, *The History of Penal Law* in ATENEO L. J., Vol. XXXIX, No. 2, p. 107, note 200.

[8] Francesco Carrara (1805-88), Italian penologist; (Vicenzo Manzini on *Carrara, Francesco* in *Encyclopaedia*, Vol.III 234).

[9] *See* Lorenzo U. Padilla on *The History of Penal Law* in ATENEO L. J., Vol. XXXIX, No. 2, p. 88, note 123 (Enrico Altavilla on *Pessina, Enrico* in *Encyclopaedia*, Vol. XII 93-94).

[10] *See* Lorenzo U. Padilla on *The History of Penal Law* in ATENEO L. J., Vol. XXXIX, No. 2, p. 66, note 30.

[11] Compte's *Cours de philosophie positive* (1830-42), says Ruggiero, "made the advent of positivism the epilogue of the intellectual evolution of humanity and enunciated the famous law of the three stages of philosophic thought: the first, theological, in which thought has recourse to the intervention of supernatural and divine being for explanation of phenomena; the second, metaphysical, in which abstract rational entities, such as substance, essence, form and cause, are posited as explanatory principles; the third, positive, in which facts are understood in their empirical certainty and in their phenomenal connections" (Guido de Ruggiero on *Positivism* in *Encyclopaedia*, Vol. XII 260-265). Ferri was, apparently, taking the third level perspective and situating what he called the "classical" school at the second.

[12] CUELLO CALON, *supra* note 3, at 46-47. At the bosom of the Classical school has reigned, as is manifest, a living contradiction, such that while for some the moral principle predominates as the basis of the Peñal law, others base it on the political principle (Carmignani, in particular, who fought with Rossi's view that penal law is grounded upon moral principle), for some the

direction.[13] The common points of contact of Classicism are as follows:

a. The Essentially Speculative Methodology

One of the more important points in scientific development is the question of methodology, for which it has many times delineated a special position. This, in effect, happened with classicism, where the question of scientific methodology describes an orientation essentially different from those afterwards adopted by positivism.[14] The Classical school adopted for its scientific methodology what is called the abstract logic method (*methodo logico abstracto*). This could not but be a by-product of its orientation inasmuch as, for its adherents, the penal law was a science that derived its precepts from the "logical deductions of eternal reason"; it was but natural for such method to be followed.[15]

b. The Consideration of Crime as a Juridical Entity (Ente Juridico)

For the Classical school, a crime is not an aggression that remains solely on the terrain of pure acts, but is a juridical attack (*acontecimiento juridico*), an assault against the penal norm and an infraction of the law of the State, a juridical entity.[16] This formula was endowed by Carrara with a higher transcendency[17] (regarding this mission, according to Asua,[18] as

penalty has an exclusively retributive sentiment (*punitur qui peccatum est*), for others it has a purely preventive end (*punitur ne peccetur*). While in this disagreement there is a recognition that the political penal conception of the preventive sense has as its adherents the majority of the jurists, among others, who are more knowledgeable, starting with Beccaria and culminating with Romagnosi; it is also manifested in the doctrines of Carmignani. On the opposite side, Rossi and, more so, Rosmini and Mamiriani dellla Rovere, persisted in the doctrine of absolute justice and of the retributive penalty.

13 PUIG PEÑA, *supra* note 1, at 28.

14 CUELLO CALON, *supra* note 3, at 48. The Classical school had enormously influenced the scientific elaboration of penal law, by organizing and systematizing it in a complete and perfect manner, elevating it to higher scientific dignity. But, its influence over legislations had been greater, as almost all the totality of the penal codes and laws elaborated in the past century were completely inspired by the orientation of this school to whose essence some of the codes more recently promulgated had remained faithful.

15 PUIG PEÑA, *supra* note 1, at 28.

16 CUELLO CALON, *supra* note 3, at 49.

17 *Id.* at 47. Carrara has elevated to a considerable level the classical doctrine, introducing in it attenuations which has rendered more viable the strictly retributionist sentiment which broadly dominated it Carrara was a disciple of Carmignani but he developed Carmignani's ideas in a direction that excluded all foreign influence; regards penal law as derived from natural law,

an adventurous enterprise capable of lending support to the juridical construction and the principle of unity from which it arises, rendering the efforts of the rest truly subordinate).[19]

c. Imputability is Based on Free Will and Moral Responsibility

As will be discussed later, the consideration of moral imputability (the subjective norm) and of free will as basis of responsibility are among the fundamental columns of the classical construction of penal law.[20]

All the ingenious edifice of classicism, all the magnificent Carraran construction up to now effective among peoples of the cult, has stood on such fundamental principles. A person can only be held responsible when his acts are born out of free will, of his moral culpability. No reproach is possible, nor any sanction, nor punishment, nor penalty, justified except only when a person consciously and voluntarily acting by virtue of his liberty and conscience, violates a legal precept. As Puig Pena said, "one who denies free will cannot justify the penal law."[21] However, this principle has been much debated and has actually undergone revision.

immutable, being the will of God; asserts that man is endowed with the right of self-defense, and that if he violates the rights of others, he exposes himself to punishment by the State as guardian of individual rights; holds that State action in defense of individual rights should operate pricipally through moral coercion, through the threat of punishment, and only as a last resort, through the actual infliction of punishment; a convinced but philosophical advocate of the abolition of capital punishment; on account of his influence, says Manzini, the ideas of Lombroso, as developed by Ferri, never made serious headway in Italy (Vicenzo Manzini on *Carrara, Francesco* in *Encyclopaedia*, Vol. III 234).

18 Jimenez de Asua; Spanish Author who translated Carrara's work on the Italian Penal Law into Spanish, entitled PROGRAMA DEL CURSO DE DERECHO CRIMINAL.

19 PUIG PEÑA, *supra* note 1, at 28-29. The crime, according to Carrara, is not an attack of whatever sort, but a "juridical entity" (*ente juridico*), an injustice. This is constituted by two forces, the moral and the physical (the first by the intelligent volition of the agent and the alarm caused among the citizenry, and the latter by the corporal movement and the material damage caused by the crime). For the crime to exist, it is required (1) that the subject be morally imputable, (2) that the act should possess a moral value, (3) that it brings about a social damage and (4) that it be prohibited by a positive law. From this perspective, he defined a crime as an infraction of the law of the State which has been promulgated for the protection of the security of the citizens, resulting from an external act of man, positive or negative, which is morally imputable. *See also* CUELLO CALON, *supra* note 3, at 47.

20 PUIG PEÑA, *supra* note 1, at 29. Man is responsible penally because he is morally responsible and he is morally responsible by reason of his free will. The moral imputability is, says Carrara, the basis of the penal science which would be badly constructed without it; *cf.* CUELLO CALON, *supra* note 3, at 46.

21 *Id.*

d. The Penalty Should be Considered an Evil by Means of Which Juridical Tutelage is Realized (Penalty to End All Penalties)

This is another fundamental principle of the Classical school which has so far distinguished it from its successors, particularly from the Correctionalist and the Positivist schools. But, the consideration of the penalty as an "evil", and as a means of juridical education (a medium by which the law teaches the criminal) notwithstanding, there exists in relation to this broad consideration diverse penal doctrines, representing the intimate bifurcation among the classicists and those to be discussed shortly.[22]

When one is required to consider the nature of the penalty, the variety of nuances among the distinct tendencies making up the Classical school may be observed.[23] In effect, within classicism, there exists a variety of nuances representing positions not only distinct but totally contraposed like, for example, the absolute doctrines of retribution and the numerous doctrines of the relative type.[24]

With the end of systematizing these doctrines, a digression into their classification is apropos. The model followed is that of the German writer Anton Bauer, who established the classification of doctrines based on the *jus puniendi*, a model until now maintained in modern treatises, more or less with variants. Bauer classified doctrines about the fundamental right to punish into absolute, relative, and mixed theories.[25]

1) Absolute Theories

The absolute theories consider the penalty as having no social function but with a reason derived from absolute justice. The criminal is punished *quia peccatum est*, simply and only because he has been delinquent. It is enough, therefore, that a person has committed a crime for the penalty to be applied to him, independently of its utility.[26]

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[22] *Id.*

[23] CUELLO CALON, *supra* note 3, at 42. Its initiator, Beccaria, held that the penalty does not have for its end vengeance, nor does it aspire to annul the crime committed, its purpose being merely preventive: to prevent the offender from committing new crimes and to avoid its been followed by others in the future

[24] PUIG PEÑA, *supra* note 1, at 29-30.

[25] *Id.* at 30.

[26] *Id.*

These theories are also called retributionist, because they are dominated by the principle of retribution of an evil by means of an evil; *malum propter malum, bonum propter bonum.* But because a crime may be a violation of the religious, moral, aesthetic, juridical, etc., order, the distinct facets of the retributionist thesis arise. Therefore, some speak of divine retribution (Stahl); others, of vindictive retribution (Duhring);[27] others, of expiatory retribution (Kohler)[28] others, of aesthetic retribution (Leibniz);[29] and others, finally, of juridical retribution (Hegel).[30]

Criticisms against the absolute theories are centered on their having "confounded social justice with ideal or absolute justice," said to be impossible to obtain in this world. Apart from that, as Sanchez Tejerina says, "if the social authority, as well as the penalty, has been ordained for the collective good, the establishment of the penalty and its imposition without such ordination for the common good, would exceed the attributes and the ends of the State. It is certain that these theories in their pure form could count on but a few adherents these days."[31]

2) Relative Theories

As distinguished from the absolute theories which, as discussed, consider penalty as an end in itself, the so-called relative theories consider the penalty as a means to an end (*una medio para un fin; nec peceiur, para que no se peque*).

The distinct modalities of the relative theories are the following:

a) Doctrine of Social Contract

For this thesis, the penalty is neither more nor less than the guaranty of social contract. All wrongful acts that may be directed

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[27] Eugen Karl Duhring (1833-1921) German economist and philosopher (G. Albrecht on *Duhring, Eugen Karl* in *Encyclopaedia*, Vol. V, 273).

[28] *See* Lorenzo U. Padilla, *The History of Penal Law*, ATENEO L. J., Vol. XXXIX, p. 59, note 4.

[29] Freihrr Von Leibniz (1646-1716), German philosopher, scientist and statesman; regards each individual as a free personality within the unity of the State which must never be considered as a mere part susceptible of being sacrificed to the whole, a natural right which no mere authoritative decree, no mere positive legal ordinance, must encroach upon, for above the positive law, the *jus strictum*, stands the higher moral law, the law of equity, *jus aequitatis*; (Ernst Cassirer on *Leibniz, Freiherrr Von* in *Encyclopaedia*, Vol. IX, pp. 400-401).

[30] Georg Wilhelm Friedrich Hegel (1770-1831), German philosopher; (Morris Cohen on *Hegel, George Wilhelm Friedrich* in *Encyclopaedia*, Vol. VII, pp. 311-315).

[31] Puig Peña, *supra*, p. 30.

against the community constitutes a violation of that contract and the penalty performs the end of guaranteeing such acts.[32]

b) The Doctrine of General Prevention (Prevencion General)

Within the doctrine of general prevention (also called "general deterrence") we have:

(1) The Theory of Intimidation (*Intimidacion*)

For this theory, whose principal representatives are Klein[33] and Filangieri,[34] the end of the penalty is to infuse terror by means of those who suffer its condemnation.[35]

(2) Thesis of Psychical Coercion (*Coaccion Psiquica*)

This theory holds that prevention of crimes which is demanded by the collectivity, acts as a psychical coercion which exerts an inhibitory influence upon all citizens, and has been defended entirely by Feuerbach.[36]

Feuerbach opined that the purpose of the State is the coexistence of men in comformity with the juridical laws. As juridical violations, whatever may be its kind, crimes stand in contradiction to this purpose, and the State possesses the authority to prevent them, this being included in its obligations to all. The mission of the penalty cannot be realized solely be means of coercion, and, at that, merely psychical coercion is not sufficient. There is further need to

[32] CUELLO CALON, *supra* note 3, at 41.

[33] *Encyclopaedia*, Vol. VIII 577.

[34] *Encyclopaedia*, Vol. VI 231. Italian political scientist, lawyer and economist, his great unfinished work on the science of legislation sought to portray a complete reformatory system, describing the specific content of laws. He asserts that the State must not only prevent crime, it must promote virtue, hence its task of education.

[35] PEÑA, *supra* note 1, at 31.

[36] *Encyclopaedia*, Vol. VI 222-223. He attempted to establish the fundamental independence of law as against morality and which, opposed to claims of the criminal law to punish the immoral state of mind as such, a view which accounts for his passionate opposition to Stubel and Grolman's doctrine of prevention, which made precautionary defense against dangerous characters the goal of criminal law.

supplement it by psychological means. The coercion must operate by means of the threat of penalty, and, in case necessary, by means of the execution of the penalty. The concurrent activity of the executive and legislative powers aimed towards intimidation constitutes a psychological coercion. The penalty is an evil which is threatened and imposed by law. Its necessity is founded upon the need to maintain the reciprocal liberties of all by every means that annul the sensible impulses towards the violation of the law.[37]

The end of the penalty, according to Feuerbach, is the intimidation of all citizenry as possible criminals, to keep them from the commission of crimes. In case crime is nevertheless committed, the end is to apply to the criminal the legal threat. The execution of the penalty also tends towards the end of intimidating citizens by means of the law. The juridical foundation of that penal threat is the necessity of securing the rights of the citizens, while the juridical foundation of its execution is the antecedent penal threat.[38]

The crux, therefore, of the doctrine of Feuerbach is the intimidation of the collective by means of psychological coercion originating from the legal threat of the penalty and by its execution when such threat is not sufficient to contain the criminal.[39]

(3) Doctrine of Notification (*Advertencia*)

This was conceived by Bauer, who opined that the law should "notify" individuals through threat of penalty not to act criminally. He added that this should be delivered not only against the sensitive nature of the person, as in Feuerbach's thesis, but against his very moral nature.[40]

(4) Doctrine of Defense

Among these doctrines, we should consider:

(a) The Theory of Criminal Impulse Control (Contraspinta Criminosc).

[37] CUELLO CALON, *supra* note 3, at 43-44.

[38] *Id.* at 44.

[39] *Id.*

[40] PUIG PEÑA, *supra* note 1, at 31.

This has been advocated by Romagnosi,[41] for whom a penalty only has a purpose of social defense *(finalidad de defensa social)*, to the extent that penal law will cease from the moment there is security that the crime committed will not be repeated.[42] Because there exists in each person a criminal impulse *(spinta)*, the penalty is a penal counter-impulse *(contraspinta criminoso)*. Here lies the efficacy of the penalty, which should not be imposed in relation to the crime, but in proportion to said criminal impulse[43] in accordance with the grade of the presumed energy of desire[44] to commit crimes.

Cuello Calon notes that Romagnosi conceived of penal law as a natural immutable law anterior to all human conventions.[45] It is a right of defense whose end is the preservation of well-being among men. It is a right of actual defense against a permanent threat, born out of an intemperate act of injustice arising from human relations, and is exercised by society, solely by it, in a measure necessary for the maintenance of said well-being.[46] Consequently, for Romagnosi, the penalty does not aspire to cause an affliction nor to inflict an evil. Neither does it aim to satisfy the spirit of vengeance, nor to obtain the expiation of the crime committed. It only tends to awaken fear in the criminal so that he may not commit a crime in the future, which is the direct or immediate end of the penalty. The species and quantity of the penalty should, therefore, be regulated in conformity with the quality and intensity of the criminal impulse *(spinta criminosa)*, the penalty operating solely as a counter-agent against the criminal impulse *(contraspinta a la spinta criminosa)*. The penalty should not be employed but as an ultimate remedy, after exhausting the use of means that are purely preventive.

e. Essentially Individualist and Humanitarian Orientation

As final distinguishing characteristic of the Classical school, Cuello Calon points to its individualist sentiment of protection and guaranty

[41] *Encyclopaedia*, Vol. XIII 419. He was one of the founders of modern criminology and was concerned particularly with the more constatnt causes of crimes; indirect prevention (general deterrence) he held, was the great task of society, punishment being merely a counter-agent.

[42] PUIG PEÑA, *supra* note 1, at 31-32.

[43] *Id.* at 32.

[44] *Id.*

[45] *Id.*

[46] CUELLO CALON, *supra* note 3, at 42.

against possible abuses and arbitrariness. The Classical school has brought about the penal system, consolidated it, with the individualist spirit of the philosophers and the principles of the French revolution. From these arose its efforts to maintain the principle of legality of crimes and penalties (*nullum crimen, nulla poena sine lege*), its aspiration to define in a detailed and restrictive manner the circumstances modifying the crime, especially the aggravating circumstances, the careful dedication to the subtle examination of the crime in its internal aspects, the minuteness of detail in its definition of the figures of crimes, and its tendency towards the prevention of all possible cases of delinquencies.

D. The Modern and Contemporary Doctrines

The modern and contemporary doctrines may be classified as (1) the positivist, (2) the critical positivist, including the sociological, (3) the various schools representing the newest direction (the technico-juridical, the actualist idealist, the pragmatist), and (4) the authoritarian.

1. THE POSITIVIST SCHOOL

As a consequence of the eruption of the natural sciences into the philosophical studies of the 19th century, there arose what is called the Positivist school (*escuela positiva*), which is owed to the teachings of its "evangelist" Ferri (professor and sociologist), Lombroso (medical doctor and anthropologist), and Garofalo (magistrate and jurist).

The new tendency which sought to dislodge even those magnificent classical construction heretofore discussed, displaced the point of reference and study: from the crime, to the criminal; from the act to the personal character of the illicit act, to its subject. In other words, the Italian positivist school signaled a new stage in the development of penal law, characterized principally by the displacement of the repressive criteria fundamental in the appreciation of the objectivity of the crime and its substitution by the preponderant appreciation of the personality of the criminal.

We could not long remain in the examination of this movement of much transcendency, which has been the object of passionate study; it is enough to say for the moment that the common characteristics of this school are the following:

a. Social Responsibility Derived from Determinism and the Dangerous Condition Posed by the Criminal (Temebilidad: Dangerous Character)

To differ from the Classical school, which bases the imputability on free will, the positivists determine this solely on the basis of social responsibility, stating that a person should be responsible by the mere fact that he lives in society. They deny free will and determine criminal liability on the basis of dangerous character that the criminal represents, given the more or less anti-social aspects thereof, and of the act realized.

In other words, after thus denying free will, which had so far based penal responsibility on moral imputability, positivism founded it instead upon "social responsibility," according to which a human being is imputable and responsible by the mere fact that he lives in a society. An individual who would commit an act punishable by law, whatever may have been his psycho-physical condition, is responsible (legal responsibility) and should be the object of a social reaction (sanction) corresponding to the degree of his dangerous character (*peligrosidad*). This is determined on the basis of the attending quality of more or less anti-social behavior of the criminal and of the nature of the act executed, but it does not have any other signification than that of an expression or manifestation of the dangerous character of the author.

b. The Consideration of Crime as a Natural and Social Phenomenon

To differ from the classicists, which consider the crime as a juridical entity, the positivists study the infraction as a natural and social attack produced by causes of biological, physical and social order.

Ferri, from the start of his scientific activities, has explained the etiology of criminality by means of the influence of individual factors, physical and social, and denied the existence of free will, which had theretofore been the basis of the penal law, and followed the teachings of Lombroso regarding the criminal, proclaiming that criminals are not normal human beings, but a breed apart who, by their physical and psychic abnormalities, represent among us, in the modern societies, survivors of a race of primitives that has disappeared or as the savages of the present times.

c. The Study of the Criminal

As opposed to the classicists, which determine nothing about the criminal, the positivists make a special study of the personality of the criminal, going deeply into his moral and spiritual silhouettes.

Rafael Garofalo intended to give a juridical systematization of the criminological doctrines of positivism. With the spirit of filling up the gaps existing in the positivist theory, which continually spoke of the criminal and forgot what it understood about the crime, Garofalo formulated a theory of "natural crime" (*delito natural*), which is the violation of the sentiments of piety (*piedad*) and probity (*probidad*) in such measure as is indispensable for the adaptation of the individual to society. The criminal, for Garofalo, is characterized by a moral anomaly, by the absence or deviation of moral sense and, frequently, in concurrence with the Lombrosian thesis, by his somatic abnormalities. The social reaction against the criminal has for its end the social defense realized by means of the elimination of those inadaptable to the social medium and their constriction to the reparation for the damages caused by the crime.

d. The Experimental Method

This differs from the classical school, which is essentially speculative.

e. Consideration of the Penalty as a Means of Social Defense

This is contrary to the position of the Classical school, which considers the penalty as an evil imposed upon the criminal.

The positivist conceives of society as a physiological organism which, like all others, remains subject to the law on preservation and of the struggle for existence. This is the law that justifies the right to punish; hence, the penalty should not operate beyond being a means of defending the social organism. Because criminals are of diverse conditions, the defensive social reaction should take distinct modes; as for born criminals (*delincuente nato*) and habitual or inured delinquents (*delincuente habitual; por habito adquirido*), the penalty should tend towards an eliminatory character, and for occasional criminals (*delincuente por ocasion*) and criminals of passion (*delincuente por pasion*), it should tend towards a repressive and reparatory end.

The influence of positivism in the penal sciences has been enormous, and this may be said of all generations of positivists. It has also influenced legislations and some Codes, like those of Russia, Cuba, Mexico, etc., which have been inspired by its principles.

In the recent years, the positive school has become the object, in particular by the work of Grispigni, of important transformation. Its name alone has been changed to "the technico-scientific direction". With the expression "technico", it is sought to be indicated that the end of the

penal function is not *moralistico*-retributive, but as a means to an end, and this is that penalty is considered as an instrument concocted in accordance with technical exigencies in relation to its proposed end, leaving aside all philosophical and religious questions. In a manner of speaking, the criterion which has inspired this direction is the non-adherence to any philosophical or religious current, precisely by reason of its purely technical character.

With the expression "scientific", it seeks to indicate that this is, as against other directions, not based on philosophical presuppositions but on the conclusions of science, which has taken its criteria from information derived through the empirico-scientific method, and not the rational *a priori* approach.

The new direction does not presuppose as one of its fundamental bases the negation of free will, but simply signals the incapacity to take it as a premise or measure of penal responsibility; it disconnects all the philosophical ties of positivism.

Social defense as an end of the penalty, which continued to remain one of the cements of the new direction, is realized by means of special or individual prevention and general prevention, and does not preclude the possibility of conceiving the penalty as moral retribution, but always treated in the sense of an objective moral retribution.

In France, the contemporary current that also flows along this direction has denominated its position as the "New Social Defense" (*La Defense Sociale Nouvelle*), with Marc Ancel as leading proponent.

2. THE CRITICAL POSITIVIST

There are two schools of critical positivists: (1) the so-called "Third School" of Italian positivists; and (2) the "Young School" of German positivists.

a. The Third School

The Italian "Third School" (*Terza Scoula*), also denominated as the first "critical school", whose creators were Alimena and Carnevale, seeks to reconcile positivism and the classical direction. But, the *Terza Scoula* actually arose in opposition to the doctrine of the Positivist school although accepting some of its fundamental principles. This school has, therefore, an eclectic posture between the positivist and the classical directions.

The *Terza Scoula* admits the negation of free will, the conception of crime as an individual and social phenomenon and the orientation towards the scientific study of the criminal and of criminality, but it rejects the doctrine of natural morbidity of crime, the criterion of legal responsibility, as well as the absorption of penal law in criminal sociology. From the Classical school, it accepts the principle of moral responsibility and the distinction between the imputables and non-imputables, but apart from this the crime is not treated as an act of one endowed with liberty. Imputability, according to the thesis of Alimena, arises from volition and from those motives which determine and are based upon the "dirigibility or directability" (*dirigibilidad*) of the subject, which means, in his aptitude to feel psychological coercion, from which it follows that only the imputables have the capacity to feel the threat of the penalty.

On the matter of the ends of penalty, the "Third School" maintains the principle of social defense, not in a pure mode as the positivists do, but considers it as a measure of justice and places limits on the minimum individual suffering within the maximum degree of social defense. They do not depreciate the necessity of the penalty, postulating a dualist system of penalties and measures of security.

The basic principles of this school, according to what may be read from the teachings of Alimena, are: (1) imputability based on the dirigibility (*dirigibilidad;* capacity to be directed) of the actions of men; and (2) the nature of the penalty radiates from psychological coercion.

b. The Young School of Von Liszt

Von Liszt has formulated an original thesis on the matter of the *jus puniendi* that merits to be catalogued among the defensists doctrines which, like that of the original positivists and the Italian "Third School", assigns to the penalty the function of defense of the social organism.

The doctrine of Von Liszt arose against the German doctrines (Binding, Halschner, etc.) founded on free will as the basis of imputability and on the retributive penalty (*Vergeltungsstrafe*).

The crime, according to the conception of Von Liszt, is not the child of free will, but originates from the influence of diverse conditions, some from individual character, others from external characteristics: physical, social and, particularly, economic. The penalty is justified by its necessity in order to maintain the juridical establishment and, as a consequence thereof, for the security of society.

The end of the penalty is attained by the concurrence of the following:

1. *By means of the threat of penalty.* — The threat of penalty is made known and intimidates all the citizens, with the end that general prevention or deterrence is realized.

2. *By means of the execution of the penalty.* — The execution of the penalty operates: (a) over all citizens, to reprimand their tendencies towards crime; (b) over all offended parties, apportioning to them the satisfaction of seeing that the crime was not committed with impunity; and (c) over all criminals themselves, upon whom is inflicted the result of special prevention or deterrence.

The penalty, when operating upon the criminal, may aspire to convert him into a useful member of society by means of intimidation or by means of his correction, and it is also possible to propose as its end special prevention, by means of the segregation of the criminal from society (*seleccion artificial*), under such condition that it would not be possible for him to commit new crimes.

Summarizing the penal ideology of Liszt, the following are its fundamental strokes: (a) repudiation of retributive penalty (*Vergeltungsstrafe*); (b) affirmation of punishment for an end (*pena finalistica; Zweckstrafe*); and (c) preponderance of the special prevention purpose.

The doctrine of Von Liszt has given rise to broad repercussions in Germany, constituting its adherents under the denomination of "Sociological school" of penal law. Its program consisted principally in the fight against criminality by means of the scientific investigation of its causes. The scientific development of penal law in Germany presented as characteristic, in the same manner as that which occurred in Italy among the defenders of the old ideas and the positivists, the fight of the schools between those called classicists and the affiliates of the modern direction; the clash of the principles of retribution and of general prevention against conceptions favorable to special prevention, with the struggle partly subsiding with the elaboration of projects for penal reform, works of transactions and compromises between the competing schools, but being aggravated in the recent years, with tones more political than scientific, by the contentions among innovators who are partisans of the implantation of the authoritarian penal law (retribution, general prevention) and those

who maintain the libero-individualist penal law (penalty for a purpose, special prevention).

The eclectic direction, with its dualist system, has molded the penal reform in almost all countries. On the side of retributive penalty, this is given in proportion to the intensity of the infraction, and measures of security are established for all dangerous subjects; on the side of the Classical penal law of the retributive orientation, it situated in its growing dualism the modern penal law of the preventive type.

3. THE NEWEST ORIENTATIONS

The newest orientations consist of: (1) the technico-juridical school; (2) the humanist penal school; (3) the so-called school of actualist idealism; and (4) the school of pragmatic tendency.

a. The Technico-Juridical School

The so-called technico-juridical direction had precedents in Germany (Binding), but it was in Italy where it attained greater diffusion (Arturo Rocco, Manzini, Massari, Battaglini and other penologists). According to this doctrine, the penal science does not aspire toward the philosophical indication of a natural penal law, nor to the formation of the penal law of the future; it abandoned all discussions about the philosophical foundation of this discipline and the investigation of naturalistic character but has limited its object to the positive penal law in force and effect, in order to simply elaborate technically the fundamental principles of its institutions, and to apply and interpret this law.

The crime is conceived purely as a juridical relation prescinding from its personal and social aspects. This school makes an abstraction of free will as the basis of imputability, while maintaining the distinction between imputables and non-imputables. Penalty is the juridical reaction against crime reserved for the imputables, while the non-imputables remain subject to measures of security, of administrative character and lacking penal sentiment.

b. The Humanist Penal School

This doctrine, founded by Vicente Lanza, professor of Catania, sought to restore to penal law the ethical content which some treatise writers have endeavored to dispossess it. For Lanza, it is necessary for the internal moral sphere to coincide with that of the external penal law.

Crime, for this doctrine, is a violation of the moral sentiments, and the penalty is nothing more nor less than that reaction of sentimental character. The penalty has an educative end.

c. The So-Called Actualist Idealism

For this tendency, which is maintained by Maggiore, the only reality is the spirit and it cannot be ascribed to any activity that is not spiritual. All human acts are, therefore, spiritual acts and here lies the essence of imputability.

The end of the penalty is the teaching of the law, but inasmuch as this could be realized only in the human conscience, and because, as we have said already, for the actualist idealist, all reality is entrenched in the spiritual act, the penalty could only have the educative end of correction of the conscience.

d. The Pragmatic Tendency

This direction is supported in Spain by Saldana and Massaveu, who applied to the penal law the general doctrine of juridical pragmatism.

Penal pragmatism studies the human criminal, more as a human being than as a criminal. According to Massaveu, if for the practitioners of the Positivist school the criminal is the object of observation, for the pragmatist, his sole motive is the experience. The criminal never loses his human aspect.

Regarding the function of the penalty, the positivist holds that the penalty should achieve the readaptation of the criminal to the actual society; the pragmatist adds, further, the ultraadaptation of the criminal and of the penalty itself to the future society. So, that, according to an author, is like complementing the penal and moral preventive functions of penal provisions.

4. PENAL THOUGHT OF THE AUTHORITARIAN TENDENCY

Against liberalism, there rose in the contemporary times, more or less openly, the new conception of the authoritarian State, that does not only have a unilateral point of view towards politics, but had also projected its thesis over all orders of human life, among which is that relative to penal law. Even in countries of liberal formation, like France, it has been observed that in the recent times a reaction against the correctional sensibility is

emerging, aspiring instead toward the objective of intimidation and exemplarity of punishment. This reaction has prevailed in many countries of Europe and America, where it has been noted that the penalty has recovered its prestige as a means of intimidation. There exists, according to one author, an exacerbation of the social defense tendencies identifiable at times with political defense (by means of augmenting the reign of punishment for politico-social crimes) and oriented, not toward the sense of special prevention, like that of the positivists, but to that of general prevention.

II. SUMMARY AND CONCLUSION

The Chapter presented a study of the foundation and the end of penalty, and that relative to the justification of the right to punish, a double consideration which, although not essential to some treatise writers, was admitted in this treatment because they are practically cross-linked and united that the explanation of one would necessarily lead to the other.

While some authors have doubted its justification, two reasons usually motivate a study like this: (1) the penal law has lived, is constantly living, and is always seen in life; hence, the necessity of inquiring into the foundation of its existence or of the right of the State to impose its sanctions; and (2) when one treats of infusing a higher juridical essence to the diction, to solve questions in the light of the juridical order, then there arises a need to penetrate deeply into their entrails. But, on the other hand, the inquiry has been confined within the terrain of philosophy because the matter goes further than one may want to go; it should suffice to study the questions in the field of living law.

The justification of the law on punishment is very clear, as a matter of general principle: the existence of a penal law is unavoidable, in order to determine the sanctions that should befall those who would transgress the juridical order. But, the State cannot impose penalty upon certain subjects, who must be excluded from punishment; penalty must be established by competent authority and should, above all, contain an orientation in the establishment of sanctions.

On this, diverse views have been presented by various authors across time, constituting an important Chapter in penal schools (understood as an ensemble of doctrines seeking to explain the end which should guide the State in the establishment of penal sanction, although broadly including each scientific group endeavoring to resolve many problems of a scientific

or technical order raised in the penal discipline). The more important of these schools have been called Classical, Correctionalist, Positivist, Critical and Sociological.

The Classical school had enormously influenced the scientific elaboration of penal law, by organizing and systematizing it in a complete and perfect manner, elevating it to higher scientific dignity. But, its influence over legislations had been greater, as almost all the totality of the penal codes and laws elaborated in the past century were completely inspired by the orientation of this school to whose essence some of the codes more recently promulgated had remained faithful.

Even when on some points, particularly regarding the nature of the penalty, the theorists of the Classical school have differed, an ensemble of materials and common lines gives harmony and unity to its scientific direction:

1. The essentially speculative methodology of abstract logic;

2. The consideration of crime as a juridical entity (*ente juridico*), an aggression not remaining solely on the terrain of pure acts but a juridical attack (*acontecimiento juridico*), an assault against the penal norm, an infraction of the law of the State;

3. Imputability is based on free will and moral responsibility (the subjective norm);

4. The consideration of penalty as an evil by means of which juridical tutelage is realized (penalty to end all penalties).

But these notwithstanding, there exist diverse penal doctrines representing the intimate bifurcation among the classicists. To this end, doctrines about the foundation of the right to punish were classified into the absolute, relative, and mixed theories.

The absolute theories consider the penalty as having no social function, but whose reason derives from absolute justice, punishing a criminal *quia peccatum est*, simply and only because he has been delinquent; these dominantly retributionist theories assumed distinct facets from various perspectives (Stahl, Duhring, Kohler, Kant, Leibniz, Hegel). Criticisms against the absolute theories are centered on their having "confounded social

justice with ideal or absolute justice," said to be impossible to obtain in this world.

As distinguished from the absolute theories, the relative theories consider the penalty as a means to an end (*una medio para un fin; nec pecetur, para que no se peque*), whose distinct modalities regarded penalty:

a. as the guaranty of social contract (Beccaria);

b. as means of general prevention:

   1) to infuse terror, by means of the spectacle of those who suffer its condemnation (Klein, Filangieri);

   2) as a psychical coercion exerting an inhibitory influence upon all citizens (Feuerbach);

   3) to "notify", with threat of penalty, that one should not act criminally, delivered not only against the sensitive nature of the person but against his very moral nature (Bauer);

c. as means of social defense:

   1) operating only like a counteragent against the criminal impulse (Romagnosi);

   2) a necessity arising from its utility, incapacitating the criminal from further causing damage, by correcting and intimidating him (Bentham);

   3) as a defensive activity to be directed not only against past dangers, but also against future dangers (Shulzt, Laborde);

d. as a means of special prevention:

   1) to intimidate the potential author of a punishable act that is yet to be committed or to render him innocuous for always or with respect to a certain crime (Grolman);

   2) to correct the criminal so that he will not commit crime again once he is reformed, meaning, corrected

(Roeder, generation of Spanish "Krausists", as to pure correction; North American penal politics, as to civil correction).

The mixed theories seek to unify the distinct viewpoints of the absolute and relative theories, under the posture that punishment is *quia pecatum* and *ut nec pecatur*, reconciling the concept of retribution and the end of defense by penalizing on the basis of justice limited by social necessity: (1) the right to punish in the hands of men, does not have greater legimacy than the necessity of defense; hence, this right remains limited by the norms of justice and is moderated as to its form by public opinion (Italian eclecticism: Carmignani, Carrara); (2) the right to punish is derived from moral law, dictated to man by his own conscience, making him responsible for all infractions perpetrated by him; but before man is moral, he is social such that it is necessary also to submit to a social order established by means of obligatory norms for the benefit of social utility (French eclecticism: Rossi).

The Italian school has exercised considerable influence in the development of penal law, declaring the basic thought of treatise writers and exerting preponderance in the writing and spirit of the majority of the codes of the 19th century, some of which are effective until now.

5. The essentially individualistic and humanitarian orientation, as protection and guaranty against possible abuses and arbitrariness, maintaining the principle of legality of crimes and penalties (*nullum crimen, nulla poena sine lege*), defining in a detailed and restrictive manner the circumstances modifying crimes, especially the aggravating circumstances, dedicating careful examination into the subtleties of crime in its internal aspects, detailing minutely its definition of the figures of crimes, and tending towards preventing all possible cases of delinquencies.

On the other hand, the modern doctrines were classified as (1) the positivist, (2) the critical positivist, including the sociological, (3) the various schools representing the newest direction (the technico-juridical, the actualist idealist, the pragmatist) and (4) the authoritarian.

As a consequence of the eruption of the natural sciences into the philosophical studies of the 19th century, the Positivist school ("*escuela positiva*") arose, displacing the point of reference and study: from the crime, to the criminal; from the act to the personal character of the illicit act, to its subject, signaling a new stage in the development of penal law, characterized principally by the displacement of the repressive criteria fundamental in the appreciation of the objectivity of the crime and its substitution by the preponderant appreciation of the personality of the criminal.

The common characteristics of the Positivist school are the following:

1. Social responsibility derived from determinism and the dangerous condition posed by the criminal (*temebilidad; peligrosidad*: dangerous character), holding a person responsible by the mere fact that he lives in society; denying free will, penal responsibility was founded instead on "social responsibility," determined by the attending quality of the more or less anti-social behavior of the criminal and of the nature of the act executed, although not indicating any other signification than that of an expression or manifestation of the dangerous character of the author.

2. The consideration of crime as a natural and social phenomenon, the infraction being a natural and social attack produced by causes of biological, physical and social order, proclaiming that criminals are not normal human beings, but a breed apart who, by their physical and psychic abnormalities, represent among us, in the modern societies, survivors of a race of primitives that had disappeared or as the savages of the present times;

3. The study of the criminal, going deeply into his moral and spiritual silhouettes;

4. The use of the scientific method of inquiry;

5. The consideration of the penalty as a means of social defense, and not operating beyond being a means of defending the social organism; and, because criminals are of diverse conditions, the defensive social reaction should take distinct modes: as for born criminals (*delincuente nato*) and habitual or inured delinquents (*delincuente habitual; por iiabito adquirido*), the penalty should tend towards an eliminatory character, and for occasional criminals (*delincuente por ocasion*) and criminals of passion (*delincuente por pasion*), it should tend towards a repressive and reparatory end.

In recent years the positive school has become the object, in particular by the work of Grispigni, of important transformation (it has assumed the name "technico-scientific direction," indicating that the end of the penal function is not moralistico-retributive, but as a means to an end, an instrument concocted in accordance with technical exigencies in relation to its proposed end, leaving aside all philosophical and religious questions; and that it is not based on philosophical presuppositions but on the conclusions of science, derived through the empirico-scientific method, and not the rational *a priori* approach. This new direction does not negate free will, but simply signals the incapacity to take it as a premise or measure of penal responsibility; it disconnects all the philosophical ties of positivism. Social defense as an end of the penalty, continuing as one of the cements of the new direction, is realized by means of special or individual prevention and, at the same time, general prevention, without precluding the possibility of conceiving the penalty as moral retribution, but always treated in the sense of an objective moral retribution.

The influence of positivism in the penal sciences has been enormous, and this may be said of all generations of positivists. It has also influenced legislations and some Codes, like those of Russia, Cuba, Mexico, etc., which have been inspired by its principles.

There are two schools of critical positivists: (1) the so-called "Third School" of Italian positivists; and (2) the "Young School" of German positivists.

On the one hand, the Italian "Third School" (*Terza Scoula*; Alimena, Carnevale) seeks to reconcile positivism and the classical direction, although originally arising in opposition to the doctrine of the Positivist school while accepting some of its fundamental principles. The penalty is regarded as a measure of justice, requiring limits to be placed on the minimum individual suffering within the maximum degree of social defense; to this end, penalty is necessary but should go with measures of security. The basic principles of the *Terza Scoula* are: (1) imputability based on the dirigibility (*dirigibilidad*; capacity to be directed) of the actions of men, not on free will (which, being partly old-stream positivists, they continue to negate); and (2) the nature of the penalty radiates from psychological coercion.

On the other hand, the doctrine of Von Liszt arose against the German doctrines (Binding, Halschner, etc.) founded on free will as the basis of imputability and on the retributive penalty (*Vergeltungsstrafe*). Crime, according to the conception of Von Liszt, is not the child of free will, but

originates from the influence of diverse conditions, some from individual character, others from external characteristics: physical, social and, particularly, economic. The penalty is justified by necessity in order to maintain the juridical establishment and, as a consequence thereof, for the security of society, whose end is attained: (1) by means of the threat of penalty made known and intimidating all the citizens, for purposes of general prevention; and (2) by means of the execution of the penalty, operating: (a) over all citizens, to reprimand their tendencies towards crime; (b) over all offended parties, apportioning to them the satisfaction of seeing that the crime was not committed with impunity; (c) over all the criminal themselves, upon whom is inflicted the result of special prevention. The penalty, when operating upon the criminal, may aspire to convert him into a useful member of society by means of intimidation or by means of his correction, and it is also possible to propose as its end special prevention, by means of the segregation of the criminal from society (*seleccion artificial*), under such condition that it would not be possible for him to commit new crimes.

The fundamental strokes of the penal ideology of Von Liszt are: (a) repudiation of retributive penalty (*Vergeltungsstrafe*); (b) affirmation of punishment for an end (*pena finalistica; Zweckstrafe*); and (c) preponderance of the special prevention purpose.

The doctrine of Von Liszt has given rise to broad repercussions in Germany, constituting its adherents under the denomination of "sociological school" of penal law. Its program consisted principally in the fight against criminality by means of the scientific investigation of its causes. The scientific development of penal law in Germany presented as characteristic, in the same manner as that which occurred in Italy among the defenders of the old ideas and the positivists, the fight of the schools between those called classicists and the affiliates of the modern direction; the clash of the principles of retribution and of general prevention against conceptions favorable to special prevention, with the struggle partly subsiding with the elaboration of projects for penal reform, works of transactions and compromises between the competing schools, but being aggravated in the recent years, with tones more political than scientific, by the contentions among the innovators who are partisans of the implantation of the authoritarian penal law (retribution, general prevention) and those who maintain the libero-individualist penal law (penalty for a purpose, special prevention).

The eclectic direction, with its dualist system, has molded the penal reform in almost all countries. On the side of retributive penalty, this is

given in proportion to the intensity of the infraction, and it establishes measures of security for all dangerous subjects; on the side of the Classical penal law of the retributive orientation, it situated in its growing dualism the modern penal law of the preventive type.

Of the newest orientations, note has been taken of: (1) the technico-juridical school; (2) the humanist penal school; (3) the so-called school of actualist idealism; and (4) the school of pragmatic tendency.

The so-called Technico-juridical direction (Germany: Binding; Italy: Arturo Rocco, Manzini, Massari, Battaglini, etc.) does not aspire to the philosophical indication of a natural penal law, nor to the formation of the penal law of the future, abandoning all discussions about the philosophical foundation of this discipline and the investigation of naturalistic character, and limiting its object to the positive penal law in force and effect, in order to simply elaborate technically the fundamental principles of its institutions, and to apply and interpret this law. Crime is a purely juridical relation, prescinding from its personal and social aspects; free will is the basis of imputability, maintaining the distinction between imputables and non-imputables, penalty being the juridical reaction against crime reserved for the imputables, while the non-imputables remain subject to measures of security, of administrative character and lacking penal sentiment.

The Humanist penal school seeks to restore to penal law the ethical content which some treatise writers have sought to dispossess it, on the ground that it is necessary for the internal moral sphere to coincide with that of the external penal law. Crime is regarded as a violation of the moral sentiments, and penalty is nothing more nor less than that reaction of sentimental character, with an educative end.

For the so-called school of Actualist idealism, the only reality is the spirit, and it cannot be ascribed to any activity that is not spiritual; all human acts are spiritual acts and here lies the essence of imputability. The end of the penalty is the teaching of the law, but inasmuch as this could be realized only in the human conscience and all reality is entrenched in the spiritual act, the penalty could only have the educative end of correction of the conscience.

Lastly, the penal pragmatist studies the human criminal, more as a human being than as a criminal; if for the positivist the criminal is the object of observation, for the pragmatist, his sole motive is the experience and the criminal never loses his human aspect. Regarding the function of

the penalty, the positivist holds that the penalty should achieve the readaptation of the criminal to the actual society; but the pragmatist adds the ultra-adaptation of the criminal and of the penalty itself to the future society, thereby complementing the penal and moral preventive functions of penal provisions.

In closing, it was noted that against liberalism, there arose in the contemporary times the new conception of the authoritarian State, that does not only have a unilateral point of view towards politics, but has also projected its thesis over all orders of human life, including penal law. Even in countries of liberal formation, it has been observed in recent times that a reaction against the correctional sensibility is emerging, aspiring towards the objective of intimidation and exemplarity of punishment. This reaction has prevailed in many countries of Europe and America, where it has been observed that the penalty recovered its prestige as a means of intimidation. There exists, in this direction, an exacerbation of the social defense tendencies identifiable at times with political defense (by means of augmenting the reign of punishment for politico-social crimes) and oriented, not toward the sense of special prevention, like that of the positivists, but to that of general prevention.

Ateneo Law Journal

SUPPLEMENT

THE FOURTH RAPE: A CRITIQUE OF PEOPLE V. SUBINGSUBING AND AN ANALYSIS OF LAWS AND JURISPRUDENCE RELATING TO INCEST

Ronaldo R. Gutierrez