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Individualization of Punishment and the Rule of Law: Reshaping the Legality in the United States and Europe between the 19th and the 20th Century

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Abstract.
This article focuses on the individualization of punishment and the indeterminate sentence between the 19th and 20th century and their impact on the principle of legality in Europe and the United States. The preventive and rehabilitative purposes of the criminological science were shared on both side of the Atlantic, but were interpreted and applied in different manners, depending on the different legal order shaped by the American rule of law and the European Rechtsstaat. While the U.S. system accepted the indeterminate punishment introducing a clear-cut distinction between the verdict and the sentence, as a compromise not to nullify the nullum crimen by individualizing the treatment of the guilty offender, the European penal codes based on a strict legality introduced the dual-track system as a way to reconcile repression and prevention. Both the biphasic trial and the security measures affected the principle of legality and gave the balance between individual safeguards and social security new characteristics, showing the possibility to mould the rule of law according to the historical, cultural and political context.

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1. Introduction

The specific content of this paper is the relationship between the international juridical debate on the individualization of punishment that took place between the 1870s and the 1930s and consequences of such individualization on the principle of legality as the hinge of the criminal dimension of the rule of law. My investigation focuses on the legal doctrines concerning an indeterminate sentence as a better way of individualizing criminal justice, their influence on the decisions of the lawmaker, and their conflicts and development. As we shall see, the historical findings of the paper show, firstly, that the idea of an indefinite sentence was interpreted differently in the United States and in Europe; secondly, that some of the most peculiar characteristics of the American indeterminate sentence were applied to the continental security measures; and finally, that the legislative implementation of penal devices aiming at social defense rather than individual safeguard increasingly shifted the purpose of criminal justice from repression to prevention. The essence of the ‘indeterminateness’ was openly in sharp contrast to the principle of nullum crimen nulla poena sine lege: the liberal criminal justice system both in Europe and in the United States was grounded on the ideas of the determinateness and fixity of the law, limited judicial discretion, and the retributive and deterrent aim of punishment, which were all incompatible with the claims of a rehabilitative and correctionalist treatment advocated by radical criminologists as well as by prison reformers. The more the notion of an indefinite sentence was raised, the more it turned out to be a deep wound to the classic principle of legality, forcing the doctrine to reshape the rule of law according to the new priorities of penal policy.

Some theoretical findings stem from this historical analysis as well. First of all, the findings emphasize the need for a historicizing interpretation of the principle of legality in its
relationship with the legal core of the American rule of law and with the European Rechtsstaat:
the different mindset of the U.S. and European legal cultures, based on different views of the
past and on different theories on the rationale of punishment, assigned the nullum crimen
principle a peculiar value in the legal order on both sides of the Atlantic. Moreover, the
enactment of the progressive penological ideal, with its two-faced approach of prevention and
rehabilitation, led to different solutions: while the indetermined sentence was finally held
constitutional by the U.S. courts and the doctrine was accepted as compatible with the nullum
crimen by reason of the distinction of the criminal trial in guilty phase and sentencing phase, the
European observance of the strict legality stressed the ‘jurisdictionalization’ of any measure of
safety. As a matter of fact, the preventive purpose of punishment, which according to the
progressives had to gradually replace the traditional repressive function, forced the legal
reasoning to find the arguments to justify a partial abandonment of the legality without
nullifying it. Thus, the nullum crimen as one of the main tenets of both the rule of law and the
Rechtsstaat, for different reasons in Europe and in the United States, was not dispensed with; as
we shall see, however, its historical configuration was changed and its meaning was modified.
As recent studies have shown, the rule of law in criminal justice has never been an invariable
concept, but rather a flexible rule assuming different characteristics according to the historical
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legality in relation to the influences of the criminological theories of social defense, dangerousness, and prevention is the main purpose of this paper. Between the 1870s and World War II, criminology and penology affected the criminal system both in the United States and in Europe, launching a radical attack against the liberal principles: even if the reformers’ more revolutionary proposals were rejected, some of their theories had a significant influence on the legislation as well as a remarkable impact on public opinion, administrative officials, and politicians. How could the individualization of punishment and the indetermined sentence be applied to the liberal legal orders? How did these new principles change the nullum crimen? The paper, as an attempt to offer possible answers to these questions, necessarily has a comparative approach, because a plausible interpretation of this topic must consider alliances, reciprocal influences, disputes, rejections, and wide-ranging provoking debates between the European and the U.S. legal cultures.

The comparison between American and European doctrine and the search for a theoretical basis by the former, fostered by the wide diffusion of European theories in the American culture, seem to have worked as a brake for the most revolutionary reforms supported by criminologists in the United States, such as the absolute indetermined sentence. The risk of this eclectic compromise turned out to be a failure of the rehabilitative ideal, though it aroused some remarkable outcomes in the criminal law system. To substantiate this hypothesis, the paper will examine the shift from the indeterminate sentence to the ‘measures of security’ or ‘predictive restraints’ (mesures de sûreté, misure di sicurezza, Sicherung Massregeln) enacted in many European codifications in the first half of the 20th century. The measures of security

2 See, e.g., J. Simon, Positively punitive: how the inventor of scientific criminology who died at the beginning of the twentieth century continues to haunt American crime control at the beginning of the twenty-first, 84 Tex. L. Rev. 2135, 2135-2172 (2006); M. Gibson, Born to Crime. Cesare Lombroso and the Origins of Biological Criminology (2002).
represent one of the most critical aspects of the principle of legality in the rule of law, because they allows the judge (or an administrative board or committee) wide discrectional power to limit the freedom and rights of the convict on the basis of a ‘dangerousness’ valuation. Although at the beginning they were considered something different from ‘punishment’, these measures, usually applied after the sentence for those criminals whose behavior was considered not completely reformed or reformable, contrasted with the principle of certainty and proportionate degree of the penalty, according to the severity of the crime. The punishment still conformed to the liberal “guilt-adequacy” principle, but the “danger-adequacy” principle opened the door to a variety of uncertain pre- and post-delictual measures for dangerous, habitual, and unreformable criminals or potential offenders. It is important to understand, however, if measures of this kind reflected the crisis of the liberal penal system, if it was one of the weak points of the ‘old’ criminal law machinery inadequate to contrast new forms of criminality, or rather if it was an internal unavoidable ambiguity of the liberal preventive pattern.

As it is known, the new school of criminology was based on the deterministic idea that crime was generated by different external conditions (sociological, anthropological, environmental, psychological); this radical attack on the classical notion of mens rea was usually disclaimed by both lawmakers and judges. Nevertheless, some jurists, both European and American, underlined the trend of the modern criminological school “to limit the sometimes excessive predominance of individualism and reestablish the equilibrium between the social and individual elements” and its consequent switch in criminal policy “because our ideas, inherited from the last century, are characteristically humane and stress the individual life, while the times demand greater regard for the general security”. The widespread call for individualization of

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3 E. Ferri, Criminal Sociology 19 (1917).
4 R. Pound, Criminal Justice in America 197 (1929).
punishment in the 20th century was partially changing its meaning as the stress of reformers shifted from the fittest treatment for the rehabilitation of the offender to the most functional social security measures. So the claim for ‘individualization’ that was ab origine so vehemently conflicting with the classical retributive system was gradually being absorbed in the same system, strengthening instead of subverting it.

2. Affinities and differences in the international criminological debate

The individualization of punishment became the key word of reformers in the Progressive Era in both the United States and Europe and was also considered one of the cardinal principles of the criminal law system in both the United States and European countries until the second half of the 20th century, even though the meaning of this formula has been changed by a slow but remarkable legal interpretation that has gradually voided its original revolutionary scope. Even if interpreted in different ways, the common idea shared by prison reformers, exponents of the new criminological science, and a large part of public opinion since the 1880s claimed the necessity of a radical rejection of the liberal criminal system based on the combination of deterrence, retribution, and reform in a firmly individualistic approach. The main focus shifted from the crime as an abstract entity to the criminals as natural, social human beings immersed in a complex network of environmental, social, and economic conditions that affected their behavior. As a consequence, the abstract notion of uniform and predetermined ‘punishment’ should be replaced by the idea of an individual treatment, always fitted to the

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6 This was the leading doctrine elaborated by Francesco Carrara in his main work Programma del corso di diritto criminale (1863).
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personal character, psychology, and overall social condition of the criminal regarded mostly as a person suffering from disease. The “move from individualism to individualization” and the shift “from the forms of legal prohibition and penalty to a new mode of normalisation”, with their criticism of the liberal State dogmas of moral guilt based on the assumption of free will and equality of punishment for the same crime (because the law was supposed to be totally impartial), had an international extent confirmed by the emergence of congresses on this subject (the international prison congresses and the international congresses of criminal anthropology), the founding of the *International Union of Criminal Law* in Vienna in 1889, the publication of specialized journals, and the translations of European criminological works in *The Modern Criminal Science Series*. Legal comparison became, on the one hand, the methodological approach to promote international standards of reform, and, on the other hand, the way to reach a compromise between American pragmatism and European doctrinarism. As Havelock Ellis stated in 1891 “The European criminologists (...) have worked for the most part purely as scientific investigators. The founders of Elmira, on the other hand, seem to have been

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11 Les Archives de l’anthropologie criminelle et des sciences pénales (1886 by Lacassagne) and La Revue pénitentiaire et de droit pénal, created in 1875 by the ‘Société Générale des Prisons et de Législation Criminelle’ in France; Das Archiv für Kriminalanthropologie und Kriminalistik (1898) in Germany; La Scuola positiva in Italy (1891); The American Journal of Sociology (1895) and The Journal of the American Institute of Criminal Law and Criminology (1910) in the United States.
13 See J.A. van Hamel, The *International Union of Criminal Law, 2 J. Am.Inst. Crim.L. & Criminology* 22 (1911), at 27: “There must be cooperation of practical energy and theoretical investigation. I do not deny that in Europe we sometimes exaggerate the importance of the latter. But still we are eager for the first and by strengthening our connections with our American partners, we hope to derive benefit from their rich source of social activity and scientific originality”.
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guided purely by practical and social considerations, and to have had no knowledge of the scientific movement that was arising in Europe. In the future, there is now good reason to hope, these two currents of scientific advance and practical social progress will be united. Therefore, if the first reforms such as conditional liberation, mark system, and ticket-of-leave arose out of the practical experience of prison officials in dealing with convicts especially in the United States and the United Kingdom, the claim for a more deep-seated innovation of the criminal system, oriented to both rehabilitation and social security, rested on theoretical considerations involving a re-examination of both the methodological analysis of criminality and the fundamental principles of penal law spread by the European criminologists.

In *Harsh Justice*, James Whitman offers a thorough historically based analysis of the difference between the American and the European systems of punishment; in his *longue durée* investigation, however, he considers the period from the late 19th century until the 1960s as a parenthesis where “an international penological orthodoxy made its weight felt on both sides of the Atlantic”. This paper assumes the different premise that the “criminological wave” (1880s-1930s) was not a uniform international parenthesis, but reflected in its variety the differences between American and European legal cultures and their notion of the *nullum crimen*: on the one side, the liberal criminal model based on Beccarian and Benthamian ideas of retributivism, deterrence, and strict proportion between punishment and individual guilt showed

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14 H. Ellis, *The New York State Reformatory in Elmira* iv (1891). See also M. Parmelee, *The principles of anthropoplogy and sociology in their relations to criminal procedure* 6 (1908): “It is now very essential that these reforms should be studied in the light of this new science of criminology, and that they should be given a sound scientific basis. European science and American practical reform should be brought together”; J. Ingenieros, *Criminologia* 211 (1913): “Italia pensó el nuevo Derecho Penal; Estados Unidos lo hace. La teoría nació Latina; la práctica es anglosajona”.
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a dark side in its concrete enactment (e.g., the growth of the public welfare offenses, *contravvenzioni*, police measures, and the so-called *Verwaltungsstrafrecht*) though nobody disbelieved the fixity of the principle of legality. On the other side, the correctionalists’ aims had control-based and repressive developments as corollary, which jeopardized individual rights. At the end of the 19th century the European as well as the American criminal system “[had] reached a point where the apparently firm foundations of criminal law appear[ed] to quake”\(^{19}\) and the comparative studies looked like a possible salvation to penal doctrine, penology, and criminological science in their extreme attempt to find remedies with an international dimension. However, even this faith in comparison was not at all unvarying.

In the United States some authors looked at the European theories as a modernizing source, complaining of the lack of a natural scientific method in their country compared with the continental *modus operandi* based on a careful observation of the applied devices, on a collection of complete criminal statistics concerning the spread and cause of crime, which was completely deficient in America\(^{20}\), as well as on the effectiveness of the punishment upon which to ground the reform projects. According to them, who were for the most part members of the *American Institute of Criminal Law and Criminology* or scientists methodologically close to its purpose, to look at the foreign doctrine as a ‘model’ or a ‘stimulus’ was the only way to reach a successful criminal reform overcoming the American deficiencies\(^{21}\). Other influential American thinkers conversely advocated for the “practical genius of this nation, unfettered by precedent


\(^{20}\) In the Editorial preface to the translation of Aschaffenburg’s Crime and its Repression, supra note 19, Maurice Parmelee writes that the study of the German psychiatrist “may well serve some day as a model for a work based on American statistic”, because “in this country we still lack adequate means of gathering the necessary data, while not enough analysis is made of such data as we have. It is to be hoped that this book will serve as a stimulus to increase the statistical study of crime in this country” (at XI, XV).

\(^{21}\) This was, e.g., Arthur C. Train’s opinion in his Introduction to the English version of Aschaffenburg’s Crime and its Repression, supra note 19, XVII-XXIII; see also E.A. Gilmore, The Need of a Scientific Study of Crime, Criminal Law, and Procedure: The American Institute of Criminal Law and Criminology, 11 Mich. L. Rev. 50, 50-55 (1912).
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and tradition” and therefore much more capable to “adopt and realize conceptions formulated by leaders of thought in the Old World” 22 but which were considered by their compatriots as too visionary and not yet suitable. On the other side, European criminologists and penal reformers looked up to the American innovations in prison administration and to the extreme flexibility of that country in experimenting with new types of treatment for the criminal, considering Elmira as “the most advanced penal institution in the world” 23. As we shall see, however, many of them were definitely critical of the more original and popular reforms in the United States, such as the indetermined sentence, and regarded the overseas proposals as too dangerous for individual rights in the liberal state order.

Even if the international degree of the debate surely justifies a historical-comparative approach 24, a closer view of this period bears out that what from afar could give the impression of being alike, turns out at close range to be significantly different. The recurrence of the same words on both side of the Atlantic did not always imply the same meaning: the ideas of principle of legality, individualized punishment, prevention, or social defense were often interpreted with unlike undertones depending on the cultural and legal background of the specific country. Therefore, this paper aims to historicize these concepts and their underlying ideologies, toward analyzing the roots of the dissimilar outcomes impressed on the U.S. and European legal order by the criminological studies. In these peculiarities it is perhaps possible to find one more explanation for the difference between the present criminal system in the United States and that of Europe: different interpretations of the past as well as different projects for the future roused

24 The utility of a comparative methodology in studying criminal punishment has been recently pointed out by J.Q. Whitman, The Comparative Study of Criminal Punishment, 1 Annual Review of Law and Social Science 17, 17-34 (2005).
to different achievements through the combination of criminology and criminal law.\textsuperscript{25} So indeed, as we shall see, the international rise of criminology and the growing debate on the “new horizons”\textsuperscript{26} of the right to punish impinged on the crucial principle of the liberal criminal system, i.e., the principle of legality based on the doctrine of individual responsibility and \textit{mens rea}, showing its ambiguities and reshaping its limits for social defense’s sake.\textsuperscript{27}

3. Individualization of punishment and the rule of law in the United States

The core of the problem raised by criminology, in which jurists, legislators, and judges were involved at the same time, was the relationship between the aim of an individualized treatment for the offender, the notion of \textit{mens rea}, the principle of legality, and the rule of law. As the notion of social dangerousness, that is, the prediction of someone’s future illegal and harmful behavior under the valuation of his background or character, took the place of criminal liability as the culpability for intentional acts based on the rule of causal relationship between

\textsuperscript{25} By assuming the juridical peculiarity of a legal historical analysis, I’m not choosing a short-sighted ‘internal’ point of view, neither I am adopting a strictly normativistic approach which would be much more faulty on this interdisciplinary subject. If it’s absolutely true that a merely descriptive legal-historical study of criminal justice, uncorcerned with the social context, is nowadays to be rejected, nonetheless the autonomy of the \textit{juridical} historical approach is to be pointed out, see P. Grossi, Pensiero giuridico. Appunti per una ‘voce’ enciclopedica, 17 Quaderni Fiorentini per la storia del pensiero giuridico moderno 263, 263-269 (1988). Just because «the criminal law was a means by and through which class power was exercised or legitimated or was to be understood as \textit{one technique among others} through which modern forms of criminality were constructed and social control was exercised» (M.D. Dubber, L. Farmer, Introduction. Regarding Criminal Law Historically, \textit{in},Modern Histories of Crime and Punishment 2 (M.D. Dubber, L. Farmer eds. 2007), it had its own language, its sources, its peculiar knowledge, its method which should not be confused with other sciences or absorbed in a general social-historical approach (M. Sbriccoli, Storia del diritto e storia della società. Questioni di metodo e problemi di ricerca, \textit{in},Storia sociale e dimensione giuridica. Strumenti di indagine e ipotesi di lavoro 127-48 (P. Grossi ed. 1986).

\textsuperscript{26} I nuovi orizzonti del diritto e della procedura penale (The new Horizons of the Criminal Law and the Criminal Procedure) is the title of Enrico Ferri’s seminal book, first published in 1881 (Bologna: Zanichelli), where he explains his challenging cultural project for a revolutionary criminal science; the same work, in its third edition completely emended, was published as Criminal Sociology in Turin, 1892, and was considered the manifesto of the “Positive Italian School of Criminal Law”. It was translated into English in 1896 (New York: D.Appleton and Co.) for The Criminology Series edited by W. Douglas Morrison and in 1917 (Boston: Little Brown and Co.) for The Modern Criminal Science Series.

\textsuperscript{27} See N. Lacey, In Search of the Responsible Subject: History, Philosophy and Social Sciences in Criminal Law Theory, 64 Mod. L. Rev. 350, 350-371 (2001).
conduct and unlawful result, the very idea of punishment shifted from repression to prevention. The reasons for this turn are to be found not only in the different strategy adopted by the state power to govern and control a more complex society but also in the rise of faith in sociology and psychology as a scientific means to understand, classify, and predict every human internal attitude and personality. The conviction to possibly recognize the criminal type not after the criminal’s misconduct but in advance, and the confidence in the rehabilitative ideal brought about a crisis for the retributive principle as the moral and legal justification for the scope as well as the legitimacy of the punishment. It is important to emphasize the connection between preventive pattern, rehabilitation, and individualization of punishment: the more the trust in the deterrent efficacy of punishment was faltering, the more the idea of an individualized treatment was gaining ground.  

The metaphor of the legislator as a physician whose main effort has to be preventive hygiene rather than the search for a therapy became the recurrent strategy of the new criminology aiming to overturn the retributive principle based on personal responsibility and replace the idea of a fixed predetermined sentence with the notion of an indetermined one. ‘Prevention is better than cure’ was the foregone scientific maxim that had to be applied to the criminality as a social phenomenon, finding the way to enact preventive means in place of repressive ones. But as the physician cannot foresee with certainty when the patient will be cured, so the judge cannot predict when the criminal or the dangerous subject will be definitely rehabilitated. It was not only a matter of reformation regarded as the scope of prison discipline

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28 See, e.g., E. Ferri, Criminal Sociology, supra note 3, at 240, 242: “We say in substance: punishment, as a means of repression, has rather a negative than a positive efficacy. (...) It being established that punishment, far from being the convenient panacea which it seems to classical criminalists, legislators, and the public, has but very limited power to combat crime, it is natural, therefore, that the criminal sociologist should seek other means of defense from the positive observation of facts and of their natural origin”; P.A. Parsons, Responsibility for crime. An investigation of the nature and causes of crime and a means of its prevention 61-2, 65 (1909): “There is a growing conviction that punishment does not deter. (...) The necessity is great for the interests of society that it be moral in the treatment of its criminals. In order to be this, punishment must be abandoned”. 
orientated toward the moral regeneration of the detainees, because this principle had already been approved in the International Prison Congress held in London in 1872 and then enacted in many legislations. The new challenge was not how to improve the prison system in order to protect the society contrasting the recidivism, but how to realize the défense sociale, an overall policy depending on preventive measures that resulted in a scientific handling of the social, psychological, educational, and economic issues, so that the germs of anti-social conduct would be prevented from living and thriving in the social organism.

If we are to understand what the ‘individualization of punishment’ and the ‘indeterminate sentence’ meant in the international penology and criminology at the end of the 19th century, we must understand the ambiguous relationship between fear and faith that supported at the same time the social defense program and the rehabilitative ideal. Both an individualized treatment and a flexible sentence were strong weapons against the most dangerous criminals as an extreme kind of re-education: while recidivists, habitual offenders, dangerous persons, and the degenerate were segregated for life or eliminated, first or petty offenders had the chance to avoid detention at all or gain quick freedom. The supporters of personalized treatment were up to persuade the public opinion of the righteousness of such treatment because, thanks to the belief in the scientific arguments and according to the political emergence of the moment or the popular sentiment of a nation, at times they insisted more on its

29 The elimination of the offender who was found “incapable of adaptation to the social coexistence”, was proposed by Raffaele Garofalo, Criminology 410 ff. (1914): he suggested an “absolute elimination”, that is death penalty, for murderers and a “relative elimination”, such as marooning, internment in an overseas penal colony for life or for an indeterminate period, confinement for an indeterminate period in an asylum and compulsory public works, for criminals of the other classes. This theory was clearly influenced by the social Darwinism: “In this way, the social power will effect an artificial selection similar to that which nature effects by the death of individuals inassimilable to the particular conditions of the environment in which they are born or to which they have been removed. Herein the State will be simply following the example of Nature” (Id., 220). On his theory see F.A. Allen, Garofalo’s Criminology and some modern problems, in Id. The Borderland of Criminal Justice, supra note 5, at 63-90.

30 As stressed by L. Friedman, Crime and punishment in American history 161 (1993) “the indeterminate sentence pointed in two directions: leniency and rehabilitation for the savable; eternal damnation for the rest. (…) Penal reform was both carrot and stick, and ‘habitual criminal’ laws were part of the stick”.

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practical efficacy in diminishing crime, other times on its moral justice towards criminals. However, the principle of individualization could have had such extreme consequences on the legal order that it was advocated in different ways in Europe and in the United States: the continental and the American penal systems reacted differently to this revolutionary project that impinged on fundamental principles of criminal law and procedure. Even if European and American jurists and criminologists looked at each other with great interest, the culture, tradition, and expectation of, for example, Raymond Saleilles, Gabriel Tarde, Robert Anderson, Evelyn Ruggles Brise, or Enrico Ferri were too far from those of Zebulon Brockway, Frederick H. Wines, Maurice Parmelee, or Sheldon Glueck, and exactly on this difference rested the dissimilar outcome of the criminological movement in the Progressive era.

3.1. The US legitimization of the indeterminate sentence

Let us now face squarely how the jurists of the Old Continent and the New Continent tackled the most significant problems brought about by the indetermined factor as a device of individualization and social defense, that is, the critiques to both the nullum crimen as one of the tenets of the rule of law and the mens rea as the essential prerequisite of every punishment. As it is known, the indeterminate sentence (usually a partially indeterminate sentence within a wide range determined by the law or with a fixed maximum) was enacted at the end of the 19th century in the United States but was endorsed by reformers in Europe as well. It became one of the most discussed and controversial issues of the international juridical debate, because, as it claimed to authorize a board of experts instead of the judicial power to determine the sentence, it undermined the principle of legality and unveiled an “irreducible incompatibility between the uncontrolled exercise of such great powers and the values implicit in the common law of
On both sides of the Atlantic the indeterminate sentence was perceived as the extreme limit of the flexibility of the legal order, but it was dealt with in a dissimilar way according to the different notions of separation of powers and individual guarantees in criminal trial.

In the United States many constitutional objections had been raised against the indeterminate sentence before it became a widespread accepted type of individualization in the form of a fixed legal maximum: the non-uniform decisions of the courts and the legal reasoning of the jurists gradually gave the indeterminate sentence a shape different from Brockway’s first proposal in 1877. The first point of attack against the enactment of indeterminate statutes hit the absolute power given to the board of control charged to determine the term of imprisonment of convicts with this kind of sentence, establishing regulations under which they might be allowed to be released on parole, after the minimum term, whenever they gave proof of having been rehabilitated. This provision was claimed to be an encroachment on the separation of powers, an impairment of the judicial power vested by the Constitution to fix the length of punishment, a delegation of legislative power to a prison board of experts not constitutionally defined. Only the Legislature had the duty to fix all the punishments for every crime, providing for a minimum and maximum range and giving the court, neither other persons nor any administrative body, the discretion to fix a term between these limits: with the new laws the risk for the convict was to “become the servant and slave of the prison board”, all the more so because its “despotic powers” were not reviewable by the courts. This way, not only was the

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31 J. Hall, General Principles of Criminal Law 57 (1960 2nd Ed.).
33 People v. Cummings, 88 Mich. 254, 256. The same critical position was asserted by J.M. Kerr, The indeterminate-sentence law unconstitutional, 55 Am. L. Rev. 722 (1921), at 740: “The great trouble with all the indeterminate-sentence statutes is that they are shadowy and not definite; they delegate to others the discretion
punishment no longer predetermined by law as required by the principle of legality, but its definition and imposition were delegated to an administrative body whose power was not provided for by the Constitution. According to the critics of this system, the discretion of the prison board conflicted with the tripartite genius of the American institutions fixed by the fundamental law. Moreover, the release upon condition entitled in the prison board was considered a pardon ‘in fact’ and therefore an infringement on the pardoning power of the Governor.

However, it was not only a question of competences and balanced powers. At stake were the traditional principle *punitur quia peccatum est* based on the freedom of the will, which was at odds with the progressive idea of punishment totally oriented towards the reformation of the offender and unconcerned with the principle of proportionality, and the classical pattern of criminal procedure as a rational process governed from beginning to end by the judicial branch whose duty included the sentence phase, now contrasted by a scheme with a diminished role played by two actors lacking in criminological knowledge such as the judge and the jury.

On both these quarrels with the traditional criminal system, the notion of legality and punishment, the American proponents of indeterminateness held a winning position, grounding their arguments on tough objections to the ongoing criminal justice. Firstly, the definite sentence system was strongly attacked due to its inequality and inequity, because the penalties fixed by statutes were too different from state to state and there was neither uniformity nor proportion in the distribution of imprisonment for given offenses, even within the limits of every single state. The Enlightenment ideal of punishing the same crime with the same penalty as a sign of equality before the law had already failed as had the ‘scale of punishment’, one of the more discussed

which the legislature should exercise in definite manner in positive law and not by way of suggestion and recommendation."
topics in Europe, since it was impossible to graduate it with mathematical precision in the United States. As Wines pointed out, codes with fixed penalties, like the Code Napoleon and all the others based on it, conferred upon the legislative branch the task of apportioning punishment to supposed guilt in a general and abstract way, whereas “the majority of our codes throw this responsibility upon the judicial department, but in varying measure” so that “the latitude left to judges and juries has not yet been fully stated”\(^\text{34}\). The output of an indefinite judicial power combined with the additional variation due to the ‘good time’ laws led reformers to assert that “the length of the prisoner’s term of confinement [was] largely the result of prejudice, caprice, or accident”\(^\text{35}\) and the indeterminate sentence, instead of being ridiculed as theoretical and visionary, could have won the challenge into the same field as its opponents. As a matter of fact, the decision of the prison board, oriented by the same scientific knowledge steadily increasing all around the country, would have granted a more gradual uniformity in the kind and length of treatment.

Secondly, it was firmly stated that the separation of powers was not violated. The legislative function was filled by providing the minimum and maximum term of the sentence; the judicial branch was not encroached as well, because it was entrusted with the function of determining the guilt of the individual and imposing the sentence provided by law, though ‘indeterminate’. The core of the constitutional frame was not modified, because “the pronouncing of a sentence [was], undoubtedly, a judicial act; the punishment which the sentence pronounc[ed] [came] from the law itself”\(^\text{36}\): but neither the legislator nor the court had the competence and the scientific expertise to administer the correct execution of the sentence, whose main rehabilitative-defensive scope called for a continuative progressive control of the

\(^{34}\) F.H. Wines, Possible penalties for crimes or the inequality of legal punishment 8 (1895).

\(^{35}\) Id. at 16.

\(^{36}\) State v. Dugan, 87 N. J. L. 603, 609 (1913).
convict’s dangerousness. The carrying out of the sentence and its periodical revision were affirmed to be “administrative in character and properly exercised by an administrative body”\(^{37}\), or, as stated in *Woods v. State*, the powers of the prison board “while neither judicial, legislative, nor executive (...) belong to that great residuum of governmental authority, the police power, to be made effective, as in often case, through administrative agencies”.\(^{38}\) Formally, the prerogatives of the legislative and judicial branches were not eliminated, but they were substantially curtailed by this new design, grounded precisely on their failure in the attempt to establish and secure penal justice.\(^{39}\) It is worth noting that this model was founded on a clear-cut distinction of the criminal trial in two phases, that is, the guilty and the sentence phases: the judge’s office was naturally reduced to the task of determining the guilt of the defendants, while the care of them was passed on to expert treatment.\(^{40}\)

3.2. Verdict and sentence: the solution of the biphasic trial

This bifurcation, unknown in the old American codes and above all in the European codes, was the only solution that allowed the advocates of the indeterminate sentence not to nullify the principle of legality. Let us focus on this crucial reasoning, thanks to which the indeterminate sentence theory succeeded in the United States, countering the charges of unconstitutionality by reshaping the boundaries of the judicial competences and the limits of the *nullum crimen*. According to this interpretation, the punishment is still fixed by the law within a minimum-maximum term and therefore is not void for uncertainty, so the *nulla poena sine lege* principle is in its essence observed. The same can be said about the fundamental right to due

\(^{37}\) *In re Lee*, 177 Cal. 690, 693 (1918).

\(^{38}\) *Woods v State*, 130 Tenn. 100, 114 (1914).

\(^{39}\) See again Wines, The new criminology, supra note 22, at 11.

\(^{40}\) See C.D. Warner, Some aspects of the indeterminate sentence, 8 Yale L. J. 219 (1899), at 222.
process of law as one of the pivots of the common law tradition of the rule of law: the guilty phase was still in the hands of the judicial branch so that nobody could be convicted by a non-jurisdictional, and hence discretionary, power. Nevertheless, after the verdict, the legal cover of the legality with the guarantee of a predetermined, not arbitrary, punishment vanished in respect of the prevailing interest in an individualized treatment. The idea of a progressive treatment, handled by a professional board of experts with criminological scientific competences, prevailed in the majority of the American legal culture over the ‘old’ fear of administrative, not strictly regulated decisions. As we shall see, this has been one of the main differences with the European notion of individualized punishment, because most of the continental codes rejected the separation between guilt and sentence.

A further complication stirred by this bifurcation dealt with the law of evidence. The increasing recognition of the rehabilitative function of punishment at the end of the 19th century fostered the shift from the fixed sentence statute to that of the discretionary sentence, raising some problems as regard to the admissibility of character evidence and the so-called undue prejudice rule, under which evidence of prior misconduct was excluded from the trial procedure, even though relevant as to guilt or innocence, because the jury charged to give the verdict must not be influenced by the defendant’s past record. The common law principle of separating the trial from the sentencing function, partially modified by the statutory procedure of determining sentence spread in the early part of the 19th century, was now to be reaffirmed especially with regard to the habitual criminal statutes and the indeterminate sentence laws, which were a clear “recognition of the principle that the sentence is not part and parcel of the verdict but a distinct and separate act”. The very notion of an individualized sentence advocated by the correctionalists was founded on the possibility of adapting the punishment-treatment to the

41 The admissibility of character evidence in determining sentence, 9 U. Chi.L. Rev. 715 (1941-42), at 720.
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criminals’ personality, an aim that was simply impossible without a widespread study of their background. The jurisprudential trend to emphasize the separation between the task of trying the accused and the task of sentencing the criminal was perfectly functional to balance the defense of the constitutionality of the indeterminate sentence with the preservation of the undue prejudice rule as an inalienable part of the common law procedure. It is worth noting that, as Wigmore pointed out, “in the Continental traditions of criminal trials”, the character evidence “[was] given great consideration and [was] freely used”42: on the one hand, if this difference eased the valuation of the prior criminal conduct in the European proceedings, where the punishment was also the consequence of the criminal’s history, on the other hand the refusal of the guilty-sentence phase distinction ‘vested’ with the principle of legality the entire trial, sentencing function included, prohibiting, as we shall see, acceptance of the indeterminate sentence.

The individualization of punishment was also furthered by the theoretical rejection of the idea of free will as the basis for criminal liability and the acceptance of a deterministic approach to crime. The notions of moral responsibility and of proportionality based on guilt became the targets of the more radical reformers, whose strength rested upon their blind faith in the scientific achievements of the positive psychology: the classical method was labeled as a “purely subjective illusion”43, “the fallacy which pervades the entire system”44, “a myth, a figment of the imagination, unsubstantial as a disembodied spirit”45, a system that was “as completely discredited, and as incapable of a part in any reasoned system of social organization, as [was] the practice of astrology or the police against witchcraft” besides being an “organized

42 J.H. Wigmore, A treatise on the Anglo-American system of evidence in trials at common law, I, 413 (1923 2nd Ed.).
43 Ferri, Criminal Sociology, supra note 3 at 38.
44 Garofalo, supra note 29 at 337.
45 Wines, The new criminology, supra note 22 at 11.
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lynch law”. Prescribed penalties, uniformly proportioned to the abstract scale of guilt, had to be eliminated because there was no mens rea to blame for the crime but only dangerous types to put under a preventive control: “definite sentence are never reformatory”, as Wines stated, “since they are in fact retributory and are founded upon character of the act which is past (...) and is therefore irrevocable. Reformatory sentences can be based only upon character of the actor it is desired to correct, but the time to alter it cannot be estimated in advance”. The very notion of mens rea as a classic tenet of the penal system was, nonetheless, imperiled by the thorough modern conception of criminality, shifting from a basis of individual guilt to one of social danger. As it was more clearly recognized from the 1920s on, the main topic of criminal jurisprudence, namely, the relationship between the protection of the individual and the protection of society, was changing, and attention was shifting to general security. The more the preventive goal of criminal law gained ground, the more the function of the culpability doctrine changed: preventive measure and rehabilitative treatment had to consider the mental state of the wrongdoers no longer as the essential prerequisite of every punishment, but just as a symptom of the psychological nature of the offenders and an index of their more suitable treatment. Furthermore, this trend away from 19th century individualism toward a new importance of collective interests is recognizable even in the increasing number of police offenses or public welfare offenses without proof of a personal guilt, required by a more

46 C.T. Lewis, The Indeterminate Sentence in The reformatory system in the U.S. 60 (1900).
47 F.H. Wines, Punishment and Reformation 213 (1910).
48 See, among others, R. Pound, The Individualization of Justice [1930], now in Roscoe Pound and Criminal Justice 176 (S. Glueck ed. 1965): “people now feel very acutely the demands of general security. A century ago the stress was upon the individual life, upon humanity, not upon security. Men now are afraid of anything that seems to have any flavour of humanity. Rightly we are insisting, and we are having to insist, that the general security receive more attention”.
49 See A. Lévitt, Extent and function of the doctrine of mens rea, 17 Ill. L. Rev. 578, 594-595 (1922-23).
complex social order and a more penetrating administrative sanctioning power. The rise of *mala quia prohibita* was, indeed, a further sign of the new penology switching to a system of offenses whose aim was primarily not to punish a damaging act *ex post* but to prevent it *ex ante* by forbidding a likely risky behavior.

Finally, those advocating the indeterminate sentence kept on saying that their proposal, rather than having a rehabilitative aim, was first of all a striking device of social self-defense. It offered a wide range of lawful choices, from the redemption of the offender to his incapacitation for evil or his elimination, depending on what was considered more useful for the security of social order in each case. Nevertheless, the protection of the criminal was presented only as an indirect effect of the protection of society, thus gaining consensus among the public opinion scared by the plague of recidivism. Wherever the indeterminate sentence was enacted, statistical records showed a longer average of detention that persuaded even the more skeptical opponents who feared a system that was too lax.

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50 For a thorough analysis of the influence of the criminological theories on the regulatory measures at the beginning of the 20th century, see Sayre, Public welfare offenses, 33 Colum. L. Rev. 55 (1933). See also Whitman, *Harsh Justice*, supra note 17, at 14, 201.

51 This trend, common in the United States and Europe, was pointed out by A.C. Hall, Crime in its relations to social progress 269-99, 331-48 (1901), where the rise of prohibitory statutes was seen as a necessary device to prevent the degeneration of *liberty* (freedom within limits) into *license* (absolute freedom from restraint dangerous for the general welfare).

52 For an example of the rhetorical discourse supporting the indeterminate sentence see, e.g., E. Smith, *The indeterminate sentence for crime. Its use and its abuse*, 17 Charities and the Commons 731 (1907): “The old theory of retributive punishment for crime has been thoroughly discredited and is now repudiated by all competent authorities. It has been supplanted by a radically different theory, the key-note of which is not vengeance but public protection. (…) From this view of the function of the state, there has been evolved the indeterminate sentence for crime, the essential principle of which is that no convict should be discharged from prison until he is fitted for freedom”.

53 See, e.g., A.W. Butler, *Ten years of the indeterminate sentence*, 11 Publications of the American Statistical Association, 85 (1908): “A study of the records of the State Prison has brought out the fact that the last three hundred men received under the old definite form of sentence served an average of 1 year, 9 months, and 14 days. The first three hundred received under the indeterminate sentence law served an average of 3 years, 2 months, and 12 days, or 1 year, 4 months, and 28 days longer”, and Id., The operation of the indeterminate sentence and parole law. A study of the record of eighteen years in Indiana, 6 J. Am.Inst. Crim.L. & Criminology 885, 891 (1916).

54 One of the recurring objections against the indeterminate sentence was that the great majority of prisoners under the new system were released on parole immediately upon the expiration of the minimum term of the sentence, that had practically become the length of detention regardless of any scientific criminological valuation of the character
3.3. The Practical Dissatisfaction

In the 1920s, notwithstanding a considerable diversity in the statutory provisions, the indeterminate sentence had been largely enacted in the United States. However, a strong objection against it was rising, which was due not just to its questionable constitutionality, but to its efficacy and legitimacy. The reformatory enthusiasm of the first phase, according to which all offenders could be re-socialized with the right treatment, gave way to a more skeptical valuation of the concrete enforcement of the indeterminate sentence and parole. On the one hand, the more radical proponents of the reform, such as Brockway, kept on invoking the adoption of an absolute indeterminate sentence, without which the correct reformatory prison system would have always been incomplete and vitiated. On the other hand, a growing dissatisfaction with the attitude of the prison boards shifted the debate from the righteousness of a reformatory punishment, by that time already accepted as a sign of the modern penology, to the fairness and competence of the personnel charged with the task of administering the sentence. Theoretically, the indeterminate sentence was the most extreme as well as the most effective form of individualization, but its practical realization was totally unsatisfactory. It lacked the necessary premises, namely, scientific criminological knowledge among prison officers and suitable parole methods. The proposals of ambitious reformers were at odds with

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55 Thirty-seven states in 1921. For a summary of the different legislations, see the 1917 report of the Committee “F” of the American Institute of Criminal Law and Criminology, written by its appointed chairman E. Lindsey, Indeterminate sentence, release on parole and pardon, in 8 J. Am.Inst. Crim.L. & Criminology 491 (1917).

56 In 1907 he pinpointed three obstacles to the realization of the reformatory system: “the conservatism of the old time notions yet remaining with some of our courts and with some lawyers”; “the lack of confidence in the possibility and certainly in the probability that administration of prisons can be had quite devoid of prejudice and partisan interference”; “a mistaken sentimentality” in favor of the prisoners in the event of their restraint beyond the right time (Z. Brockway, An absolute indeterminate sentence, 17 Charities and the Commons 867, 869 (1907)).

57 See, e.g., R.J. Wright, Digest of indeterminate sentence and parole laws 79-80 (1936): “One of the glaring defects of the entire parole situation today is that of an inadequate personnel. (…) The important elements contributing to intelligent and well-planned administration, such as modern investigative and social case methods, supervision
the real parole procedure and administration and with the conditions of the detention institutions as well. An examination of the concrete situation of the reformatories and a closer scrutiny of collected statistical data on the efficacy and consequences of punishment showed all the limits of the reformatory sentence implementation, spreading a general mistrust in its beneficial effects on both the offender’s rehabilitation and the social defense.

“It is time to suspend theoretical discussion and undertake detailed observation of the operation and results of the statutes we have before proceeding further with theorizing”\(^{58}\): strangely enough, after having looked at the European criminological science in search of a theoretical basis for the indefinite sentence, the American legal science from the 1920s on claimed a return to a more pragmatic approach, grounded on an unbiased valuation of the pros and cons of the indeterminate statutes such as applied in the different states. The legal problem was shifting from the abstract justification of the indeterminate sentence within the constitutional limits to the objective assessment of its opportunity and the best method for its implementation without betraying the original purpose of rehabilitation. This second, more critical phase of the American discussion on the reformatory punishment clearly raised the question of legality, as an echo of many European thinkers’ position but also, from the mid-1930s, as an inner reaction against some continental degenerations such as the German Nazi penal laws. In 1929 Roscoe Pound stressed the “reaction from administrative justice, the chief agency of individualization” brought about by the movement for indefinite sentence and preventive justice in the United States: it had threatened both the “general security (…)  

\(^{58}\) Lindsey, What should be the form of the indeterminate sentence, supra note 54, at 541.
impair[ing] the fear of the legal order as a deterrent upon anti-social conduct, and releas[ing] habitual offenders prematurely”, and “the security of the individual life by committing too much to the discretion of administrative officers”\(^59\). It was a frontal attack on the progressive crusade that had challenged the *nulla poena sine lege* principle: the reformers had failed exactly in their main goal of preventing crime by rehabilitating the offenders, of protecting society by reforming the criminal. Good ideals had not been followed by so good devices, and the result was the need for a radical rethinking of the administration of punishment, finding the way to make the methods of an individualized penal treatment “reasonably predictable”.\(^60\) The effort made by Sheldon and Eleanor Glueck to find a method of prognosis for the fittest treatment through the notion of ‘predictability’ was the extreme attempt “to introduce scientific method into the work of criminal courts and parole boards”\(^61\): it was not a condemnation of the indeterminate sentence per se, but of its wrong unscientific application. The target of the critique was the too broad discretion given to the prison board, a problem that evoked the risk of an unlimited arbitrary power conflicting with the fundamental principle of the government by law and not by men.

It is plausible to assume that in the 1920s American thinkers were influenced by the moderate view of the European penologists and criminologists on the ‘marvelous’ benefits of

59 R. Pound, Foreword to Sheldon and Eleanor Glueck, Predictability in the administration of criminal justice, 42 Harv. L. Rev. 297, 298 (1929).
60 Id. at 299; see also Pound’s synthesis: “But over-enthusiasm in the decades of progressivism, inadequate provision for administration of the new devices, the necessarily experimental character of some of them, leaving many things to be worked out by trial and error, and the strain put upon the whole machinery of criminal justice by post-war conditions in our large cities, have brought all the agencies of preventive criminal justice under suspicion” (at 299).
61 S. and E. Glueck, Predictability in the administration of criminal justice, supra note 59 at 328; see also at 327: “In other words, legislative prescription of penalties, and judicial sentencing, are founded upon considerations almost wholly irrelevant to whether or not a criminal will thereunder ultimately be a success, partial failure, or total failure. Can any proof of the unscientific nature of the contemporary treatment of this problem be stronger?”. Still in 1940 the indetermined sentence, if properly applied, was seen as a possible solution to the sentencing problems, better than the judicial officers’ discretion that caused a great disparity of sentence: “If the system operates properly, however, and its administration is implemented by scientific supervisory personnel permitted to maintain an independence of action, indeterminate sentence by no means result in coddling the offender in any way” (M.F. McGuire – A. Holtzoff, The problem of sentence in the criminal law, 20 B. U. L. Rev., 423 (1940), at 433).
the indeterminate sentence; nonetheless, it was not hitherto a complete abandonment of the ideal of an individualized punishment. The change in the legal discourse upon individualization in the United States is worth noting: as Wines pointed out, the origin of the indeterminate sentence with the creation of the Elmira reformatory couldn’t have been influenced by the European criminal anthropology because in 1870s it was little known yet.\textsuperscript{62} The first, enthusiastic phase and fortune of the indefinite method was basically experimental. Later, the continental doctrines had a relevant impact on the New World penology, seeking, as we have seen, for dogmatic roots for their prison reforms. This convergence with the European approach, though, upset the early optimism of the reformers, and the legal reasoning had to face the difficulty of designing the whole criminal system in the light of constitutional principles and the rule of law. The more the ideal of an individualized punishment had to be translated into a rational penal policy, the more the original enthusiasm was weakened by the problems of its consistency with the rule of law tradition and the democratic constitutions. In this sort of reversion that questioned the legality and the method of applying the indefinite sentence, some decades before the ‘decline of the rehabilitative ideal’ that took place between the 1960s and the 1970s\textsuperscript{63}, it seems to us that the European legal anxiety not to overturn the \textit{nulla poena} principle affected the American thinkers as well.

3.4. Rethinking the limits of the rule of law

The debate aroused in Europe by the Free Law school of jurisprudence, the legal modernism, the \textit{freie Rechtslehre}, had an echo in the United States and impinged upon

\textsuperscript{62} Wines, The new criminology, supra note 22 at 12.
criminology and penology as well. Writing the *Introduction* to the translation of Saleilles’ *L’individualisation de la peine* in 1911, Pound emphasized the “reaction against administration of justice solely by abstract formula” throughout the world and focused on the role played in the United States by jurors or courts in finding a new balance between the extra-legal equity of the concrete cause and the preservation of the form of the law. In the Anglo-American institution of the courts of equity he saw the instrument to achieve the desirable “system of individualization”, both legal and judicial. What is to be remarked is, though, the adjustment, not to say the relativization, of the rule of law: it was taken no longer as a strict inflexible rule but as a “general guide” that could suffer some relaxations in its concrete functioning. What Pound was proposing was exactly to ‘historicize’ the rule of law, rethinking its meaning according to the current problems and challenges to come of the criminal justice. The penal individualization in the United States could not be precluded by constitutional provisions, because the very notion of ‘unconstitutionality’ was changing and was different from that of the 18th century, so as changes in the State constitutions were becoming “quite easy enough, when there [was] anything which reasonably demand[ed] it”.

For Pound, the time was ripe for progress in the administration of criminal justice, without being inhibited by the old principles of the founding fathers: he claimed not for an abolition of the past institutions, but for their adjustment to the new developed industrial society. In 1930 he pointed out the dissatisfaction with the mechanical operation of legal rules, invoking a “balance between rules of law and magisterial discretion” in order to give effect to both social defense and individual safeguards. His thorough analysis was based on a continuous historical contraposition between the ‘past’ and ‘present’ conditions

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65 Pound, Criminal Justice in America, *supra* note 4 at 38.
of American society and justice\textsuperscript{66}: the “traditional spirit of our law”, the “democratic tradition”, the “pioneer institutions”, the “whole apparatus of juristic thinking” had not to be disavowed, but “reshaped”, “overhauled” and “transcended”.\textsuperscript{67} This task of reshaping the rule of law without renouncing it, the success of which rested upon the modern trend of cooperation of social scientists, psychologists, physicians, and lawyers, followed the “line of progress” and was the only way to achieve three special aims: preventive justice, what he called a “systematized individualization” and a “readjustment of our legally received ideals as to the balance between the general security and individual life”.\textsuperscript{68} Pound was firmly convinced that neither the common law tradition of criminal law nor the rule of law was so strict as to preclude the possibility of its evolution toward individualization.

In 1937 Jerome Hall, in light of the “infusion of equitable principles that overrode the rules of law”\textsuperscript{69} in many European States, questioned the role and the vitality of the principle of legality on both sides of the Atlantic. The \textit{nullum crimen nulla poena sine lege} principle, a creation of the continental Enlightenment of the 18\textsuperscript{th} century and the premise for many penal codifications as the way to fix strict rules of interpretation, had been partly imported in the Anglo-American legislation as well, through the substitution of the common law of crime with penal codes or statutes. But quite in the Old World something was changing.\textsuperscript{70} From the

\textsuperscript{66} Id. at 197-98: “Penal treatment in America today raises specially difficult questions because the time calls for individualization and the traditional spirit of our law calls for generalized penalties; because our ideas, inherited from the last century, are characteristically humane and stress the individual life, while the times demand greater regard for the general security; because at the time when we need to experiment and try out new devices the public fears a relaxation of punitive measures; because conditions of urban life and a multitude of new offences have filled our penal institutions with types for which our traditional methods are ill-adapted, and yet new methods are scouted as depriving penal treatment of its deterrent effect.”

\textsuperscript{67} Id. at 197, 198, 199, 215, 214, 215.


\textsuperscript{69} J. Hall, Nulla poena sine lege, 47 Yale L. J. 165 (1937), at 186.

\textsuperscript{70} The German Act of June 28, 1935, providing the punishability “according to the fundamental conceptions of a penal law and sound popular feeling” and allowing the penal analogy, such as the Russian Penal Code of 1926 based on the punishment of all behaviors considered “socially dangerous” according to the revolutionary standards,
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perspective of the American jurist, the more the ‘constitutional’ value of the *nullum crimen* was vanishing the more the notions of rule of law and *Rechtsstaat* were at stake. The principle of legality, even in its Latin brocardo, is composed of two connected but independent parts: *nullum crimen* refers to the incriminating norms, their interpretation and application, whereas *nulla poena* refers to punishment, whose type and length should be determined by law. As Hall stated, “as to *nulla poena sine lege* in its reference to punishment there [had] been very considerable departure from classical views”, due to indeterminate sentence, suspended sentence, ‘good time’ laws, parole etc.: even if someone was suggesting as the proper goal of correctionalism the retention of *nullum crimen* and the abandonment of *nulla poena*, he rejected this solution as questionable and too risky for individual guarantees. For Hall, the two rules were “inextricably interwoven” and, summing the shift of interest from the crime to the personality of the criminal claimed by criminologists, which had the abandonment of *nullum crimen* as a corollary, with the demand for complete individualization of punishment through the complete abandonment of the *nulla poena*, the risk was to entirely eliminate any criminal act and only substitute the measures of social defense to punishments. Hall was not a strong opponent of the individualization of punishment; on the contrary he suggested in 1935 a gradual step-by-step policy toward its adoption, so as to match the validity of the treatment method with the

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71 Even if Hall pointed out the indefiniteness of the very idea of *Rechtsstaat* (Hall, *Nulla poena sine lege*, supra note 69, at 181 “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”, 181), he recognized its kernel in the limitation upon the discretionary power of the government by strict and specific rules. The *nullum crimen nulla poena* principle, considered as “the essence of *Rechtsstaat*, in its penal aspect” (Hall, *Nulla poena sine lege*, supra note 69, at 182) was challenged by the laws referred in the note above and its abandonment was insistently called for by the advocates of individualization.

72 *Id.*, 183.

73 *Id.*, 183.
availability of a body of competent officials and the consensus of public opinion.\textsuperscript{74} In the abstract he did not condemn the sacrifice of the \textit{nulla poena} as regards the treatment of criminals, but he seriously worried about the concrete enactment of individualization both in Europe and the United States, and in 1937 he blew the whistle on its real effect to mask a repressive punishment behind the veil of the fittest treatment and social defense. In a global historical context where the basis of democracy was at stake and criminological ideals showed their dark side, the \textit{nulla poena} had to be defended as “the most cherished of all the values involved in the administration of the criminal law”.\textsuperscript{75} “For the abolition of \textit{nulla poena} provides a sieve through which can flow not only humanity and science but also repression and stupidity”\textsuperscript{76}: with a realistic view, thanks to an historical comparative analysis of the development of the notions of rule of law and \textit{Rechtsstaat} in the 1930s, Hall recognized the ongoing failure of both the indeterminate sentence and the strategy toward an individualized treatment.

In brief, from the experimental enthusiasm in the 1870s for indefinite sentence and individualization of punishment to the skepticism of the 1930s, the American legal discourse acknowledged how the whole criminal legal order was strained by these reforms. In so far as indeterminateness for the sake of rehabilitation asked for a shifting from determined provision and judicial guarantees to administrative discretion in the sentencing phase, it acted as a worm

\textsuperscript{74} See J. Hall, Theft, Law and Society 292-298 (1935), and 298: “The entire analysis reveals the technique necessary for further application of individualization, namely, \textit{a progressive utilization of this treatment beginning with the crimes which arouse least public emotion, and ascending from that point only as rapidly as experimentation and an educated public opinion permit}”.

\textsuperscript{75} \textit{Id.}, 184.

\textsuperscript{76} \textit{Id.}, 189. His critical position on individualization was confirmed in later works, when the debate in the United States was still opened; see, e.g., J. Hall, General principles of criminal law 58 (1960, 2\textsuperscript{nd} ed.): “While, in general, one applauds the sound individualization of treatment and feasible programs of crime prevention and rehabilitation, it should also be remembered that the rule of law, especially as regards crime and punishment, is the greatest achievement of Western political experience”; J. Hall, The purposes of a system for the administration of criminal justice (1963).
destroying the guarantee of the principle of legality from the inside. Even if the rule of law in the common law tradition could have taken on a new significance according to the historical and social context, it was reaching a breaking point. Surely, one of the most important effects that criminology had at the end of the 19th century was a sort of enlargement of the boundaries of legality: indeed, in the effort to discipline by law not the act but the character, not the responsibility but the social dangerousness, the perimeter of the *nullum crimen nulla poena* was so extended that it was emasculating.77 The prevention of crime, and the enactment of the fittest therapy for the criminal, could have been reached only by means of an extended control of the State in the individual and social life: nonetheless, this growing role played by the public power easily obliterated the illusion of a sound scientific treatment of the offender and unveiled the repressive side of the reforms in the Progressive era. The opposite attitudes of American and European reformers about the role of the State is worth emphasizing: the former, accustomed to a minimum state institutional landscape, suggested a more invasive function of the discretionary public authority, considering the growing shadow of the State as an opportunity rather than a danger; the latter, contrariwise, even if their constitutional framework was centered upon the foremost role of the legislative and administrative State, regarded any room for discretion in criminal law as a sign of the despotic Ancien Régime defeated by the liberal revolutions.78 As we shall see, this contrasting perspective, due to a different tradition of liberty and democracy, was the premise of unlike opinions on the indeterminate sentence.

77 See Garland, Punishment and welfare, supra note 7, at 103-107.
78 As David Rothman pointed out, “the most distinguished characteristic of Progressivism was its fundamental trust in the power of the state to do good, The state was not the enemy of liberty, but the friend of equality (...) In criminal justice, the issue was not how to protect the offender from arbitrariness of the state, but how to bring the state more effectively to the aid of the offender. The state was not a behemoth to be chained and fettered, but an agent capable of fulfilling an ambitious program. Thus a policy that called for the state’s exercise of discretionary authority in finely tuned responses was, at its core, Progressive” (D.J. Rothman, Conscience and Convenience. The Asylum and its Alternatives in Progressive America 60 (1980)).
4. A different tradition: the European rejection of the indeterminate principle

Let us now turn to the European attitude toward the indeterminate sentence. Between the 1890s and the 1910s the issue became the object of universal curiosity, discussed at many international congresses: however, even if the principle was considered as ‘something in the air’ by its continental proponents who believed in its progressive unstoppable pervasiveness, the idea of an indefinite punishment in the Old World was hardly accepted and was surrounded by many suspicions. My intention here is to analyze the main critiques against the adoption of the indefinite sentence and focus on the alternative strategy aimed at enacting indeterminate measures of detention not in the place of but in addition to the ordinary punishment. It is worth noting that, while the European opponents of this neither legally nor judicially determined penalty appealed to their strong tradition of individual liberty against any arbitrary power and to the strict limits of the nulla poena to contrast the introduction of the reform such as passed in the United States, they were absolutely favorable to apply preventive forms of custodial control, without any fixed term or with long term, to particularly dangerous classes of criminals after the expiation of the punishment. Indeed, the adoption of the dual-track system in many European codes meant the defeat of the reformers’ ideal of rehabilitation through an individualized treatment and the success of a State control policy implying an extended administrative power on individual rights. The dangerousness of this divestment of criminal law was part of a broader transition toward a therapeutic welfare state, whose roots and grounds might be already found in the way the European legal reasoning enacted the notion of ‘individualized treatment’ in the liberal era.

79 See, among others, G. de Lacoste, Étude historique sur l’idée de sentences indéterminées 93 (1909): “Il est donc certain que l’idée nouvelle n’a point fait faillite. Aussi peut-on être persuade qu’elle progressera, et finira par se réaliser un jour pleinement”; see also W.E. Wahlberg, Das Principl der Individualisirung in der Strafrechtspflege 144 ff. (1869).

80 See Garland, Punishment and welfare, supra note 7, ch.8; Sullivan, Liberalism and crime, supra note 1 at 1-15.
4.1. The principle of legality and the heritage of the ‘Ancien Régime’

The relative indeterminate sentence had some influential advocates among European jurists, such as van Hamel, von Liszt, and Saleilles. They surely were favorably influenced by the American experience, but revealed from the beginning the double goal and the different meaning of the proposed reform: the indeterminate sentence could have been applied both as a “peine de réforme” for occasional criminals to whom the ordinary penalty was not enough as well as for habitual delinquents who committed petty offenses, and as a “peine de sûreté” for the more dangerous habitual offenders and incorrigible recidivists. Reform and prevention were the two possible targets of the indeterminate principle, which in its original formulation had to be strictly interwoven; the critical approach of the European jurists led to a progressive acceptance of its preventive exploitation and a refusal of its corrective potentiality. What is worth stressing for the purpose of this paper is that the outcome of the ‘Europeization’ of the indeterminate factor turned out to be partly a reduction and partly a betrayal of the first ideal. The reformatory character of the origin shifted toward a more conservative misuse of the criminological ideas, hiding repressive aims behind the mask of the fitter treatment for the criminal. In this process, the European legal culture played a crucial role in hindering the most innovative reforms by turning the more pragmatic American claims into the traditional technical limits of the rule of law doctrine. The first notion of individualization, originally criticized, was taken in by laws and Courts but with a reductive meaning, whereas the principle of an indefinite

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81 Among the Italian proponents of a relative indeterminate punishment see, e.g., B. Franchi, Di un sistema relativo di pene a tempo indeterminato, 9 La Scuola Positiva 449 (1900). On the contrary, Raffaele Garofalo (Di un criterio positivo della penalità 72 (1880); Criminology, supra note 29 at 411) and Enrico Ferri (Criminal Sociology, supra note 3 at 502-509) were strong advocates of the absolute indeterminate sentence.

82 This was the opinion expressed by van Hamel, see Séance de la Société Générale dés Prisons du 19 avril, 1899, Revue Pénitentiaire 661, 675 (1899).
punishment was enacted as a preventive tool against the dangerous offender to apply after an ordinary time spent in prison. The European jurists’ legal reasoning that was willing to defend the *nullum crimen* and *nulla poena* as an unavoidable foundation of the rule of law, adapting the aim of individualization to the retributive system and searching for a compromise between radical progressives and conservatives, refused the more subversive idea of rehabilitation and adopted the virtually unlimited repressive scope of the social defense.

Let us briefly trace the main European oppositions to the indeterminate sentence, all of which were more or less explicitly grounded on its contrast with the traditional values of the criminal law in the liberal state model. The first difference between the American and the continental approaches concerned the very philosophical justification for punishment. As stated by Tarde, the social function of punishment was complex and could not be reduced only to the rehabilitation of the criminal: besides being reformative, the criminal sanction had to be retributory as well as deterrent. The judicial sentencing of a determined and publicly stated penalty satisfied the collective indignation for the crime and represented a beneficial and necessary reaction against the troubles caused by the crime in the conscience of honest citizens. The insistent analogy between criminal and patient suggested by the advocates of an extremely individualized justice was a mistake: punishment had to be “exemplaire at intimadante” and therefore absolutely different from the treatment of a disease. Moreover, indeterminate detention

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83 Even such a reformer as von Listz, suggesting to extend the meaning of the rule to the dangerous behaviours, considered the *nullum crimen* as an essential guarantee of the individual against the absolute power of the state: ‘Der Doppelsatz: nullum crimen sine lege, nulla poena sine lege - ist das Bollwerk des Staatsbürgers gegenüber der staatlichen Allgewalt, gegenüber der rücksichtslosen Macht der Mehrheit, gegenüber dem ‚Leviathan‘’ (F. von Listz, Über den Einfluß der soziologischen und anthropologischen Forschungen in Id. Strafrechtliche Aufsätze und Vortrage II 80 (1905)).

84 The effort of Tarde to conciliate free will and determinism, avoiding the possibility of a totally individualized sentence based only on the character and the personality of the offender; the Saleilles’ distinction between responsibility and dangerousness; the prospect of finding legal criteria predetermined by law to evaluate the dangerousness (E. Ferri, Giustizia penale e giustizia sociale, 21 La Scuola Positiva 33 (1911)), and the insistence of some Italian jurists (U. Conti, Diritto penale e suoi limiti naturali (concetto della pericolosità criminale) (1912)) on the necessity to ‘define the boundaries’ of the criminal law, are all evidences of this technique of compromise.

85 G. Tarde, Considération sur l’indétermination des peines, Revue Pénitentiaire 750, 753 (1893).
presupposed the inefficacy of the reformatory sentence: as Roux pointed out, the fault for the
defeat of the rehabilitation process also had to be laid upon the system of administering the
sentence, and if the therapy did not work it was nonsense to extend it \textit{sine die}. When a patient is
not satisfied he is free to look for a fitter treatment, whereas with the indefinite punishment the
culprit is forced to put up with the “médecins de l’État” even if they do not do him any good: for
this reason, the indeterminate sentence was not only detestable, but also risible.\textsuperscript{86} The other side
of the state right to punish the crime in the liberal framework was the criminals’ right to be
punished\textsuperscript{87}: the principle of legality had to be declined also in terms of the predictability of an
objective punishment, because the unlimited discretion of a public body to treat the offenders
until their moral reform rested on the very dangerous premise that the State had the duty to
uniformly educate deviant citizens.\textsuperscript{88} The classic notion of a ‘minimum criminal law’ conflicted
with the invasion of the individual conscience by a welfare state that was trying to hide an
enlargement of the penal law boundaries behind the mask of a scientific ‘medical’
legitimization.

A second difference hindering European recognition of the indeterminate principle was
the lack of the same preconditions that fostered the reform in the United States. The eminent
English prison reformer Evelyn Ruggles-Brise, who considered the indeterminate sentence “in
striking contradiction to the principles that [had] hitherto, at least in Europe, regulated the
punishment of crime”, namely, that the punishment to be effective should be certain and
definite, that the sentence of the court should be the final arbitrament of the case, and that the

\textsuperscript{87} For a study of the right to be punished as one of the basic character of the Enlightenment and the liberal penal
system see M.D. Dubber, \textit{The right to be punished: autonomy and its demise in modern penal thought}, 16 Law and Hist.
Rev. 113 (1998); a thorough historical analysis of the punishment as a right of the criminal and an including
factor of the offender in the legal order is also in G. Cazzetta, “\textit{Qui delinquit amat poenam}. Il nemico e la coscienza
dell’ordine in età moderna”, 38 Quaderni fiorentini per la storia del pensiero giuridico moderno 421 (2009).
\textsuperscript{88} See the exploitation of criminal law devices in terms of ‘governmentality’ and ‘normalisation’ proposed by
Foucault, e.g. in \textit{Surveiller et punir. Naissance de la prison} (1975).
prerogative of mercy was an essential attribute of the sovereignty, indicated three reasons justifying the American adoption of the reform: the want of public confidence in, and respect for, the State’s Judiciary; the imperfections of the prison system; and the reaction against the lack of uniformity in the criminal codes of the different states of the Union. The history and development of the English (and European) criminal justice had led to a different situation: the discretion of the judge, never subjected to political pressure by the interested parties as were the elective American colleagues, was one of the most sacred principle of English criminal law and, more broadly, the strength, character, and tradition that belonged to the judiciary in Europe prevented the same distrust in this constitutional power. Whatever effort to individualize the sentence had therefore to be referred to the judicial branch, whose role and duty was to interpret the public sentiment about crime. Moreover, instead of neatly separating the guilty phase from the sentencing phase, such as suggested by the American reformers, the target of an individualized punishment could have been better achieved through a “close and intimate relation between the judicial authority that passe[d] the sentence and the prison authority that execute[d] it”. As for the uniformity of punishment, the post-revolutionary penal codes in Europe had already reached this goal, thanks to the general enforcement of the principle of

90 See E. Ruggles-Brise, Discretionary powers of judges in England (Contributed to the Paris Congress) in Id., Two Prison Congresses, supra note 89 at 117-120.
91 See Willert, Das Postulat der Abschaffung des Strafmasses und die dagegen erhobenen Einwendungen, 2 Zeitschrift für die gesamte Strafrechtswissenschaft 473 (1882).
92 E. Ruggles-Brise, An English view of the American penal system, 2 J. Am.Inst. Crim.L. & Criminology 356, 360 (1911); the quotation follows to demonstrate that, in comparison with the United States, the European experience rested on a trust in the judiciary supported by a satisfying prison system: “In a country where the judiciary are fully aware of the effect of their sentences, and where they are in close touch and sympathy with the constant changes that are proceeding in prison régime and administration, where any suggestion from the prison authorities is welcomed and encouraged, n that country it will be possible, without detraction from the high dignity and discretion of the court, to arrive at the same result which is aimed at by the ‘indeterminate’ sentence, viz., the individualization of punishment” (360-361).
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legality combined with a more or less mechanical work of the judiciary. The constitutional order in the Old World provided that the judicial branch acted as a crucial guarantee for individual rights, because its power had been clearly limited and defined by law. The problem of the European legal theory at the beginning of the 20th century was how to extend the judicial discretion within the legality rather than how to restrain it, because it was believed that ‘the modern judge’, unlike his predecessor in the Ancien Régime who ignored the right of the individual, had developed a habit of respect for the rights and freedom of citizens. The European Rechtsstaat, with its doctrines of the separation of powers and nullum crimen, prompted the conviction of having developed a well-balanced legal order that at the most had to be improved rather than overturned. The prerogatives, as well as the autonomy, of the legislative, judicial, and administrative branches had to be defended. It was conceivable to extend the judicial range through the possibility of balancing extenuating and aggravating circumstances and the supporting knowledge of criminology so to fit the punishment to the criminal, but the tendency suggested by the more radical progressives had to be rejected. The uncritical, ‘gullible’ acceptance of the U.S. indetermined sentence in Europe was perceived as a sort of ‘Trojan horse’ that, under the appearance of a humanitarian and corrective device of individualization, constituted a significant step toward that “steady, progressive abdication of

93 See A. Prins, La défense sociale et les transformations du droit pénal 139-40 (1910): “Ne perdons pas non plus de vue que nous possédons des garanties morales qui sont des acquisitions définitives de la culture et de la civilisation modernes. Le judge de l’ancien régime ignorait le droit de l’individu. Le judge moderne a pour le droit individuel un respect qui est entré dans les moeurs, et fait partie de son atmosphère, et lui inspire des scrupules don’t il faut reconnaître la valeur quand il s’agit du sort et de la liberté du citoyen”.

94 A comparison with the past was necessary to explain the aim of the new progressive movement, but the past was not always only an obstacle to overcome; sometimes it was an important tradition, rich in habits, rights, political persuasions, that was impossible to delete. The determinism of the positive school of criminology measured itself not only against the classical school, but also against the historicism or against the religious and cultural value of tradition.
the lawmaker in the hands of the judge and of the administrative power” that was feared by the conservatives and hoped for by the reformers.\footnote{Among the opponents, see, e.g., S. Rapoport, Les sentences indéterminée, 12 Revue internationale de sociologie, 729, 729 (1904); among the advocates of a broader judicial discretion see Aschaffenburg, Crime and its Repression, supra note 19 at 306-309, and de Quiros, Modern Theories of Criminality, supra note 23 at 177: “Judicial discretion is regaining what it had lost, and rids itself of the unfortunate note as the magistrate gains in science and conscience”. Silvio Longhi, Repressione e prevenzione nel diritto penale attuale 702-03 (1911), claimed for administrative discretion: “Tale è l’ufficio attuale del giudice nella repressione; ufficio che potrà subire notevoli modificazioni e restrizioni a profitto del periodo amministrativo, col perfezionarsi delle discipline penitenziarie e specialmente del sistema di determinazione e individualizzazione della pena nel periodo di esecuzione”.}

The third difference was that European jurists perceived the indeterminate sentence to jeopardize three fundamental principles of their legal order, namely, that the punishment of crime was the function of the State and not of the individual; that to condemn some prisoners to ordinary detention and others to a special form of detention or to condemn the same crime with unlike sentences constituted a grave breach of the principle of equality; and that to transfer to the prison officers the essential attributes of a judge was an act of despotism, gravely affecting the liberty of the individual.\footnote{See, e.g., Saleilles, at Brussels Congress, quoted in Ruggles-Brise, Two Prison Congresses, supra note 89 at 58.} Again, the gap separating the American and the European approaches to the individualization of punishment was taking the form of different customs and traditions in terms of balance between State and citizens, between power to punish and individual safeguards.\footnote{This was, according to the German judge Adolf Hartmann, Reform of the criminal law in Germany, 2 J. Am. Inst. Crim. L. and Criminology 349, 350-351 (1911), what differentiated the American tendency to endorse sentences of indefinite time from the European approach to criminal justice: “For this reason many new European codes of criminal law are like the older Roman statues of the deity Janus, having two faces, the one looking backward to former times, the other looking forward to the light of modern ideas. Customs and traditions coming down from centuries ago tell on public opinion very much; political parties of different kinds find themselves specially interested in maintaining the historical principles of the strictest state of the past - the state of discipline, of relentless retribution and of inquisitorial trial”. See also H.P. Areco, “Psicología legal”, Address delivered at the Facultad de Derecho in Buenos Aires, 1912: “La condición especial de las naciones jóvenes hace presentar que en alguna de ellas tendrá lugar el sacudimiento definitivo de las arcaicas bases jurídicas. Las naciones europeas tienen como petrificada la osatura de su derecho, por que soportan el yugo de tradiciones y rutinas seculares”, quoted by Ingenieros, Criminologia, supra note 14 at 239.} The institutional equilibrium was based on the egalitarian premises that, especially in criminal law, neither biases nor differences were tolerated and that the same welfare state that had the duty to guarantee the safety of society also had to be the only
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legitimate actor to handle crime and punishment. The divestment of state authority in the administration of penal sentences represented one of the major obstacles toward the acceptance of the indeterminate factor in the Old World, because it was intended as a breaking element of the virtuous balance achieved in the liberal scheme – a balance not only between the retributory, deterrent, and reformatory purposes of punishment, but also between the legislative, judicial, and executive branches, that the “old-fashioned European formula” wanted to preserve so that the Old World “was not prepared to go as far as America in this respect”.98 The unconditioned application of the indefinite sentence was perceived as a distortion of the harmonious principles of public law that tended towards the safeguard of individual freedom against any arbitrary invasion, or worse as a violation of the natural law: the hypothesis of a discretionary sentence immediately evoked the resurgence of the unlimited administrative arbitrament of the pre-revolutionary era, as if the storming of the Bastille had been fruitless.99

These attacks were directed against the theoretical foundations of the indeterminate principle because of their conflict with the historical meaning of the rule of law in European criminal justice. Other objections were raised against the empirical enforcement of the reform.

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98 E. Ruggles-Brise, Address delivered at joint conference of foreign delegates and the American Prison Association at Washington, 2nd October, 1910 in Id., Report to the Secretary of State for the Home Dept. on the proceedings of the eight International Penitentiary Congress held at Washington, October 1910 72-74 (1911).

99 See A. Prins, Science pénale et droit positif 457-58 (1899), and his discourse at the Séance de la Société Générale dés Prisons, supra note 82 at 676: “La question en droit public est celle-ci: quand il y a délit, il faut une peine et, quand le juge applique une peine, cette peine doit être déterminée. Tel est le principe moderne; il a garanti le citoyen contre l’arbitraire et le caprice du Pouvoir. Si le 14 juillet 1789 la foule s’est ruée contre la Bastille (…) c’est parce que la Bastille symbolisait l’arbitraire, les lettres de cachet, c’est-à-dire la forme ancienne de la sentence indéterminée”. Even more critical was the opinion of L. De Combes, Les peines indéterminées, 24 Revue catholique des institutions et du droit 63, 73 (1900): “L’introduction de la sentence indéterminée dans les lois françaises serait donc une expérience dangereuse, contraire aux principes du droit naturel, et que n’excuserait aucune lacune dans nos institutions. Les remèdes qu’on nous propose nous les avons déjà, sans l’intolérable arbitraire d’un pouvoir occulte, d’une inquisition dont l’inspirateur faillible serait un grand chieur ou un gardien de maison d’arrêt”. The same arguments were proposed, e.g., by G. Vanier, Pour ou contre les peines indéterminées, Revue pénitentiaire 737 (1893); A. Le Poittevin, Compte rendu de M. Prins: Science pénale et droit positif, Revue Pénitentiaire 882 (1899); J. Baumgarten and M.E. Gardeil, Séance de la Société Générale dés Prisons, supra note 82, at 680-81, 686-88. In the U.S., the same position was held by M. Parmelee, Criminology 398 (1923).
Some jurists, after recognizing the merits and the potential advantages of the indefinite punishment in principle, gathered nonetheless for its practical impossibility or inexpediency.\(^{100}\) The more recurring arguments, however, were about the continental autonomy and capacity to elaborate fitter alternatives. It is worth noting that, behind this chauvinistic discourse, the European thinkers were accepting the idea of an indeterminate detention for particular classes of offenders on the basis of a social security justification, while refusing the rehabilitative ideal that guided, at least apparently, the Elmira model. As a matter of fact, the first answer given to the proponents of a European importation of the American indeterminate sentence was that conditional liberation, already enacted in many continental codes, achieved the same target without any constitutional complication. Instead of introducing such a revolutionary measure that conflicted with the traditional criteria of punishment, European authors stressed the reformatory character of the ‘libération conditionnelle’\(^{101}\), of the conditional sentence\(^{102}\), or of similar forms of release on good behavior as devices to make the sentence more flexible according to the culprit’s merits without vanishing its formal legal limits.\(^{103}\) These measures

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\(^{100}\) See, e.g., A. Gautier, Pour et contre les peines indéterminées, 6 Zeitschrift für Schweizer Strafrecht 1, 50 (1893): “je ne crois pas que l’introduction de la peine sans durée fixe dans la législation pénale soit désirable ni possible”; Rapoport, Les sentences indéterminée, supra note 95, at. 773-74; Mittelstädt, Für und wider die Freiheitsstrafen, 2 Zeitschrift für die gesamte Strafrechtswissenschaft 419 (1882).

\(^{101}\) See also W. Tallack, Penological and preventive principles with special reference to Europe and America 102 (1889); Prins, Science pénale et droit positif, supra note 99, nt. 1 at 459 and Séance, supra note 82 at 677; De Combes, Les peines indéterminées, supra note 99, at 71-2; N. Nocito, La libertà condizionale dei convicti secondo il nuovo Codice Penale italiano e la procedura del R.D. 1 dicembre 1889 (1891); G. Fioretti, Della liberazione condizionale in Completo trattato teorico e pratico di diritto penale secondo il Codice unico del Regno d’Italia 407-75 (Pietro Cogliolo ed. 1888). Tarde, Considération sur l’indétermination des peines, supra note 85, at 759, considered the conditional liberation enacted in France in 1885 (Law August, 14\(^{th}\)) for all the convicts as a “determination conditionelle et relative” preferable to any form of indeterminate sentence, while van Hamel saw in this provision “un pas vers le système des sentences indéterminées” (Séance, supra note 82 at 671).

\(^{102}\) The conditional release of first offenders was provided, e.g., in the United Kingdom, by the Probation of First Offenders’ Act (1887), and in France by the Bérenger Law or law of sursis à l’exécution de la peine (1891).

\(^{103}\) Similarly, even the French relegation law (May, 27\(^{th}\), 1885) which provided for “l’internement perpetuelle” in state colonies of the more dangerous recidivists representing a permanent threat for the society, was considered more respectful of individual right than the American indefinite sentence, because the relegation was issued in obedience to the necessary guarantees, such as defense counsel, cross-examination, public and motivated sentence, possibility to override the decision (see De Combes, Les peines indéterminées, supra note 99 at 73, and Rapoport, Les sentences indéterminée, supra note 95 at 769).
were emphasized as less radical but more effective steps toward the individualization of punishment, because it was considered less risky to arbitrarily curtail or suspend a determined penalty than to extend it with discretion.

4.2. The crisis of legality: from repression to prevention

If the European culture reacted against the general application of the U.S. device of individualization by seeking to build its own system suitable for its legal traditions, it is worth emphasizing that it was nonetheless very much interested in the preventive purpose of punishment. Replying to von Liszt’s statement, in 1899, that the indeterminate sentence idea kept on going around the world, Roux ironically wrote in 1905 that effectively it had completed the tour – returning, though, without leaving any trace, to the starting point at Elmira. However, his opinion was not exactly true: the seed of the indefinite punishment took root in the fertile soil of preventive justice. As a matter of fact, the same European jurists who firmly refused the possibility of any indeterminateness as for the punishment, because it impinged on the principle of legality, were willing to introduce in the legal order post delictum security measures without a fixed term. The dual-track system, one of the most typical products of the continental legal system of the 20th century, was taking shape as a compromise reaction against the introduction of any indeterminate factor inside the ‘sacred’ limits of the punishment. The punishment, having to reach its retributive, deterrent, and reformative goals, could not violate the *nullum crimen nulla poena* principle, but to contrast professional and habitual criminals, recidivists, defectives, deviants, and lunatics, an indefinite preventive measure of detention and

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104 Roux, La sentence indéterminée et l’idée de justice, supra note 86, nt. 1 at 366: “Effectivement, elle l’a fait, si bien et si complètement qu’elle est revenue à son point de départ; partie d’Elmira, elle y est retournée et n’est restée nulle part…“.
control was admissible at all. \(^{105}\) First of all, it was something different from punishment, both in its name and in its substance. It was called a ‘mesure de préservation’, a ‘system of conditional correction’, a ‘complemento di pena’, a ‘measure of amendment or correction’, applied not as a special kind of punishment but as a supplementary sentence for particular classes of criminals, to be expiated in a specially constituted penal establishment for an indetermined or a long time, until the criminal could be discharged without danger to society\(^{106}\): that way the necessary punishment, \(a\ priori\) fixed by the judge in proportion to the gravity of the offense, was neither substituted nor confused with considerations of resocialization, the one being subject to a time limit, the other not. The goal and the legitimacy of this social security measure were exclusively the prevention of crime and, therefore, being added after the execution of the ordinary sentence but on the premise of the conviction for a crime, the strict rules of the principle of legality could be attenuated. As we shall see, the indefinite sentence principle regained ground in the European legal order by means of this ambiguous compromise between repressive and preventive devices, which artificially seemed to preserve the tenets of the rule of law.

Nevertheless, it is worth noting once again that the principle of legality as the core doctrine of the rule of law was modifying its contents according to the new preventive pattern. Let us now glance at the difference between the conclusions on the indetermined sentence reached at the International Prison Congresses held at Brussels in 1900 and at Washington in 1910. The fourth question of the Brussels Congress explicitly concerned this subject, i.e., if there were classes of criminals to whom this measure might be applied and how it might be realized. Even if the wider recognition received by the theme was a success of the proponents of

\(^{105}\) This thesis was held, e.g., by Prins, Science pénale et droit positif, supra note 99 at 459-461 and, as we shall see, at the Washington Congress in 1910.

\(^{106}\) This kind of legal device was proposed as a more suitable alternative to the U. S. indeterminate sentence by Ruggles-Brise and Édouard Gauckler at the Brussels Congress (see Ruggles-Brise, Two Prison Congresses, supra note 89 at 58-59).
indefinite punishment, the time was yet not ripe for its general endorsement: as pragmatically commented Samuel Barrows, Commissioner for the United States on the International Prison Commission and one of the strongest supporter of the reform, “the traditional theory of a definite penalty for every offense against the criminal code is so strongly intrenched in statute and practice that to dislodge it is something like the task of removing Gibraltar”. The complete disappearance of every idea of retaliation and social vengeance, a necessary premise for the acceptance of the indefinite sentence as a rehabilitative treatment, was far from realization yet, because the conservative, traditional ideal of criminal justice was still deeply rooted. As a matter of fact, the conclusions adopted at Brussels seemed to shatter the indeterminists’ hope, because as to penalties, the indeterminate sentence was not only declared “inadmissible” but was also considered to be “advantageously replaced by conditional liberation combined with a progressive cumulative sentence for recidivists”. As to measure of education, protection, or safety, it was held admissible, but only “through restrictions which involve[d] the abandonment of the principle itself” so that it would have been “more logical, more simple, more practical to preserve the system of prolonged imprisonment as modified by conditional liberation”. Nonetheless the victory of the European traditional approach was not final.

In his address delivered at the Washington Congress, the appointed president of the assembly, Charles Richmond Henderson, after having stressed that the duty of the state was not only to punish the offenders but also to direct the prisoners’ conduct, urged on the specialists of the criminal field the courage to change, quoting the famous hymn of James Russell Lowell “New occasions teach new duties; time makes ancient good uncouth”; he suggested going

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108 These were the points (a) and (b) of the final conclusions adopted by the general assembly on the fourth question.
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beyond the conquests of the past and embracing the indetermined sentence principle, because
“the ultimate and final test of a penal law, of any law, is not its constitutionality, its agreement
with traditions of judicial decision, its conformity with ancient usages” 109 The first question of
the Congress ran on the relation between the principle of the indeterminate sentence and the
fundamental principles of criminal jurisprudence, and, after a fiery discussion that as usual
opposed the conservative point of view based on the historically grounded arguments to the
reformative and preventive one 110, thanks to the pressure of Prins, the resolutions adopted by the
assembly looked like an unexpected coup de main of the indeterminists. 111 If we examine the
resolutions more carefully, however, we find limitations, conditions, and compromising
interpretations that thwarted the real recognition of the indefiniteness. The scientific principle
was approved not for all criminals, but only for moral and mental defectives, juvenile offenders,
and particular criminals requiring reformation: it was an attempt to circumscribe the application
of the rule by definitions that were, however, absolutely vague and not based on uniform and
generally accepted scientific notions. Moreover, the resolutions refused the deterministic idea on
the sociological and anthropological causes of criminality and professed the compatibility of the
individual responsibility with the individualization of punishment. 112 The doctrinal struggle at

109 The address is quoted in C.H. Henderson, Report of the Proceedings of the Eighth International Prison Congress,
110 Among the conservative opponents of the reform there were the delegates of the Latin countries of Europe, such
as the Spanish Silvela or the Dutch Dressellhuys, and the Yale Law School Professor Gordon Sherman.
111 The complete resolution was as follows: “The Congress approves the scientific principles of the indeterminate
sentence. The indet. sent. should be applied to moral and mental defectives. The indet. sent. should also be applied
as an important part of the reformatory system, to criminals (particularly juvenile offenders) who require
reformation and whose offenses are due chiefly to circumstances of an individual character. The introduction of this
system should be conditioned upon the following suppositions: (1) That the prevailing conceptions of guilt and
punishment are compatible with the principle of the indet. sent. (2) That an individual treatment of the offender be
assured (3) That the board of control or conditional release be so constituted as to exclude all outside influences and
consist of a commission made up of at least one representative of the magistracy, at least one representative of the
prison administration, and at least one representative of medical science” (Report of the Proceedings of the Eighth
International Prison Congress, supra note 109 at 35).
112 This was the position held by Raymond Saleilles in his famous L’individualisation de la peine. Etude de
criminalité sociale (1898) (English translation: The Individualization of Punishment (1911)). The French jurist
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the Washington Congress in 1910, rather than signaling the victory of the U.S. form of indeterminate sentence, sealed the European trend toward the enactment of the dual-track system, as explicitly suggested there by Sherman and by the Italian delegate Ugo Conti. This interpretation could offer an explanation of the change in the European debate on the indeterminate factor as from the 1910s onward, a change from repression to prevention, from punishment to measure of safety. The exploitation of the potential of the indeterminate sentence shifted from the criminal field to the administrative: the strategy, shared by the doctrine and the legislative branch, was to carry on preserving the principle of legality as for the guilty and played the role of a mediator between the classical and the positive school of criminologists, between those who based their conclusions on the postulate of free will, and those who rejected the idea of moral responsibility. Surely influenced by the catholic idea of guilt and by the historical development of canonical criminal law, he tried to reconcile these two approaches by retaining the idea of freedom of will as a basis of moral responsibility, but rejecting it as a basis of punishment: “The conception of punishment implies responsibility. One must believe in responsibility in order that a measure taken against an offender shall be a punishment. But the application of punishment is no longer a matter of responsibility but of individualization. It is the crime that is punished; but it is the consideration of the individual that determines the kind of treatment appropriate to his case. Responsibility as the basis of punishment, and individualization as the criterion of its application: such is the formula of modern penal law” (at 181). However, while penalty for crime was thus justified by responsibility, it should not be measured by it. Saleilles suggested dividing penalties into those of surety for the incorrigible criminals without hope of reform, those of reform for the criminals who may be reformed, and those of intimidation for those who were not at all criminal in character but had been led into crime by force of circumstances.

Conti proposed accepting indetermination not as a fundamental principle, but “as a means of public security to be applied in the case of dangerous criminals and of habitual recidivists as a sort of supplementary penalty to be added, if necessary, to the fixed period of imprisonment” (quoted in Report of the Proceedings of the Eighth International Prison Congress, supra note 109 at 35). At the Brussels Congress in 1900, Ruggles-Brise suggested a similar system, proposing a particular form of indeterminate sentence for the professional criminal guilty of repeated crimes of acquisitiveness; it was a sort of ‘time’ and not ‘reformatory’ sentence, based on the “principle of preventive justice”, whose goal was “not to reform the individual but to defend society from his depredations”: the length of this preventive measure of segregation should have been out of proportion to the offence and for a period of time limited only by the length maximum of the offence of which the man was guilty, but liable of shortening by the exercise of the powers of conditional liberation by the Secretary of State (E. Ruggles-Brise, Professional Criminals (Contributed to the Brussels Congress) in Id., Two Prison Congresses, supra note 89 at 106-116, quotation at 111, 116).

Only few examples: in 1904 the Norwegian Penal Code was the first to enact preventive measures, providing for indeterminate detention of persistent offenders adjudged to be a public danger and of abnormal offenders (§ 65); in the United Kingdom the Prevention of Crime Act (1908) instituted preventive detention for habitual criminals who, after serving their ordinary sentences, were subjected to a further measure of ‘preventive detention’ for a period non exceeding ten nor less than five years (for the history of this Act, see E. Ruggles-Brise, The English Prison System 49-58 (1921), and N. Morris, The Habitual Criminal 33-80 (1951)); the Swedish Act of 1927 provided for indeterminate detention of abnormal offenders and dangerous recidivists, and the Belgian Social Defence Act of 1930 introduced indeterminate sentence by enabling the same categories of offenders to be detained at the discretion of the government; in 1930 the Italian Penal Code instituted a series of security measures of indeterminate duration for persistent offenders, offenders by profession or propensity, deaf-mutes offenders or
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penalty phases, while introducing a more flexible, discretionary device, administrative in its nature, added to the ordinary punishment, directed to special classes of dangerous criminals and with a long or non-fixed term. While the indeterminateness was expunged from the punishment, because it was considered too revolutionary, contrary to the European legal tradition of the rule of law and dangerous for individual safeguards, contrariwise it was accepted as a supplementary measure of social security, thereby creating a much more potentially repressive system that summed up the repressive and preventive characteristics of both the punishment and the measure of safety while keeping out the reformative ones.

4.3. The dual-track system and the rule of law

In brief, it is possible to state that the security measures were the European response to the U.S. indeterminate sentence. Even if these preventive devices were grounded on the shared principle that the retributive function of punishment could not encompass the entire duty of the state criminal law, their legal premises and characteristics were nonetheless extremely different from the U.S. solution. The different ‘habits of legality’ of the continental and the American legal traditions could give us some explanations not only of the different route of the indeterminate factor in these two systems, but also of its unlike relationship with the nullum crimen. As we have seen, the U.S. formula placed the observance of the principle of legality all and only in the guilty phase, leaving the sentencing phase completely not protected by the rule and in the hands of the discretionary power of an administrative body; leaving aside the objections of unconstitutionality of this system, mostly overruled at the beginning of the 20th

offenders suffering from mental disorder or chronic intoxication by alcohol or narcotic drugs; the German Act of 24 November 1933 provided extremely strict preventive measures for irresponsible and partially responsible offenders, alcoholics, drug addicts, and dangerous persistent offenders.
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century, from the late 1960s on it turned out to be unsatisfying for both the detainees and the public safety, not to mention the growing claim of the public opinion for a restoration to fixed and determined punishment. Nonetheless, despite Frankel’s “rule of law” argument supporting a new positive law of sentencing\textsuperscript{115} and despite the ‘decline of the rehabilitative ideal’, still at the beginning of the 21\textsuperscript{st} century “the traditional indeterminate structure remains the single most prevalent model of U.S. sentencing practice”\textsuperscript{116}.

On the contrary the European legal orders have never adopted a biphasic criminal trial and have retained the entire criminal process, the verdict as well as the execution of the sentence, within the limits of the principle of legality. The enactment of the dual-track system was, therefore, the legal achievement of a spirit of compromise and conciliation reached in the 1920s between the classical and the positivistic schools, which prompted the parallelism between punishment and measure of safety\textsuperscript{117}. This solution satisfied both schools because, as two parallel lines that never merge into each other, while the punishment was still an expression of the classical retributive ‘serve him right principle’, the security measure turned on the principle of social defense and preventive protection. They were not different in terms of privation of individual freedom, but if the former was ‘act oriented’ and therefore looked at the past, the latter was ‘actor oriented’ and based on considerations of social protection in the light

\textsuperscript{115} See M.E. Frankel, Criminal Sentences. Law without Order (1973); Id., Lawlessness in sentencing, 41 U. Cin. L. Rev. 1 (1972).
\textsuperscript{116} In Reitz’s opinion, the two main explanations for the ‘staying power of indeterminacy’ are “the entrenchment of existing legal structures and their component bureaucracies and the absence of a unified theory to replace the rehabilitative model as the foundation of system design” (K.R. Reitz, The disassembly and reassembly of U.S. sentencing practices in Sentencing and Sanctions in Western Countries 231-232 (Michael Tonry and Richard Frase eds. 2001).
\textsuperscript{117} On this parallelism as a fruit of the cooperation between the two schools, see P. Kumar Sen, From Punishment to Prevention 50-64 (1932). For the theoretical compromise between punishment and treatment, Strafe and Massnahmen, in the German debate about Minderwertige offenders, see S. Galassi, Kriminologie im Deutschen Kaiserreich. Geschichte einer gebrochenen Verwissenschaftlichung 349 ff. (2004), and R.F. Wetzell, Inventing the criminal. A History of German Criminology, 1880-1945 73-105 (2000).
of the criminals’ formidability. After the early manifesto claiming radical changes, the adherents to the Positive School recognized that a complete abandonment of the pure doctrine of classic principles of criminal law was possible only at the intermediate state of the coexistence of both punishment and security measures, because the idea of retributive justice was still deeply rooted in the European legal tradition as well as in the public opinion. However, to the extent that the reformation of the offender was unanimously recognized as one of the goals of every penalty, the distance between punishment and measure of safety tended to diminish, so that the strenuous reformers claimed for a gradual unification of the two devices. In this sense, Marc Ancel in 1954, in his study made for the Social Commission of the United Nation, interpreted the rise of codified measures of safety in many European and Latin American legislation as a progress made by the indeterminate sentence principle, and stressed a parallel between the conditional release, as a part of the neo-classical punitive system that became permeated with the basic ideas of indeterminateness, and the system of penalties that became more and more closely identified with the system of safety measures: “in our opinion it would scientifically be a serious misconception of the exact status of the problem of the indeterminate sentence not to be aware, both of the theoretical differences which were prominent at the beginning, and of the gradual but irresistible assimilation which then asserted itself in practice”.

118 As Enrico Ferri said at the First International Congress of Penal Law held in Brussels in 1926, “There is no difference between punishment and measure of safety – it is the principle underlying either that justifies the differences” (Premier Congrès International de Droit Pénal, Actes du Congrès 538 (1927)). As pointed out by Carl Stooss, one of the theorician of the security measures, these preventive devices were applied to habitual criminals according to their status rather than to their acts (Zur Natur der sichernden Massnahmen, 44 Schweizerische Zeitschrift für Strafrecht 261 (1930). See also E. Wüst, Strafe und sichernde Massnahme, 21 Schweizerische Zeitschrift für Strafrecht 1 (1908).

119 M. Ancel, The Indeterminate Sentence 8 (1954). See also M. Ancel, Où en sont les mesures de sûreté? in Festkrift til folketings ombudsmand professor Dr. Jur. Stephan Hurwitz 19 (1971): “Or, il s’est passé, singulièrement depuis la fin de la dernière guerre, un phénomène inverse, la peine se transformant et se rapprochant de la mesure, tandis que la mesure à son tour subissait de plus en plus la contagion de la peine transformée”.
Nevertheless, even if many affinities could be found between the indefinite sentence principle and the security measures, let us stress the different relationship that came out between the preventive system of the security measures and the principle of legality, which, acting both as a cause and as an effect of the new shape of the rule of law in the European criminal justice, once again marked a distance with the U.S. experience. As a matter of fact, the safety measures, aimed at neutralizing the dangerousness of the criminal, had to be provided and defined by law, they could be applied only after the execution of an ordinary penalty or, exceptionally, after the conviction of the irresponsible agent\textsuperscript{120}, and their duration was not determinate but subjected to mandatory periodic decisions. As many jurists have pointed out, the brocardo \textit{nulla poena sine lege} had been replaced by the \textit{nulla poena sine crimine}, because the only clear criterion for the legislative conception of the dangerous state was based on the fact of either the criminal act or the relapse.\textsuperscript{121} Nonetheless, even if this new face of the principle of legality was coherent with the preventive goal of social security adopted by the penology of the 20\textsuperscript{th} century, the balance between state power and individual freedom shifted. The preventive profile of criminal justice offered the welfare liberal state much more possibilities to interfere with the life of the citizens, to control their personality, to limit their liberty, or, in Foucaultian words, to discipline them. The only arguments that allowed the legal culture to admit the security measures within the boundaries of the rule of law, the only justifications that made the new preventive system look

\textsuperscript{120} Only few radicals, leading to extreme consequences the valuation of the dangerous state not only of the criminal but of the human being in general, suggested, thanks to the scientific possibility of predicting the probable criminality, dispensing wholly with the punishment and enforcing the measure of security not only on the commission of a crime, but also on the dangerousness of the individual (see, e.g., Q. Saldana, Punishment and measures of security, 4 Revue internationale de droit penal 25, 33-5 (1927); G. Sabatini, La pericolosità criminale come stato subiettivo criminoso, Rivista di diritto e procedura penale 253 (1921), E. Florian, Causalità e pericolosità, 4 (n.s.) La Scuola Positiva 304 (1924)). Some reformers suggested that the new role of the principle of legality was to prescribe the symptomatic value of dangerousness of each criminal act (F. Grispigni, La pericolosità criminale e il valore sintomatico del reato, 9 (s. IV) La Scuola Positiva 97 (1920)). Of course, the unsolved problem was how to prove, beyond any reasonable doubt, what was not a fact but a personal condition.

\textsuperscript{121} See E.S. Rappaport, Judicial guarantees of Measures of security, Revue pénitentiaire de Pologne 220, 221 (1928), quoted by Kumar Sen, From punishment to prevention, supra note 117, at 66-67 n. 1.
congruent with a flexible notion of legality, were the ‘jurisdictionalization’ and reviewability of the measures: the relaxation of the principle of legality had to be offset with the strengthening of the principle of jurisdictionalization. This detachment of the principle of legality from the qualities of generality and abstraction of the law, combined with the role of guarantee assigned to the judiciary, was the peculiar trait that differentiated the European system from that of the United States. The dual-track system, such as the indeterminate sentence, aimed at the utmost possible degree of protection of society afforded by reformation of the reformable and confinement of the unreformable criminals based on the predictions of their likelihood of returning to crime. However, instead of separating the guilty from the sentencing phase as the United States did, so opening the field to the administrative discretion, the European legal order decided not only to reject the biphasic solution, leaving the nullum crimen nulla poena unchanged, but also resolved to put even the enforcement of the preventive measures of social control under the safeguards of a judicial procedure. This choice was surely motivated by the effort to conciliate the preventive needs with the staying power of the principle of legality: we can briefly assert that from the 1920s on, from the reformers of the positive school to the adherents of la défense sociale nouvelle, the effort of European penology has been oriented to justify the coexistence of the security measures within a system based on the legality principle, trying to make the judicial individualization of punishment compatible with the nullum crimen nulla poena principle. It is worth noting, however, that this effort turned out to be like the weaving of Penelope, and the more prevention and personalization of treatment were being

122 See, e.g., F. Bricola, La discrezionalità nel diritto penale, I, Nozione e aspetti costituzionali 416-422 (1965).
124 See, e.g., M. Ancel, L’individualisation judiciaire et la défense sociale, 5 Revue internationale de criminologie et de police technique 194 (1951); P. Nuvolone, Le principe de la légalité et les principes de la défense sociale, 2 Revue de science criminelle et de droit pénal comparé 231 (1956).
raised, the more the notion and legal function of legality were melting away, losing their pivotal role of institutional guarantee. Thus, as the indeterminate sentence had been refused because of its character contrasting the rule of law, neither did the dual-track system reach completely the aim to conciliate legality and prevention.

The different approach to individualization of punishment in the U.S. and European experience can be interpreted on the basis of a broader historical as well as comparative analysis of the concepts of rule of law and Rechtsstaat. Assuming that the nullum crimen was one of the fundamentals of both orders, it took different forms depending on the peculiar essence of each one: the rule of law roots in the common law tradition were based on the duality of gubernaculum and iurisdictio\textsuperscript{125}, a typical medieval heritage of a pluralistic legal system whose coherence and legitimacy rested upon the conviction that the will of sovereign, rather than embracing all the positive juridical sources, was limited and conditioned by the fundamental law of the land, which was beyond the power of the king and was entrusted to the wisdom of the judiciary. This system was extremely different from the continental Rechtsstaat up to World War II, which was characterized by an absolute centrality and predominance of the law as the expression of the will of the legislator.\textsuperscript{126} Given this fundamental difference in the rationale of the rule of law and the Rechtsstaat, let us consider how this diversity impinged upon the value and the legal consistency of the principle of legality with reference to the individualization of punishment. In the United States the nullum crimen was interpreted with greater flexibility by both the courts and the doctrine, and the constitutionality of the indetermined sentence was

\textsuperscript{125} See C.H. McIlwain, Constitutionalism Ancient and Modern 69-94 (1940).

\textsuperscript{126} For an overall rethinking of the historical meaning of the rule of law and its difference from the European Rechtsstaat, see G. Palombella, The Rule of Law and its Core in Relocating the Rule of Law 17-42 (G. Palombella and N. Walker eds. 2009); Id. The rule of law beyond the state: failures, promises and theories, 7 I-CON 442 (2009). See also P. Costa, The Rule of Law. A Historical Introduction in The Rule of Law. History, Theory and Criticism 73-150 (D. Zolo and P. Costa eds. 2007).
finally accepted because it was supposed to be a progress towards the achievement of the two targets of punishment, namely, rehabilitation of the offenders and social security. Neither the core of the principle of legality nor the ideal of the ‘rule of law and not of men’ was thought to be violated, because a different balance between social security and individual safeguards was conceivable, other than the strict legality and out of the legal positivism. In the European Rechtsstaat, built as a ‘rule by law’ order, whatever exception, diminution, or weakening of the nullum crimen nulla poena sine lege was considered as a frontal attack against the unlimited power of the lawmaker and a dangerous empowerment of the judicial or administrative branch.\footnote{On the different approach to the principle of legality taken by the American and the European judges see Allen, The Habits of Legality, supra note 1 at 57 ff.} Formally, the law being the exclusive legitimate source as a consequence of the continental ‘legal absolutism’\footnote{For an history of the European raise of the anti-jurisprudential movement in the modern legal system, reaching its peak with the French Revolution and the 19th century codification, see P. Grossi, A History of European Law 39 ff. (2010).}, even the indeterminate factor had to be ‘legalized’ in the measure of security.

However, the ‘new’ European criminal face of the rule of law shortly appeared as an unsatisfying compromise between individual freedom and social defense, even more irreconcilable with reference to the principles of the post-war constitutions. The safety measures have turned out to be in sharp contrast with the values of the contemporary ‘bill of rights’, which, for the umpteenth time, have again given the rule of law a different design, according to which the margins of administrative discretion and indeterminateness of the measures of security are often held unconstitutional by the doctrine.\footnote{See, e.g., for the Italian situation, G. Bettiol, Repressione e prevenzione nel quadro delle esigenze costituzionali in Studi in memoria di Arturo Rocco, I 177-93 (1952); C. Esposito, Irretroattività e ‘legalità’ delle pene nella nuova costituzione in Studi in onore di F. Carmelutti, IV 501-515 (1950).} The safety measures, such as the ante delictum police measures, can be included in a comprehensive penal policy, on condition that the sphere of repression, that is the punishment with its reformative goal, is clearly separated.
from the sphere of prevention, thus not to transform the retributive quiddity of penalty into a
entirely reform-oriented treatment, i.e., into a disguised measure of security. The tendency
toward an assimilation of the retributive devices into preventive ones, based on the 19\textsuperscript{th} century
fundamental notion of social dangerousness, seems to have been overcome.