

NULLA POENA SINE LEGE

By JEROME HALL †

NULLA poena sine lege has several meanings.¹ In a narrower connotation of that specific formula it concerns the treatment-consequence element of penal laws: no person shall be punished except in pursuance of a statute which fixes a penalty for criminal behavior. Employed as *nullum crimen sine lege*, the prohibition is that no conduct shall be held criminal unless it is specifically described in the behavior-circumstance element of a penal statute. In addition, *nulla poena sine lege* has been understood to include the rule that penal statutes must be strictly construed. A final, important signification of the rule is that penal laws shall not be given retroactive effect. Obviously, it is necessary to keep each of the above meanings distinct.

I. ORIGINS

The view one finds most frequently expressed is that the rule, despite its Latinity, is not of Roman origin² but was born in eighteenth century Liberalism. The matter is not so simple. A few threads persist to perplex; they refute an all-too-facile history, even though they may not establish a clear, unbroken line of development.³

True it is that the "extraordinary" offenses of Roman jurisprudence suggest almost unlimited discretion in the judiciary. But side by side with *extraordinaria judicia* may be found insistence upon pre-definition of offense and penalty. As regards first malefactors, magisterial discretion probably joined appeal to the populace to provide specific decisions, which, in course of time, defined "ordinary" offenses governed by pre-

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1. See ROUX, *COURS DE DROIT CRIMINEL FRANCAIS* (1927) 16; I GARRAUD, *DROIT PENAL FRANCAIS* (3rd ed., 1913) §137. The most detailed discussion I have seen is DE LA MORANDIERE, *DE LA REGLE NULLA POENA SINE LEGE* (1910) (Recueil Sirey).

2. SCHOTTLAENDER, *DIE GESCHICHTLICHE ENTWICKLUNG DES SATZES: NULLA POENA SINE LEGE* (1911) *STRAFRECHTLICHE ABHANDLUNGEN*, Heft 132, at 1; Matzke, *Juristische Wochenschrift*, 7 July 1934; Klee, *Strafe ohne geschriebenes Gesetz* (1934) D. J. Z. 641-643; DROST, *DAS ERMESSEN DES STRAFRICHTERS* (1930) 80 ff.

3. See STRACHAN-DAVIDSON, *1 PROBLEMS OF THE ROMAN CRIMINAL LAW* (1912) 103, 104.

scribed rule.⁴ There is evidence, also, that though specified penalties could be mitigated, they could not be increased.⁵ Certainly as to Roman citizens, and in the ordinary course of administration, there were long periods when prescribed penalties had to be strictly adhered to.⁶ This rule reached its most rigorous statement in the Roman law with Sulla who insisted that for certain crimes both offense and penalty be exactly described in the statute under which the accusation was brought.⁷

The prohibition against retroactivity of penal laws was well known and followed under Sulla; long before that it appears to have been approved by the Greeks.⁸ Under Augustus several penal laws were declared to be non-retroactive, although not until 440 A.D. was the principle itself enacted.⁹

The rule in its several aspects thus had a vague and checkered Roman history. But clouded as it is in the uncertainty of sporadic expression, flanked by the well-known *extraordinaria judicia*, appeals to the populace, and such wide powers as those under the Principate, nevertheless certain minima appear—more than enough to require that the search for origins be directed far back of the eighteenth century.

We shall not inquire into the ramifications of the rule in the Middle Ages¹⁰ nor into the question whether the penalization by canon law of "offenses against conscience" completely barred its application to major crimes.¹¹ Without doubt, the mediaeval doctrine of the primacy of law was deeply rooted¹² until challenged in its theological, authoritarian

4. *Id.* at 108.

5. D. 48. 19. 42; D. 50. 17.

6. D. 50. 16. 131 provides: "*Poena non irrogatur, nisi quae quaque lege vel quo alio jure specialiter huic delicto imposita est.*" 12 SCOTT, THE CIVIL LAW (1932) 278 ("a penalty is not inflicted unless it is expressly imposed by law, or by some other authority."). See also D. 50. 16. 244. ". . . an appeal cannot be taken from a penalty, for where anyone is convicted of an offense, the penalty for it is fixed, and must be paid at once."

"Hence, the differences between these things becomes apparent, because certain penalties are prescribed for certain illegal acts; but this is not the case with fines, as the judge has power to impose any fine he pleases, unless the amount which he may impose is fixed by law." *Ibid.*; 11 SCOTT, *supra*, at 296.

7. See SCHOTTLAENDER, *op. cit. supra* note 2, at 9, 10.

8. 2 VINOGRADOFF, OUTLINES OF HISTORICAL JURISPRUDENCE (1922) 139, 140.

9. SCHOTTLAENDER, *op. cit. supra* note 2, at 16 ff; see also "*Nemo potest mutare consilium suum in alterius iniuriam.*" D. 50. 17. 75. Code 1.14.7.

¹ For a summary of this history see *Dash v. Van Kleeck*, 7 Johns. 477 (N. Y. 1811).

10. See GRAF and DIETHERR, DIE DEUTSCHEN RECHTSSPRICHWORTE (1864) 286, Nos. 7, 9, 10; DANIELS and GRUBEN, DIE GLOSSE ZUM SACHSISCHEN WILCHBILDRECHT, § 334.

11. See PETRONCELLI, IL PRINCIPIO DELLA NON RETROATTIVITA DELLE LEGGI IN DIRITTO CANONICO, 29 PUBBLICAZIONI DELLA UNIVERSITA CATTOLICA DEL SACRO CUORE (1931).

12. See GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES (Trans. Maitland, 1927) 74.

aspect by the rise of the modern state. On the other hand, one must not read into ancient doctrine those special meanings which the rule took on in the eighteenth and nineteenth centuries. Hence those who find the origin of *nulla poena*, in its present significance, in Magna Carta¹³ are on unsettled territory. At the same time, it is probable that "*lex terrae*" in the famous 39th clause did mean more than procedural guarantees. More likely was it a limitation of both process and substantive law upon the royal prerogative.¹⁴

In English history the principle of law as limitation is prominent from the time of the Charter of Henry the First; it is reiterated in the Constitution of Clarendon in 1164. Magna Carta is the great symbol of the socio-political forces that established the supremacy of the Rule of Law in England;¹⁵ with Bracton it is already urged vigorously. The movement is evidenced rather than created by subsequent petitions and bills of right.¹⁶ The rise of Parliament plays an important part;¹⁷ and,

13. See METZGER, STRAFRECHT (1933) 77.

14. "The struggle was waged to secure trial in properly constituted courts of justice and in accordance with established law. The latter requirement would apply equally to substantive rules as far as they existed, and to procedure." VINGRADOFF in MAGNA CARTA COMMEMORATION ESSAYS (1917) 85; see also POWICKE in *id.*, at 121; McKECHNIE, MAGNA CARTA (2d ed. 1914) at 379, 380, 394; McILWAIN, HIGH COURT OF PARLIAMENT (1910) at 55.

15. Over five hundred years ago, Fortescue wrote: "In such a Constitution, under such [humane] laws, every man may live safely and securely." And those who look only to eighteenth and nineteenth century liberalism for the origin of concern for the individual, should read the ringing passage, in which he says: "Indeed, one would much rather that twenty guilty persons should escape the punishment of death, than that one innocent person should be condemned, and suffer capitally." DE LAUDIBUS LEGUM ANGLIAE (trans. Gregor, 1874) c. 27, at 94.

16. See the Resolution of March 29, 1628 passed by the House, quoted by POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS (1882) 225, and the Petition of Grievances of Commons to James I, 1610, quoted *id.*, at 221.

17. Compare the following with eighteenth and nineteenth century liberalism on the Continent: Sir Robert Phillips—" . . . the Right of the Subject is thus bulwarked by the law of the kingdom . . ." ". . . I can live although another without title be put to live with me; nay, I can live, although I pay Excises and Impositions for more than I do: but to have my liberty, which is the soul of my life, taken from me by power, and to be pent up in a gaol without remedy by law, and thus to be so adjudged to perish in gaol; O improvident ancestors! O unwise forefathers! To be so curious in providing for the quiet possession of our lands, and liberties of parliament, and to neglect our persons and bodies, and to let them die in prison, and that *durante bene placito*, remediless. If this be Law, why do we talk of our Liberties."

Coke: ". . . it is against law, that men should be committed, and no cause shewed . . . it is not I, Edward Coke, that speaks it, but the Records that speaks it; we have a national appropriate Law to this nation . . ."

"Then the House of Commons came to the following Resolutions: Resolved. '1. That no Freeman ought to be detained or kept in prison, or otherwise restrained by the command of the king or privy council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be

indeed, it is parliamentary influence which in fact transformed what might only in a very vague style be termed *nulla poena* into some real approximation to the rule. For with legislation came gradual subordination of common law and, also, the distinctive techniques of statutory construction which characterize the continental significance of the rule.¹⁸

But England ran far ahead of the continent in imposing law upon government. The Prussian Code of 1721 provided that offenses which were not enumerated in the territorial code nor provided for by the imperial law, should be judged *ex aequo et bono*, except that the more difficult cases should be personally decided by the king. The Bavarian Code of 1751 directed that cases not provided for by the Code should be decided "*ex aequitate et analogia juris*," and the Austrian Code of 1769 provided that "cases not set forth in the Code should be decided according to the principles laid down in the Code."¹⁹

Long before the French Revolution,²⁰ the movement for codification had advanced some of the ideas underlying *nulla poena* on its technical side. Indeed, it was in the Code of the Austrian monarch, Joseph II, (1787) that specific prohibition of analogy first entered the modern criminal law.²¹ The English tradition of the rule of law,²² translated by

committed, detained, or restrained.'" Proceedings in Parliament Relating to Liberty of the Subject, 3 STATE TRIALS (1627-1628) at 65, 66, 78, and 82.

18. "A penal law then, shall not be extended by construction. The law of England does not allow of constructive offenses, or of arbitrary punishments. No man incurs a penalty unless the act which subjects him to it, is clearly both within the spirit and the letter of the statute imposing such penalty. 'If these rules are violated,' said Best, C. J. in the case of *Fletcher v. Lord Sondes* [3 Bingham 580], 'the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws!'" DWARRIS, A GENERAL TREATISE ON STATUTES (1873) at 247.

19. See SCHOTTLAENDER, *op. cit. supra* note 2, at 43-44. Affinity with the German law of June, 1935, is apparent. See note 43, *infra*.

20. "The main thesis of this work [Essay of GLOBIG and HUSTER ON CRIMINAL LEGISLATION (1783)] was the need of a code which contained a complete and plain formulation of the criminal law." VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW (1916) 248.

That the *Constitutio Bambergensis* (1507), Arts. 125-126, prohibited inferior courts from applying customary penal law and also prohibited analogy by inferior justices. See SCHOTTLAENDER, *op. cit. supra* note 2, at 36-37.

21. See VON BAR, *op. cit. supra* note 20, at 252.

22. The American Declaration of Independence complained that the king "has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries;" and the American Colonies generally had asserted the English tradition guaranteeing against conviction for any crime except by the law of the land; see also ". . . William Penn in the preface to the plan of government prepared for Pennsylvania, in 1682, declared that 'any government is free to the people under it, where the laws rule, and the people are a party to those laws.'" 2 KENT, COMMENTARIES (1896) 4, n. (a); cf. N. Y. Act of 13 May 1691; Mass. Const. of 1780, Art. 12; Laws of Mass. 1672, at 1; 1702, at 1; 1750, at 1; 1784, at 1.265; 1795, at 1; all cited in *State v. Danforth*, 3 Conn. 112, 118 (1819).

eighteenth century French philosophers²³ into terms expressive of the Revolutionary ideology, joined with the continental movement for codification to provide *nulla poena* with its particular, current meanings.

We must remember, too, that in revolutionary France the thesis of judicial severity and arbitrariness in the *ancien régime* was, rightly or wrongly, almost unquestioned. That proposition coincided with and facilitated the rise to power of the legislature.²⁴ Lafayette, who participated actively in the Revolutionary Assembly of 1789, proposed the drafting of a Declaration of the Rights of Man — his inspiration coming, it is said, from the Virginia Declaration. On August 26, 1789, the famous *Déclaration* appeared, containing in its eighth article the provision: "*Null ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée.*" The *Déclaration* fixed the prevailing meanings of *nulla poena* not only as a basic constitutional safeguard of the individual against oppressive government but also as a cardinal tenet of penal law. The rule was restated in the French Constitution of September 3, 1791; it was not repeated in the *Code Pénal* of 1791, although the Military Code of that year did contain it.²⁵ It reappeared in the French Code of 1810, thence to remain practically unchanged.²⁶

The rule was incorporated in the Bavarian Code drafted by Feuerbach in 1813; not until 1850 did it appear in the Prussian Constitution, nor until 1851 in the Prussian Code,²⁷ and not until 1870 in the Reich Code. It was omitted from the Reich constitutions of 1849 and 1871, although it appeared in most of the federal state constitutions — Bavaria's as early as 1818, Wurtemberg's in 1819.²⁸

Feuerbach is generally credited with the statement of *nulla poena* in its current form. His *Lehrbuch des peinlichen Rechts* first appeared in 1801 — at the peak of liberal revolutionary reform, at the zenith of Classicism in general. He enunciated three principles²⁹ and declared that

23. For Voltaire's drastic experience in France and his appreciation of English law and liberty, see DICEY, *LAW OF THE CONSTITUTION* (1931) 180, 185-186.

24. See M. Bergasse's address in the Assemblée Nationale, quoted by BUCKEY et ROUX, 2 *HISTOIRE PARLEMENTAIRE DE LA REVOLUTION FRANCAISE* 284.

25. Pt. 1, Arts. 1 and 2.

26. See the present article 4 of the Code pénal: "*Nulle contravention, nul délit, nul crime ne peuvent être punis de peines qui n'étaient pas prononcées par la loi avant qu'ils fussent commis.*"

27. The Prussian Code of 1794 [Intro. Sec. 87] provided that "acts and omissions which are not prohibited by the laws cannot be regarded as crimes." But "laws" here included Natural Law. SCHOTTLAENDER, *op. cit. supra* note 2, at 49.

28. Prohibition of analogy was included in the Projects for German Penal Codes in 1909, 1913, 1919, and 1925. See ACKERMANN, *DAS ANALOGIEVERBOT IM GELTENDEN UND ZUKUNFTIGEN STRAFRECHT* (1934) Heft 348, *STRAFRECHTLICHE ADHANDLUNGEN*.

29. Par. 24.

they should be adopted without exception: *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali*.³⁰

Feuerbach's integration of prevailing political ideology with the criminal law was simple enough: one who violates the liberty guaranteed by the social contract and safeguarded by penal law commits a crime.³¹ All future offenders cannot be known in advance and physically coerced; hence, he argued that the essential purpose of punishment must be deterrence by threat, *i.e.*, it must be psychological. Incidental purposes were direct deterrence by witnessing the infliction of punishment, making the state secure through incapacitation of the offender, and reformation of offenders.³² Like Bentham³³ he insisted upon strict adherence to the statute; he rejected analogy completely; and his general view of the judicial function would, by later standards, be regarded as extremely narrow, even naive.³⁴ But his plan was not mere terrorism; he would temper penalty with humanitarianism. To his theory of psychological constraint, Feuerbach added those principles regarding the punishment of offenders which have generally been associated with English Utilitarianism and Classical penology. These philosophical views and the political ideology that fused them with the law have persisted — and not least as regards retroactivity of penal law.

II. RETROACTIVITY

English history is not without a number of instances of *ex post facto* penalization³⁵ — some for very serious offenses.³⁶ These were political cases that arose during turbulent Stuart times. They are suggestive of the use of the coercive legal apparatus during crises rather than relevant to the general problem of retroactivity. No constitutional provision expressly forbids retroactivity in England as does the American Constitution. But the bias against such penal legislation is deeply embedded

30. The current German slogan merely omits the last word (legal) in Feuerbach's third rule. See Schmitt (1934) D. J. Z. 691.

31. LEHRBUCH DES FEINLICHEN RECHTS (1801) par. 28.

32. *Id.* at par. 133.

33. Bentham had written: "Hence the first law with which a great code ought to be begun, should be a general law of liberty — a law which should restrain delegated powers, and limit their exercise to certain particular occasions, for certain specific causes." PRINCIPLES OF PENAL LAW, Pt. 3, ch. xx; 1 WORKS (Bowring 1843) 576.

34. Compare Livingston for the fullest American expression of these views.

35. Recent examples of *ex post facto* legislation are the *lex van der Lubbe* and like treatment of Communists which rode in the face of prohibitions in the Weimar constitution. The "execution" of Roehm and his associates was also subsequently declared "legal".

36. *King v. Thurston*, 1 Lev. 91, 83 Eng. Rep. 312 (1663); for other instances collected, see *Calder v. Bull*, 3 Dall. 386 (U. S. 1798).

in the common law.³⁷ A mere handful of truly retroactive public laws are found in the English reports,³⁸ and these seem invariably to have been intended to relieve an individual or a group from what was deemed an unjust hardship.³⁹

In a sense, to be sure, all case law — and that includes jurisprudence interpretative of statutes or codes — operates retroactively. For only fictitiously can it be said that all acts found to be criminal upon trial were criminal when committed. The fact is that it is the subsequent decision which reaches back into time and places the authoritative stamp of criminality upon the prior conduct. The theory is otherwise. In most cases, too, it is reasonably certain in advance that particular acts will be declared criminal; but there are the exceptions. There are behavior and circumstances with regard to which no one can say that they were within the prescription; there are cases, landmarks in every modern system of law, where the courts make new law by their redefinition of statutes or of jurisprudence. The lines shade imperceptibly into one another. Proof of substantial, if not complete, non-retroactivity as regards judicial decision must rest upon the inertia of language, facts, and moral ideas, and upon the utility of concepts (including rules of law) to function as reasonably reliable vehicles of the common aspects of phenomena that may be far apart chronologically. In any event, the relatively rare appearance of judicial penal legislation provides no reason for not barring retroactivity in its simpler statutory manifestation where it is clearly present.

An additional problem needs to be fairly confronted. Underlying the revulsion against retroactivity of penal laws is a simple assumption: it is unjust that what was legal when done should be subsequently held criminal, that what was punishable by a minor sanction when committed should later be punished more severely. Obviously there will be no disagreement as to these value-judgments if the act when done was moral,

37. Even Bentham wrote: "This is one of the noblest characteristics of the English tribunals: they have generally followed the declared will of the legislator with scrupulous fidelity, or have directed themselves as far as possible by previous judgments . . . This rigid observance of the laws may have had some inconveniences in an incomplete system, but it is the true spirit of liberty which inspires the English with so much horror for what is called an *ex post facto* law." 1 WORKS (Bowring 1843) 326. See ALLEN, LAW IN THE MAKING (2d ed. 1930) at 274 ff.; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 23 (1870); *R. v. Griffiths*, [1891] 2 Q. B. 145, 148. But see *Ex parte Clinton*, 6 STATE TRIALS (N.S.) 1105, 1107 (1845).

38. See ALLEN, *op. cit. supra* note 37, at 275-276.

39. *Ibid.* The American colonies early provided against retroactivity. As to substantive law, the problem has rarely been raised in the Supreme Court. See *Cummings v. Missouri*, 71 U. S. 277 (1866); *Ex Parte Garland*, 71 U. S. 333 (1866), both outgrowths of post civil war legislation. On the problem generally, see Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence* (1936) 20 MINN. L. REV. 775.

or at least not immoral. But why should not the perpetrator of a clearly immoral act be punished by subsequently enacted law? Why not in such cases increase an existing penalty to one that is "adequate"? Does not "substantial justice" require affirmative replies?

Apologists of retroactivity ridicule the notion that the lawbreaker is entitled to notice of the possible penalty he may incur. While they wish "to strike terror into the hearts of criminals,"⁴⁰ they argue that experience and observation have amply demonstrated that sanctions do not deter, and that it is a vestige of a rationalistic age to believe that the would-be offender will weigh the advantage of his crime against the evil of his possible punishment. Yet criminals who give no heed to any possible punishment are elsewhere said by these same criminologists to be such students of the law that they operate in areas which are just beyond the reaches of the statute.⁴¹ This paper cannot elaborate upon the validity of the fundamental values that lie at the basis of the judgment which heartily condemns retroactivity of penal laws. Premised is a "value cosmos," which is something quite different from either formal ethics or "preferential attitudes."

But there is another phase of the problem and another body of opinion which should be mentioned here. I refer to the insistence by many criminologists, in the United States, as elsewhere, that the criminal act should be entirely ignored, that punishment, or, as they prefer, "treatment", should depend entirely upon the personality of the offender and his dangerousness to society. This notion goes beyond challenge of the guarantee against retroactivity; since it eliminates requirement of any act whatever — post-law or ante-law — as regards the basis for subjection to penal treatment, relative occurrence of behavior becomes irrelevant.

A plausible rationalization of deliberate retroactivity cannot be made. More important, because more convincingly challenged, is *nullum crimen sine lege* interpreted as a prohibition on the use of analogy.

III. ANALOGY AND INTERPRETATION

Analogy is, strictly speaking, a likeness of relationships. But the term has a more popular connotation, and it is that to which the law more nearly adheres. To illustrate what is popularly termed "reasoning by analogy": two phenomena resemble each other in certain features which are regarded not as accidental but as essential and which are deemed to preponderate over the known differences. A proposition is known to be true of one phenomenon; it is then inferred to be true of the other.

40. See Franck, quoted by Cantor, *Prison Reform in Germany—1933* (1934) 25 J. CRIM. L. 84, 88.

41. See Franck, quoted by Preuss, *Punishment by Analogy in National Socialist Penal Law* (1936) 26 J. CRIM. L. 847, 848.

Reasoning by analogy is not applied to things which are almost identical; such reasoning is applied only when similarities are limited in number and it is admitted that significant differences also exist.

Analogical reasoning in law means something quite different from this. Indeed, the use of the term "legal analogy" is misleading and obscures its differences from the doctrine of extensive interpretation. For under the theory of this doctrine, it being granted that statute or rule *R* correctly applies to the *X* situation, the *Y* situation is subsumed under *R* by *logical* analogy if *Y* resembles *X* in a number of particulars which outweigh known important differences. Thus, under extensive interpretation the same rule is applied to both situations. Legal analogy applies only where the differences are so important as to make improper the subsumption of *X* and *Y* under the same rule. Hence, "judicial legislation" more truly describes what is involved in so-called legal analogy. Offense *Y*, though "sufficiently" different from offense *X* so as not to be subsumable under *R*, does have important characteristics in common with *X*. Because of these, it is thought that *Y* should be punishable.

It is debatable whether, and to what extent, the above distinction between analogy and extensive interpretation is operative in the judicial process, especially at the periphery of facts and symbols. One's judgment of the value of the distinction will turn upon opinions held regarding the role of the concept in the actual mental process, including the possible indirect effects of the distinction as a general determinant of judicial attitude. Certainly the common assumption in debate on *nulla poena*, as to its importance in the judicial process, is clear. When, however, basic theories regarding adjudication are under fire, it seems superfluous to consider the niceties of the problem. But we may note some of the implications that lie near the surface.

No two cases are identical; yet all cases have some common characteristic. Upon the level of generality selected for the criteria of likeness or dissimilarity depends the outcome. Hence it is clear that there are no formal limits which the analogical method cannot reach. Also, just as every similarity in two factual situations enhances the analogy, so differences, as they mount, diminish it. Any two situations, facts or events have some similarities, some differences. How can one decide which preponderates? It necessarily follows, also, that there is an inevitable competition between analogies. A new situation has some characteristics in common with those admittedly included under Statute *A*; but other characteristics are like those admittedly included under Statute *B*. Which statute shall be the basis of the new rule? With a multitude of statutes that are quite alike in principle, it is fallacious to assume that any one must necessarily be closer to the act in question than any other. A fact-situation has some characteristics of situations admittedly included under

a statute, and some of other situations which were admittedly, perhaps even specifically, excluded from the statute. Which principle, if any, applies?

To some degree these difficulties apply to extensive interpretation as well as to analogy. But extensive interpretation is limited by the broadest actual denotation which the words symbolize. The standard is an objective one and may be contrasted with the derivation of factual referents resulting from imaginative expansion of a statute into an all-embracing "principle." Back of extensive interpretation are the language institution and a long body of experience which apply some check on the process of identifying fact-situations. Beyond some point, words used as symbols, not principles, cannot be persuasively stretched, situations cannot be identified. Legal analogy, however, is a break from the meaning of words however stretched. But how much of a break is permitted? Where is there a body of experience with legal analogy, *i.e.*, judicial legislation, that can exert a restraining effect upon its application? The only possible limits may arise from the practices of judges representative of a common culture — practices that might conceivably, over a period of time, fix some general framework for such legislation. But at the outset only the vaguest of ideational factors can limit the pursuit of "principle."

Hence we arrive at a central distinction between the use of analogy in England and the United States, and that recently proposed on the continent. Anglo-American judges have made use of logical analogy⁴² in the application of case law; and this process has generally been so slow and detailed as to be hardly perceptible except to careful search. It has for the most part — and here I speak of the growth of criminal law over the centuries, not of particular leaps that undoubtedly can be found — kept pace with change in the language institution itself. It has amounted mostly to an all-but-unnoticed bringing-up-to-date of old terms — so that, filled with new content, they refer more adequately to the changed conditions. When American writers speak of expanding criminal case law by analogy they do not mean deliberate law-making, avowed and apparent to all; they are speaking of analogy in its more proper logical connotation, *i.e.*, extensive interpretation.

At the same time, it is perfectly clear that the traditional theory which limits judicial authority to routine application of the legislative intent is no longer tenable. Only infrequently are the intentions of a large group of legislators determinable to any great extent. Rarer yet will these intentions, or those of the majority, be uniform or specific. With

42. "It is characteristic that leading English and American treatises on statutory construction do not even refer in their indices to the term 'analogy,' and the few cases in which the terms of a statute have received an extended application beyond their possible literal meaning, are clearly exceptional or anomalous." See Freund, *Interpretation of Statutes*, (1917) 65 U. OF PA. L. REV. 207, at 226, 227, 230.

passage of time difficulties mount. Although conditions arise which the legislators could not possibly have had in mind, the fiction of mere application persists.

But rejection of traditional theories or dogmas of statutory interpretation does not require or justify the conclusion that statutes play no actual role whatever in the judicial process. Admittedly, the formal statement of the rule persists absolutely unchanged. The social milieu is not apt to be so utterly novel as to render completely unknowable at least the general purpose of the statute. Mores persist; linguistic change is slow. The court arrives at a judgment which will not jar the mores, which, by and large, substantially effectuates words as understood at the date of decision and which adheres to the rule as written.

Contrast these limitations of language, formal rule, and declared purpose with the requirement that after all the above linguistic, social, and psychological factors have played their parts, as they inevitably must, if the fact-situation still falls outside the rule, it must nevertheless in certain eventualities be punishable.⁴³

Considered in the abstract, a persuasive argument can be made to support the deliberate and constant use of legislative powers by the courts in disregard of the certainty of existing law. But only by analysis of specific aspects of the problem in the light of actual conditions can valid judgment result. The problem of division of labor between legislature and judiciary concerns partly questions of efficiency, partly political and ethical values. To this issue we shall shortly recur.

On the technical side of the question, it is apparent from decisions of the *Reichsgericht*, which still includes judges of the older regime, that analogy offers the magistrate an opportunity to escape the labor of diligent research and study of the penal code by easy resort to "principle" and "sound feelings of the people." It is equally clear that these judges have extended analogy to areas of immorality or misconduct which the legislature intended to leave unpunished.⁴⁴ But it is especially significant

43. The German Act of June 28, 1935, provides: "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act." Compare Holmes, J., in *McBoyle v. U. S.*, 283 U. S. 25, at 27 (1931), citing *United States v. Bhagat Singh Thind*, 261 U. S. 204, at 209 (1923).

It is admitted that the German judge had been freed from narrow interpretation for more than a decade prior to 1935. See DAHM, SPECIAL REPORT FOR THE INTERNATIONAL CONGRESS OF COMPARATIVE LAW at 3, 4. Hence, extensive interpretation operated in Germany prior to and at the time of the Act of June, 1935 which abolished *nulla poena*. This act, to have meaning, must obviously be understood to go beyond extensive interpretation.

44. *E.g.*, incest although the act was not consummated; homosexuality by women; acts criminal within the jurisdiction, but committed outside the jurisdiction when they

that analogy has apparently been little resorted to in Germany despite the Act of June 28, 1935⁴⁵ — due, to some extent, perhaps, to the *Reichsgericht's* reversal of the first cases to be appealed. If the power is so little used, then obviously analogy does not serve its avowed purpose. The penal laws in their multiplicity apparently do not contain the wide gaps that were declared to exist.

"Substantial justice" does not suffer from lack of laws. On the contrary, modern penal law suffers from superfluity, not paucity of statutes. By comparison with lack of detection, lack of complaint, and lack of knowledge of criminality, failure to punish the guilty, resulting from inadequacy of the penal code, must constitute an almost trivial defect, although it is true the effect of analogizing by petty magistrates in cases that are not appealable is unknown. Aside from the possibility of such magisterial zeal, the injunction to employ analogy has effect, if anywhere, in the formation of a repressive attitude that must tell not only in the interpretation of laws but in the finding of facts as well.⁴⁶ This indication is strengthened by the fact that the judge is not permitted to nullify any existing penal law even though the sound feelings of the people are indifferent or even hostile to it. There is no injunction to allow the morally innocent to escape; only the command to widen the net of punishability.

The supporting theme runs in terms of society versus the criminal⁴⁷ — although elsewhere the traditional view of the individual as outside of or opposed to the Community is vigorously rejected. If what people thought Lombroso said were only true! If the criminal actually stood apart, marked and labeled like the leper, there might be justification for reversion to the simplicity of primitive justice. But, in the light of known facts, this view is fantastic in its unreality. The supposition is that "the criminal" is not only perfectly well known but that he is known in advance of trial. That the criminal is a unique, atavistic being, recognizable on sight, is a bias deeply rooted in the public mind, which only rational, deliberate analysis can overcome; such an analysis is sought to be attained by law, *i.e.*, by determined abeyance of decision until a prescribed process of careful deliberation shall have been concluded. As to petty infractions, it is absurd to speak of criminals in the popular sense. Yet analogy is applied to these offenses upon an indiscriminate "State versus evil individual" thesis. As to serious wrongs which arouse moral indignation, one may depend upon judges the world over to extend interpretation in these instances as far as is permissible; very rarely, indeed,

were not criminal. See *Frankfurter Zeitung*, June 24, 1936; R. G. 27/3/36 *Deutsche Justiz*, 1936, 774; R. G. 18/2/36, *Deutsche Justiz*, 1936, 609.

45. The Act is set forth in note 43, *supra*.

46. See BECCARIA, *ESSAY ON CRIMES AND PUNISHMENTS* (1770) 14, 15; MONTESQUIEU, *SPIRIT OF LAWS* (1748) Bk. XI, Ch. VI.

47. See Radin, *Enemies of Society* (1936) 27 *J. CRIM. L.* 328.

does a modern penal code lack sufficient instrumentalities — certainly not as regards major wrongs. An excessive judicial conservatism may for a time allow a few malefactors to escape; that is the price paid for the larger benefits conferred. But the legislature soon intervenes where it becomes necessary.

Yet it would be somewhat delusive to imagine that the Classical conception of the judicial function persists. Especially as regards interpretation of statutes have there been profound changes; but it is difficult to generalize about these. The rule of strict construction of penal statutes played a peculiar and important role in eighteenth century England when a humanitarian ideology propagated by Beccaria, Romilly, Howard, Buxton and others rose against a severe and indiscriminating written law. Statutes perfectly clear in their meaning were distorted to exclude numerous situations that came before the courts. "Strict" construction was any construction, however fantastic, that saved the offender from the capital penalty. This movement and its significance with reference to the strict interpretation of penal statutes I have discussed elsewhere at length.⁴⁸ So far as generalization here makes any sense, it may be said that in most cases where the weight of precedent is not great English and American courts now construe penal statutes with a view to carrying out the legislative intention. Where the statute is clear, words are given normal meanings; the rules of grammar are not strained.

Difficulties arise where ambiguities exist — and that, by general agreement, is the point where *nulla poena* is now relevant. To comprehend the significance of the jurisprudence interpreting penal statutes requires techniques and theories which have hardly yet been applied; certain it is that little can be learned simply from the language of the courts or of the traditional treatises. Only the most tentative generalizations may, therefore, be hazarded as to American cases: where the ambiguity applies to a procedural or formal matter, there seems to be a tendency to resolve the uncertainty against the accused. This tendency seems especially noticeable when the crime is serious and public opinion is aroused. Elsewhere, strict construction, in the sense of giving the accused the benefit of doubt, persists.⁴⁹ The problem needs complete reformulation and analysis which cannot be undertaken here.⁵⁰

But manifest are the hazards of officially instructing judges, especially minor magistrates who can be removed at will by the political authorities,

48. HALL, *THEFT, LAW AND SOCIETY* (1935) especially Ch. 3.

49. ROUX, *op. cit. supra* note 1, at 84; 1 GARRAUD, *op. cit. supra* note 1, at art. 146, p. 303; *Rex v. Halliday*, [1917] A. C. 260, at 274.

50. One need is to fix the meanings of the terms "strict" and "liberal." The extant literature confuses even the primary distinctions between (1) construction favorable to or unfavorable to the accused, and (2) construction concerned with objective meanings of words.

that they must hold facts clearly outside a statute to be punishable, and that they must do so by reference to what they imagine to be the attitude or "feelings of the people." Even if this power were confined to the major courts, it would still be fraught with many difficulties, *e.g.*, official abuses, indifference, irrelevance or uncertainty of public morals, changing attitudes, ethical invalidity of public standards in many regards, and occasional public hostility to certain laws or public admiration for certain offenders. Finally, even if many of the premises and objectives underlying advocacy of the use of analogy are accepted, there remains the important question whether modernized legislation is not the sounder method.

Failure to comprehend the more complex methods by which guarantees against governmental abuses are provided by Anglo-American law has caused certain European criminologists to assert recently, in defense of their innovations, that *nulla poena* does not exist in England or America. In a sense this may be a narrow, literal truth, but as intended by these writers, it is certainly a substantial error.⁵¹ The propositions, *nullum crimen sine lege*, *nulla poena sine lege*, as they developed on the continent at the end of the eighteenth century and as they are there understood, premise inclusive penal codification. In a few American states, which have substituted penal codes or collections of statutes for the common law of crimes, a somewhat generally accurate parallel can be drawn; the qualifications would run along lines suggested by distinctive techniques of adjudication and by the differences resulting from reference to a wide net-work of precedent utilized to interpret words in a penal code. In perhaps a majority of American states, as in England, despite the large and constantly increasing volume of statutes, there exists a residuum of common law which makes *nulla poena* irrelevant in its specific continental sense; it certainly complicates even broad comparison.

It is not difficult, however, to find some approximation in English legal history to contemporary continental abandonment of *nulla poena*. The ancient prerogative of the Crown exercised in the issuance of numerous decrees, the powers of the Council, the decisions of the judges during some centuries of creative building of the common law—all are suggestive. For almost two hundred years the Court of Star Chamber exercised a wide jurisdiction over crimes, and "it punisheth errors creeping into the Commonwealth, which otherwise might prove dangerous and infectious diseases . . . although no positive law or continued custom of common

51. See Marshall, C. J., in *United States v. Wiltberger*, 5 Wheat. 76, 96 (U. S. 1820): "It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of a kindred character, with those which are enumerated." Compare note 43, *supra*.

law giveth warrant to it."⁵² Despite subsequent condemnation of the Star Chamber, the Court was really a popular tribunal. But it was abolished in 1641. Since then law, in its narrow connotation, has been the avowed single authority. Close adherence to precedent, especially in England, has strengthened that authority. But there has been one striking exception, perhaps not unrelated to the abolition of the Star Chamber, and that has to do with misdemeanors.⁵³ In recent years it has generally been forgotten that from 1660 to 1860, the courts, without any specific precedent, frequently punished conduct which was *contra bonos mores*, or which openly outraged public decency,⁵⁴ or which was subsumable under some similar generalization; and there are scattered instances of the courts having continued this practice after 1860.⁵⁵

The shock produced by *Rex v. Manley*⁵⁶ in 1933 indicates how rarely courts in England have exercised this discretionary power in recent years, and how firmly the tradition of law is there established. Probably the larger part of English criminal law is now statutory, and penal statutes have typically been rather narrow and specific. It is clear that such statutes are not extended by analogy; even where acts fall within the words of a statute they will not be held punishable unless they are also within the spirit, not of "the people," but of the statute as fixed by common understanding of the language.⁵⁷

Hence, even as to misdemeanors generally, it cannot be said that there is very great similarity between the functioning of the English judge and recent continental innovations regarding analogy, which, it must be remembered, apply to all crimes. And in analyzing the infinitely more difficult problem of the processes employed by Anglo-American judges in transforming the law, one must not confuse the deliberate invention of new rules with the relatively unconscious subsumption of unanticipated or

52. Hudson, quoted in 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (5th ed. 1935) 504.

53. And, of course, as regards juvenile delinquency.

54. See 4 BLACKSTONE, COMMENTARIES 65; HAWKINS, PLEAS OF THE CROWN (8th ed. 1824) c. 5, § 4; 1 EAST, PLEAS OF THE CROWN (1716) cc. 1, 3, 4.

55. *Reg. v. Stephenson*, 13 Q. B. D. 331 (1884); see STEPHEN, A DIGEST OF THE CRIMINAL LAW (1878) 106, 107.

56. Defendant falsely stated she had been robbed, thus causing police officers to make an investigation to discover the offender. She was convicted of effecting "a public mischief." *Rex v. Manley*, [1933] 1 K. B. 529. And see Stallybrass, *Public Mischief* (1933) 49 L. Q. REV. 183; Jackson, *Common Law Misdemeanors* (1937) 9 CAMB. L. J. 193.

57. See notes 18 and 51, *supra*; THE GAUNTLET, 4 C. P. 184 (1872); Farwell, L. J. in *Baylis v. Bishop of London*, [1913] 1 Ch. 127, 137; Scrutton, L. J. in *Hartnett v. Fisher*, [1927] 1 K. B. 402, 424 ("This court sits to administer the law; not to make new law if there are cases not provided for"); ALLEN, *op. cit. supra* note 37, at 184-185, for several examples where, though judges heartily disapproved of a rule of law, they felt themselves "powerless to change the rule."

even unintended sets of facts under old prescriptions — a process found in both code and common law adjudication, and a phenomenon inseparable from the endless interaction of a growing language and changing socio-economic institutions.⁵⁸

At first glance, it might appear that under such generalities as *contra bonos mores*, "outrage to public decency", or "injury to public morals", there is an almost unlimited discretion.⁵⁹ No doubt, the possibilities for such discretion do exist; no doubt at various periods in both English and American history these powers were widely used. But an examination of cases decided in recent years indicates that a strong legal tradition imposes sharp limitations on the operation of such statutes.⁶⁰

There are other potent, though more subtle, forces affecting Anglo-American jurisprudence than the principle of *stare decisis* rigorously applied. They operate to effectuate the ends which are sought on the continent through *nulla poena sine lege*. It is only necessary to recall that European scholars of the eighteenth century, especially French, looked to England as the home of political liberty; and that thence a number of forms of English criminal procedure, along with related political and constitutional guarantees, made their way into continental countries. A wide array of ethical-political principles incorporated into fundamental law, and made warp and woof of popular and official tradition over a period of centuries — these provide nicer and, no doubt, more effective guarantees of individual security and freedom from arbitrary penalization than can result from any formal expression of *nulla poena* which is isolated from actual administration of law.

58. See HALL, *loc. cit. supra* note 48.

59. See Schinnerer, *Analogie und Rechtsschöpfung* (1936) 55 ZEITSCHRIFT FÜR STRAFRECHTSWISSENSCHAFT, Heft 6, at 771; DAHM, SPECIAL REPORT FOR THE INTERNATIONAL CONGRESS OF COMPARATIVE LAW (1937).

60. See Sec. 675 (present sec. 43) of the New York Penal Code. There are, obviously, two all-important limitations on the statute: it is confined to misdemeanors; and the vast majority of misdemeanors are specifically described in the Code. Finally, as to the relatively small area provided for by Sec. 43, the judges have imposed numerous restrictions. See *People v. Baylinson*, 211 App. Div. 40, 43, 206 N. Y. Supp. 804, 807 (1st Dep't 1924); *People v. Tylkoff*, 212 N. Y. 197, 105 N. E. 835 (1914); *People v. Burke*, 243 App. Div. 83, 84, 276 N. Y. Supp. 402, 404 (1st Dep't 1934), *aff'd without opinion*, 267 N. Y. 571, 196 N. E. 585 (1935); *People v. Ward*, 148 Misc. 94, 96, 266 N. Y. Supp. 466, 468 (Ct. Sar. 1933); *In re Farley*, 143 N. Y. Supp. 305 (Sup. Ct. 1913); *People v. Helmes*, 144 Misc. 695, 259 N. Y. Supp. 911 (Ct. Chen. 1932).

Cases involving other parts of Section 43 (675) Penal Law include: *People v. Most*, 171 N. Y. 423, 430, 64 N. E. 175, 178 (1902); *People v. Nesin*, 179 App. Div. 869, 167 N. Y. Supp. 49 (2d Dep't 1917); *People v. Heinlein*, 172 N. Y. Supp. 669 (Ct. West. 1918).

IV. RECHSSTAAT

Upon an analysis somewhat similar to that presented above, the Permanent Court of International Justice held that application of the German law of June 28, 1935⁶¹ to Danzig was in violation of the requirement that the government of the city be by rule of law (*Rechtsstaat*).⁶² The rationale of the decision is clear. In a formal sense, however, "law" may be said to be simply the will of the State; under this generalization whatever the State's officials do in pursuance of the declared will of the State is "legal". There is no *logical* reason why the State's commands must be specific. Hence, with perfect consistency one may contend that the German law is no violation of *Rechtsstaat*; and, indeed, the like position may be taken as regards simply one all-inclusive command, for example, punish "socially dangerous" conduct.

But it is perfectly clear that "*Rechtsstaat*" is something more than an abstraction to which any nebulous interpretation can be applied. Its meaning can be ascertained only by reference to its actual, historical context. This meaning has been generally expressed as limitation upon the application of force by government, such limitation to be effected by prescription and application of specific rules. Hence the direct object of *Rechtsstaat* is to confine discretion.⁶³

It is also apparent that some circumstances, or our knowledge of them, are of such an intrinsically general nature that it is impossible to define them specifically.⁶⁴ And, it is axiomatic that no scheme of legal administration can escape the uncertainties imposed by the imperfections of human nature. Some may seek an escape from this rather disconcerting reality by a barrage at an alleged belief in a mechanically certain legal apparatus.⁶⁵ Recognition of the maximum limits of certainty in the judicial process may be the first step towards enlightenment. But the major problem is the discovery of the particular spheres of relative cer-

61. See note 43, *supra*.

62. Advisory Opinion of Dec. 4, 1935, Series A/B-No. 65. The vote was 9 to 3, the dissenting judges being Polish, Italian and Japanese—the last only placing his dissent on divergence from the view that the law was inconsistent with *Rechtsstaat*.

63. See Permanent Court of International Justice, Series A/B. Judgments, Orders and Advisory Opinions, No. 65, Dec. 4, 1935, pp. 53, 56.

64. This distinction is not recognized by those who, on the basis of an occasional necessarily very general statute, argue that analogy restricts more rigorously than does interpretation. If such a result is reached, it is not because analogy is restrictive, but because legal tradition persists and is especially suspicious of analogy.

65. To those who hold that rules of law are of little consequence in the judicial process, *Rechtsstaat* is sheer fiction. This view can be understood as a reaction from an other-worldly philosophy that contemplates the legal rule only as ideal. But there is a sound psychological approach to the problem of the concept as reality. Instead of dogmatic denials of the existence and effectiveness of legal concepts, a scientific position would hold conclusions in abeyance, while research proceeded open-mindedly.

tainty and uncertainty. It is more than a fair hypothesis that throughout the entire body of the law numerous specific concepts abound and elicit reasonably uniform responses in their application, though the complete results depend not only upon the legal rules but also upon institutional non-legal behavior and upon common ideas and standards born of recurrent similar experience in a particular culture. *Rechtsstaat* can mean no more than attainment of the maximum possible certainty through implementation of specific rules. It means no less.

In light of the position that code and statute occupy in continental law, the judgment of scholars that *nullum crimen, nulla poena sine lege* constitute the essence of *Rechtsstaat*, in its penal aspect, was quite unchallenged until two years ago.⁶⁶ Law, to be sure, may be viewed solely as a means to the attainment of social purposes. As a mere instrument there is no reason why it should be surrounded by an aura of inviolability; on the contrary there is every reason for modification, repeal and manipulation as occasion requires.

But law has also been so long and so closely identified with uniformity, equality, order, fairness and stability that it is in fact impossible to separate it from these universal ideas and ideals. Law in its operation is both the immediate observable representation of these ideas and their abstract symbolization. As such, law is an end in itself, one of the great values of civilization, and for the most part, the only concretely manifest side of an ideal justice. *Rechtsstaat* is a significant aspect of this value, and it is little wonder that its preservation is warmly espoused.⁶⁷

V. TREATMENT OF OFFENDERS

Nullum crimen sine lege was never literally followed. As regards juveniles, vagabonds, mendicants, persons without visible means of support, and others, only a distortion of words can deduce a merely formal requirement that there be an act (*crimen*). There is a long tradition regarding vagabonds and mendicants in English law; hardly ever has treatment of them and of other special classes accorded with otherwise rigorous insistence upon specific definition of criminality.⁶⁸ Again, as

66. See Gerland, *Artikel 116* (Nipperday) *DIE GRUNDRECHTE UND GRUNDPFLICHTEN DER REICHVERFASSUNG* (1929) at 368. Compare Gerland, *The German Draft Penal Code and Its Place in the History of Penal Law*, 11 *J. COMP. LEG. & INT. LAW* (3rd Series, 1929) at 21, 25, 30 with Gerland, *Neues Strafrecht*, *DEUTSCHE JURISTEN-ZEITUNG* (1933) 857, at 860.

67. See McIlwain, *Government by Law* (1936) 14 *FOR. AFFAIRS* 185.

68. As regards some of these classes it will be noted that they have not been regarded as really criminal. Hence, abandonment of *nullum crimen* (especially as to juveniles) has meant individualized and humane treatment. Similar reasons urge like treatment of other classes, e.g., drug addicts, and prostitutes.

My proposal to extend like treatment to petty thieves [*THEFT, LAW AND SOCIETY* (1935) Ch. 7] has been criticized on the one hand because it might make possible long

regards certain other offenses such as acts against good morals, it is exceedingly difficult, if not impossible, to frame specific definitions; besides, a long legal tradition together with restriction of such inclusive statutes to minor offenses would make insistence upon *nullum crimen* impracticable in this particular. With reference to political offenses, the matter is quite a different one;⁶⁹ there is no doubt as to the opposing views of liberalism to autocracy regarding that. Apart from the cases of special classes of persons, and offenses requiring inherently necessary vague definition, *nullum crimen* has persisted in most liberal states.

As to *nulla poena sine lege* in its reference to punishment, however, there has been very considerable departure from classical views. Indeterminate sentence, probation, suspended sentence, nominal sentence, waiver of felonies on pleas to misdemeanors, compromise, modified sentence, "good time" laws, parole, and pardon have almost completely transformed eighteenth century law and penological ideas.⁷⁰

On first impression, one might believe that these departures from *nullum crimen*, *nulla poena* suggest the proper objective for our times, which might be expressed as retention of *nullum crimen* and abandonment of *nulla poena*. That solution is, however, quite questionable. The centering of recent criminologists on the personality of the offender has as its corollary the complete abandonment of *nullum crimen*.

Even more cogent a reason for questioning the proposal that *nullum crimen* be retained and *nulla poena* be abandoned is that the two rules are inextricably interwoven. Complete abandonment of *nulla poena* means complete individualization of punishment. In effect the guarantee has vanished almost entirely, if *anything* can be done to any convicted person. It might be rare indeed that the murderer with political connections would escape serious punishment while the impotent petty thief

incarceration of petty offenders. This criticism is irrelevant to the proposal actually made, for the text makes it quite clear that (1) *existing maximum sentences* were accepted as the *upper limits* of incarceration; and, more than that (2) the purpose was to discover a method of *eliminating punishment entirely* so far as many of these petty offenders were concerned. Obviously, the nature of treatment is as important as its duration. Other criticism of the proposal was that it was too restricted. As to this, aside from referring to this paper generally, and to purposes of the criminal law other than rehabilitative ones, all that can be said here in addition is that the major objective was to formulate a general theory regarding individualization, rather than to advance a particular reform.

69. "He who in order to weaken the spirit of resistance of the population, spreads in time of war or when war is imminent such rumors as may weaken this spirit is punishable by imprisonment." [up to 15 years]. POLISH CR. CODE, Sec. 104.

70. See, e.g., GEHLKE, CRIMINAL ACTIONS IN THE COMMON PLEAS COURTS OF OHIO (1936) 292. California, except for two or three instances where *minimum* sentences are fixed by statute, requires the judge to impose an entirely indeterminate sentence. CAL. PENAL CODE (Deering, 1937), Sec. 1168; *Ex parte Lee*, 177 Cal. 690, 171 Pac. 959 (1918); *A Digest of Indeterminate Sentence Laws and Parole Rules* (1923) 18 J. CRIM. L. 580.

languished in jail, or that for any reason petty offenders were the more severely punished. But those extreme cases must be comprehended in any program that purports to supply valid answers to the perplexing problems that are involved. The current issues can be indicated most briefly by reference to demands being made in the United States, as elsewhere, for sentencing boards together with complete elimination of prescribed penalties. The judge, it is argued, should be confined entirely to the conduct of the trial; his participation should end when a verdict is reached. Sentences, we are informed, should be wholly indeterminate; treatment, if any is necessary, should be prescribed by an administrative board of experts who have opportunity to study the offender and knowledge concerning rehabilitation. As noted, the argument occasionally extends to advocacy of entire elimination of any criminal act. Presumably, the "anti-social" person will in some sort of proceeding be declared "dangerous" and placed in the hands of the sentencing tribunal. Not punishment but only measures of "social defense" are to be applied.⁷¹

This argument and rationalization are familiar as representative of the Positivist School.⁷² But they have been given a different and insidious emphasis by continental Neo-Positivists who accept the strictures of the older Positivism on law as a limitation on official conduct but with even greater zest reject the humanitarianism which accompanied that development.⁷³ It is impossible to ignore the various purposes implicit in a particular system of criminal law and its administration as well as actual ability to attain those purposes which should be sought; in this field, if any, it is necessary to insist that theory have some fair correspondence to fact. And in all this, it must be remembered that in the last analysis *nulla poena* represents the most cherished of all the values involved in the administration of the criminal law. What is actually done is the ultimate basis for judgment. What is done to the criminal is a very real

71. ". . . par une nouvelle Ecole . . . l'interprétation doit chercher le même but que la peine, c'est-à-dire à mieux assurer le défense social . . . Il est difficile de voir dans cette tendance un progrès, car elle n'est qu'un retour, peut-être inconscient, à l'arbitraire des peines, si dangereux pour la liberté individuelle." VIDAL, COURS DE DROIT CRIMINEL (1916), at 78-9; see also Cornil, *La Mesure de Sureté Envisagée Objectivement* (1929) DROIT PENAL ET CRIMINOLOGIE, 825.

72. De la Morandiere observes acutely (*op. cit. supra* note 2, at 280) that Ferri would make all criminals responsible, *e.g.*, a person who was insane when he committed a crime is not now punished. But such a person, if "socially dangerous", would under positivist ideas be incarcerated. The issues are debatable except that it seems clear that the very general concepts of "insanity" and "mental disease" would be supplanted by the much more nebulous concept, "social danger." It also seems clear that until the nature of incarceration and of treatment change radically, it is sophistry to distinguish "social defense" from punishment. Even as to juveniles in Belgium, Racine states that they almost invariably write letters pleading to be released. See SPECIAL REPORT TO INTERNATIONAL CONGRESS OF COMP. LAW (1937).

73. See Cantor, *op. cit. supra* note 40, at 89.

index to the degree of civilization. Hence, whatever shortcomings the Classicists had, it is to their abiding credit that they said not only *nullum crimen sine lege*, but much more, that they said *nulla poena sine lege*.

Criminologists generally are prone to assume that the discretion exercised by an administrative board will be "wise and good"; it will not be arbitrary and severe like judicial discretion in the *ancien régime*. Unfortunately, history records other eventualities—and in places where knowledge and social altruism reached the highest peaks in human development. What, indeed, is wise discretion? How does it differ from official arbitrariness? Until these questions can be answered correctly and with some degree of certainty, the issues between Classicists and Positivists remain unresolved.

Yet it is impossible in the abstract to condemn or to praise abandonment of *nulla poena* as regards treatment of criminals. It all depends. It depends upon the premises made regarding the purposes of the criminal law and its administration, and even more upon the actual facts which condition objectives and may radically modify otherwise splendid purposes. Are wise judges available and in sufficient number? Is "treatment" really treatment, or does that, as well as the equally euphemistic "social defense," really mean punishment, perhaps of a repressive sort that harks back to the darkest chapters in human history? If it be assumed that one is humane and is seriously searching for truth, the question remains, is there really a body of knowledge which permits discovery of socially dangerous persons in advance of their criminal behavior or that assures humane and sound treatment of offenders? Or are the social disciplines, at best, so uncertain in their verities and so difficult to comprehend that only the exceptional scholar can master them? These are the issues that should check propaganda and guide sound theory. These are the actualities that should form the basis for decision as to whether the present need may not be for improvement of administration in its already far-flung field rather than further abandonment of law.

VI. POLITICAL AND PHILOSOPHICAL CONSIDERATIONS

In its eighteenth century context *nulla poena* meant limitation upon government and consequent protection for the individual. That meaning has persisted. Yet, when one finds that Denmark introduced analogy a few years ago, that Italy in her 1930 Code reaffirmed *nulla poena* including non-retroactivity, and when we note that Poland did likewise, that Germany has departed from the rule, and that Russia discarded it entirely in 1926, we must conclude that no facile identification of *nulla poena* with a particular type of government will suffice. It would, how-

ever, be much more fallacious to assume that political forces are not involved.

In Germany, the judge had been freed from "slavish adherence to the statute" long before 1935,⁷⁴ and this had been influenced by overpowering post-war economic changes. Inflation and bankruptcy coincided with contracts calling for payment in gold and providing for creditors' remedies which, if pursued, would have brought chaos. Legal classicism, already condemned by philosophy, gave way before an infusion of equitable principles that overrode the rules of law.⁷⁵ The judge, applying the penal law under pressure of a strongly centralized government, itself the creature of economic and moral collapse, found ready-made the work of Liszt and his followers; and the fact that scientific criminology was constructed in a liberal age did not make it any the less instrumental in carrying out the dictates of authoritarian government. The law of June, 1935 was but one of numerous legal and constitutional changes that characterize the new regime. Such legal change becomes comprehensible only when placed in the whole context of economic conditions and political ideology.⁷⁶

The new Italian Code of 1930 was adopted some years after the Fascist Revolution. Stability of government joined a strong legalist tradition. Again, in Italy a highly developed Natural Law philosophy may, in some spheres and to some extent, have retarded the full sweep of countervailing views.⁷⁷ The setting up of special tribunals to hear political offenses in disregard of constitutional law,⁷⁸ and the very broad definition of crimes,⁷⁹ along with the turning over of the chief interests of the

74. The 1927 draft of a German Penal Code had already incorporated many of the views of the positivist school. See Gerland, *op. cit. supra* note 66, at 28 ff.

75. See 107 DECISIONS OF THE R. G., CIVIL CASES 87 (November 28, 1923).

76. Such an analysis would need to be supplemented, and could be most interestingly, by a study of the personalities of those largely responsible for radical legal change. As to Roland Freisler, credited with a major role in the departure from *nulla poena*, see 61 *Juristische Wochenschrift* (1932) 2203. His career includes: Bolshevik official in Russia, censure by Bar Associations, and a series of fines in criminal courts, chiefly for slander. Of quite another order is the complete change of position among intellectuals after a revolution. No better example can be had than that of the eminent Prof. Gerland. See note 66, *supra*. Finally, account would need to be taken of those who are not won over by the revolutionary ideology. Several of these are to be found in the *Reichsgericht*, and their persistent adherence to the older legal tradition may be seen from their refusal to affirm convictions by analogy. *E.g.*, R. G. 27/3/36 D. J. 1936, 774, and R. G. 18/2/36, D. J. 1936, 609.

77. See HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930) 279, ff. And as to recent natural law in Germany, *id.* at 246, 247.

78. See Cantor, *The Fascist Political Prisoners* (1936) 27 J. CRIM. L. 169.

79. *E.g.*, Art. 282: "Whoever commits an offense against the honor or prestige of the Head of Government shall be punished with penal servitude from one to five years." See also note 69, *supra*.

state to administrative boards no doubt facilitated retention of traditional law in the ordinary run of offenses.⁸⁰

The German Act of June, 1935 is conservative by comparison with the Russian Penal Code of 1926. Here all "socially dangerous" behavior is punishable, and the standards of dangerousness are the objectives of the Revolution. Yet there has been a long series of significant changes in Soviet law, making it difficult to generalize with reference to the entire period of its operation. In the first instance, one may inquire to what extent Russian views on law represent a phase of revolutionary propaganda rather than normal viewpoints. Lenin announced that the Communist Dictatorship is "a dictatorship untrammelled by any law, an absolute rule, a power that is based directly on violence" . . .⁸¹ This enunciates the Marxist attack upon law as an instrument of the ruling class. Hence, a classless society will have no need of it.⁸² Under some such broad formula as "socially dangerous" the judge will function to attain and preserve the objects of the Revolution. Yet Lenin himself retreated from this theoretical position. The fourteenth Congress of the Communist Party demanded a return to legality.⁸³ Others argued that non-legality was bad for the peasants. The Code of Criminal Procedure, Article 5, contained guarantees against illegal arrest, although the special police were not hampered by judicial review. And the new Soviet Constitution purports to introduce a Bill of Rights of far-reaching effect. Even as regards treatment of juveniles, the Russians have abandoned their former position and now resort to admittedly punitive measures.⁸⁴

During revolution, law, especially criminal law, is used as a party weapon. But law soon transcends the transitory revolutionary conditions, and copes with people and situations that cannot be treated by simple reference to revolutionary ideals. Non-political situations affecting especially the person and the family give rise to conflict; quite apart from the reaches of political doctrine, specific issues may be decided by law or arbitrarily. Both the uniformity and fairness that universally characterize law and the security which its administration instills should recommend themselves to autocratic states no less than to democracies. Indeed, there is even greater reason why an authoritarian state should be a *Rechtsstaat*; this is a point that does not escape Italian and Hun-

80. See generally Steiner, *The Fascist Conception of Law* (1936) 36 COL. L. REV. 1267.

81. Quoted in Mirkine-Guetzévitch, *The Public Law System of the Sovietic Dictatorship*, (3rd Series 1930) 12 J. COMP. LEG. & INT. L. 248, at 250.

82. See Dobrin, *Soviet Jurisprudence and Socialism* (1936) 52 L. Q. REV. 402.

83. Mirkine-Guetzévitch, *op. cit. supra* note 81, at 249.

84. See Berman, *Juvenile Delinquency, the Family and the Court in the Soviet Union* (1937) 42 AM. J. SOC. 682.

garian commentators, for example, in their arguments for retention of *nulla poena*.⁸⁵

Several common traits characterize these revolutionary movements in authoritarian states. Special police are exempt from legal constraint; they arrest, try, execute, and exile without check by law or courts. Again, appeal is limited. Special tribunals for the trial of political offenders may be depended upon to effectuate the will of the government. Sweeping abrogation of Constitutional guarantees limits the area of governmental constraint; compared with the suspension of the Bill of Rights in the Weimar Constitution, the abrogation of *nulla poena* seems a trifle. To be added to the various factors noted above is the whole stream of prevailing philosophic thought as interpreted by dominant leaders to implement their political aims. Upon its particular conjunction with these factors depends the significance of any rule of law.

Authoritarian political theory supports authority. Its attack upon *nulla poena* consists in stressing the paramount importance of the Community⁸⁶ in order to justify subordination of the individual. To these are added special theories of leadership and of popular law.⁸⁷ The Leader has a mystic power of divining the people's spirit and can best formulate its will in laws.⁸⁸ Some legislation, to be sure, relating to more or less complex aspects of life is not the reflection of the sound feelings of the people. It must represent only the Leader's will. The Leader's will, however, never clashes with the sound feelings of the people.

That these views are largely articles of faith, not knowledge, seems all-too-apparent. Rulers have made similar pretensions before, and philosophy has often been their handmaiden. But the idealist view of the State, even though combined with a psychological need for faith and obedience, cannot obscure the fact that States act through governments and governments through men — who, alas, are limited, all-too-human beings.

But the difficulty with much of the current criticism of analogy is that it is premised upon a dislike of actual results reached under authoritarian government. The reasoning is backwards: dictatorship is an unmitigated evil; it has abolished *nulla poena*; therefore, abolition of *nulla poena* is necessarily improper. But one must consider Denmark and other liberal

85. See The Special Reports written by Professor Racz and Delitala for the International Congress of Comparative Law, Hague (1937).

86. See notes 78, 80, *supra*.

87. See MARX, *GOVERNMENT IN THE THIRD REICH* (1936); ERMARTH, *THE NEW GERMANY; NATIONAL SOCIALIST GOVERNMENT IN THEORY AND PRACTICE* (1936).

88. RICHTER, 5 *DEUTSCHES RECHT* (1935) 365, translated in Marx, *op. cit. supra* note 87, at 91.

countries which have also departed, at least to some extent, from *nulla poena*. If the treatment of offenders is humane and the administration of criminal justice is wise, is not the greater freedom of the judge desirable?

It is in the light of this latter argument that one can understand the sweeping inroads of Positivism upon liberal government generally. That the abolition of law took place first in the treatment of juveniles is all-significant as an index of the motivation behind the movement for individualization. But the possibilities of this movement are now apparent; and it is understandable, too, why Liszt, von Hippel and Exner are quoted by German criminalists today.⁸⁹ For the abolition of *nulla poena* provides a sieve through which can flow not only humanity and science but also repression and stupidity. Dictatorship will not brook interference by law (unless in particular instances the goal can be achieved none-the-less); the wise and humane community seeks the freedom to utilize its resources to aid the weak and the maladjusted. Only by careful study of the actual results of the abandonment of law can one arrive at a valid judgment. An occasional democracy like Denmark, wise beyond most in social science and sympathetic to the unadjusted, tries to achieve a fuller utilization of her altruism and skill. But the retention of *nulla poena* by the vast majority of liberal states—indeed, the move to intensify legality, as in Belgium with reference to juvenile delinquency⁹⁰—indicates that traditional political attitudes endure where they have taken firm root.

Nothing is more superficial than to lay at the door of the present German and Russian governments complete accountability for their current law. The roots are deeply grounded; and, indeed, there is no more fascinating or ironical page in intellectual history than their adoption of a legal philosophy largely propagated by men who have since been personally disowned, even exiled.

The major problems dealt with in the above discussion parallel the moot issues of modern jurisprudence. Some further understanding of

89. See Matzke, *Juristische Wochenschrift*, 7 July, 1934; see also Klee, 1934. D J. Z. 641-643.

90. See the exceptionally well considered Special Report of Aimée Racine to the International Congress of Comparative Law, Hague, 1937, p. 23, wherein is discussed the insistence of a group of Belgium scholars and lawyers that the juvenile is entitled to at least as much legal protection as the criminal. Racine concludes: "*Nous pensons qu'en ce qui les [délinquants] concerne, il faut appliquer aussi strictement que possible la règle nullum crimen sine lege: ne pas considérer comme vol de la part d'un enfant ce qui n'est point vol pour un adulte; ne pas accorder la correction paternelle, si l'inconduite ou l'indiscipline ne revêtent un caractère de réelle gravité. Et s'il reste par ci par là un cas où l'intervention judiciaire paraît opportune, mais où elle ne pourrait se réaliser qu'au moyen d'une interprétation extensive, ce n'est point une raison pour se départir de la règle en question . . . Pareille incertitude doit être évitée aux enfants et à leurs familles.*" . . .

these problems may result from thoughtful consideration of certain far-reaching principles which underlie analyses of many legal problems. From this more general point of view, the final answers given to the question whether *nulla poena* should be maintained are based upon the outcome of two fundamental considerations. As a matter of fact, is it possible for human conduct, particularly that of judges, to be significantly guided by concepts, *i.e.*, legal rules? Secondly, what are the political and social values of the answerer?

Until recently, these inquiries have been posed quite differently. Traditionally, the problem has been analyzed in terms of rules of law versus discretion, of "justice with and without law", of equity versus law, and so on—extending clearly back to Aristotle, and, no doubt, beyond. Two apparently distinctive sets of conditions, two unique psychological processes have been noted, described, and usually opposed: adjudication according to prescribed rule, and adjudication without rule but according to certain more or less intuitively apprehended ideas of justice—sometimes advanced as Equity or higher, *i.e.*, Natural Law, or as Reason.

In recent years, adjudication by law has been increasingly challenged, both as a value and as a fact. The modern movement may conveniently be dated from Jhering,⁹¹ and its social and emotional impetus can be suggested by noting that it coincided with Marxism.⁹² No later writer has equalled Jhering's satire of a "heaven of concepts". But the anti-conceptualism which he fostered has advanced far beyond his formulation of the issues. The Free Law school of jurisprudence took up the attack on "mechanical jurisprudence", derogatorily described as "slot-machine" adjudication. It assumed a constructive position with reference to those areas of the private law whose further growth was not determined by weighty precedent. Here the courts were to legislate without hesitancy or disguise and—save for such an occasional voice in France as Saleilles'—were to draw their premises not from the suggestiveness of existing codes and rules, but from the needs of the social problem⁹³ confronting the judge. In the United States, Holmes adopted this program to some extent as regards what he termed the "interstitial areas" of the private law. Later, Mr. Justice Cardozo applied these views, elaborated into a more conscious social-utilitarianism, to important segments of the judicial process. But judicial legislation in those areas untouched by existing private law was not the last phase of the Free Law movement. For in the United States, at least, a natural,

91. See JHERING, *LAW AS A MEANS TO AN END* (1913) 320.

92. Jhering, born in 1818, published *DER ZWECK IM RECHT* in 2 volumes in 1877, 1883. Marx, born in 1818, published *DAS KAPITAL* in 1867. Liszt, born in 1851, published *LEHRBUCH DES DEUTSCHEN STRAFRECHTS* in 1881.

93. These needs are never viewed as ethical or cultural, but always as economic.

if not welcome, offspring of this school is so-called Legal Realism, which, in its extreme form, denies completely the efficacy of rules of law to prevent or to determine any controversy. The implications of this position are of overshadowing importance. For if rules are relatively inconsequential factors in governing the relations of men as well as the decisions of judges, then there is no distinction between the administration of private and criminal law; precedent is necessarily ignored as a figment of the legalistic mind and a popular myth. The whole field of legal relations, including litigation, becomes an "interstitial area." Psychology, preferably of the subconscious, supplants knowledge of legal rules and their correct deliberate application. So, also, self-conduct in accordance with law becomes an illusion. The traditional analyses of rule versus discretion, law versus equity, etc., become meaningless. Thus, an intellectual movement, born of a vital necessity to modernize legal systems and advanced by some of the most brilliant of modern philosophers, falls into dangerous dogmatism.

The initial opposition to excessive reliance upon concepts and complete acceptance of traditional abstractions was important and worthy. But the validity of the initial positivist movement provides no intellectual defense of its ultimate manifestations. On the contrary, rejection of the efficacy of legal rules is both an illogical and unscientific nonsequitur of the truth inhering in attempts to develop an empirical science of law — though not, indeed, of the exaggeration and exhortation found there all too frequently.

The relationship between modern criminology and sociological jurisprudence is apparent, as is that between extreme positivism and extreme realist jurisprudence; but it is obvious that there is every shade of opinion concerning these relationships and that the above generalizations are merely for purposes of analysis, not identification of particular views. Recent continental application of the Free Law school ideology to penal law — one of the most instructive phenomena in all jurisprudence — should reveal to criminologists and to extreme Legal Realists what are some of the practical possibilities of uncontrolled positivism.

VII. CONCLUSION

Emphasis has been deliberately placed upon certain merits of Classicism and certain shortcomings of Positivism, but not because that represents an ultimate appraisal of each school; rather because the present need is to secure a fair and sympathetic understanding of the Classicists and their contributions. The great advance of the Positivists should not, and, indeed, cannot be ignored. But corrections are necessary; and

no better method of procedure can be adopted than revaluation in light of the fundamental significance of Classicism.

The Classicists arose in an age of despotic governments, harsh laws, and arbitrary judges. The Positivists inherited relatively liberal government and the benign attitudes fostered by their predecessors. They were free to disregard, for a time, the lesson of Classicism and to concentrate upon what they regarded as scientific. In an age when democracy can no longer be assumed, but must be deliberately conserved — or, perhaps, even achieved — the writings of both schools of thought should be completely re-examined. One principle, at least, should be quite apparent: criminology cannot profitably ignore politics or law, unless it desires to run the danger of fostering evils far greater than those it seeks to eliminate. For there is more involved than repression or elimination of anti-social persons. Transcending that particular social purpose are others, not the least of which concerns the means and methods employed. Hence the chief task that now confronts criminologists is a phase of what is one of the most vital problems of our times: from the point of view of democratic societies, what is the most desirable relationship between Science and other human Values? Hidden conflicts must be discovered and expressed if sensible decisions are to be made.

If one asks why, at bottom, retroactivity of penal laws is objectionable, why all sentences should not be capital or at least unusually cruel, why, other factors constant, unequal sentences are unjust if applied to like offenders in like circumstances, the answers will inevitably take the form of certain "first principles." Once these "fundamental" values are rejected, no amount of argument carries the slightest weight. One can strive only to discover one's values and to understand them — in itself an endless task. Those lying at the basis of liberal democracy affirm the significance and ineffable worth of the individual human being. No person is regarded as good enough to dominate any normal human being. Even the all-powerful state, indeed, especially the all-powerful state, must use the regular channels of due process before any individual can be punished. So, but a few months ago, the United States Supreme Court, an agency of the most powerful capitalist society ever known, declared that a negro communist had been improperly convicted. Around an accused, however degenerate, legal procedure and prescribed rules provide a cloak of dignity and self-esteem. That is the solemn and deliberate regard of liberal democracy for the humblest of its citizens. The price for consistency with an ideal of the basic worth of each individual may sometimes be paid grudgingly, but in the long run it is deemed a pittance for the benefits conferred, the values expressed. If present, specific devices for achieving and preserving these values are supplanted by discretion, which, without doubt, does have an important and proper sphere

of operation, other devices must be discovered and employed to safeguard what is paramount. Quite apart from theoretical questions of ethics is the need to lead raw behavior into human channels. Law wisely applied — though it falls short of achieving this purpose — is one of the best instructors that society has discovered. In light of the above discussion it is necessary to conclude that there should be a strong presumption in favor of legal control of penalization. The burden of proof should be on those who claim superior knowledge and ability to attain better results by extra-legal methods.