

ARTICLE

RETRIBUTION, REHABILITATION
AND THE REVISED PENAL CODE:
JURIDICAL DISCOURSE IN THE CARCERAL STATE

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*Christine Veloso Lao**

"It is...the great carceral continuum which provides a communication between the power of discipline and the power of law, and extends without interruption from the smallest coercions to the longest penal detention [which] constituted the technical and real, immediately material counterpart of that chimerical granting of the right to punish."

Michel Foucault, Discipline and Punish

Although the Revised Penal Code is touted as one of the Philippines' most enduring pieces of legislation, its vaunted permanence is matched by a series of seemingly ceaseless attempts to have it overhauled. The recurring reason given in favor of its revision is the Code's alleged rigidity — its adherence to an old school of penology which pays more attention to the crime than to the criminal, and its failure to provide means to rehabilitate delinquents.

This paper, however, proposes that neither the retributive nor the rehabilitative school of thought contributes to the eradication of crime and the reformation of criminals. Hence, this paper suggests that the current discourse concerning Philippine penal law must go beyond the debate between the retributive and rehabilitative ends of punishment.

Finally, this paper hopes to break away from the aforementioned debate by beginning an alternative discourse on law and punishment, and by engendering further discussion and research on the matter.

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I. JURIDICAL DISCOURSE AND THE CARCERAL STATE:
THE FOUCAULDIAN FRAMEWORK

In *Foucault and the Law: An Anti-Juridical Jurisprudence?*,¹ Hernando Valencia-Villa, a Professor of Law at the Universidad de los Andes, Bogota, Colombia, ends an introductory essay to the thought of Michel Foucault thus:

[According to Foucault], jurisprudence...must be regarded as a discourse of power, a knowledge of order, because...knowledge cannot be neutral. All knowledge is political not because it may have political consequences or be politically useful but because knowledge has its conditions of possibility in power relations.... Perhaps we need an *anti-juridical jurisprudence*, or rather, an *anti-jurisprudence*. Otherwise, so long as we continue thinking of the law in terms of a neutral tool, or even a utopian realm of fairness, we will still become the very battlefield of a tireless will to power and to knowledge which is indeed another astuteness to reason.²

That Valencia-Villa mentions Michel Foucault and the law in the same breath comes as a surprise to those who are familiar with the latter's work. Valencia-Villa himself expresses the hope that his article, which introduces Michel Foucault to the Philippine legal community, may attract more legal scholars toward employing Foucault's analysis in studying the law.

The seeming incongruity between Michel Foucault's thought and the work of legal theorists is caused by the fact that the law is not central to Foucauldian analysis. In fact, as Valencia-Villa notes, Foucault's work tends to have an "anti-juridical" flavor. Foucault's distrust for the law is evident in his brief mention of the law in his work on the history of prisons in France entitled *Discipline and Punish* (1979):

Historically, the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was marked by the establishment of an explicit, coded and formally egalitarian juridical framework, made possible by the organization of a parliamentary and

¹ 56 PHIL. L.J. 355 (1981).

² *Id.* at 366.

representative regime. But the development and generalization of disciplinary mechanisms constituted the other, dark side of these processes. The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday physical mechanisms, by all those systems of micropower that are essentially non-egalitarian and asymmetrical that we call the disciplines.³

That Foucault takes a critical stance vis-à-vis the law gives the student of law two attractive areas of study: First, the latter may validate the soundness of Foucault's thoughts about the law by applying Foucault's analysis of the French penal and legal systems to the Philippine situation; Second, if the aforementioned analysis is found to be applicable to the Philippines, the student may use Foucault's critique in his or her own examination of juridical discourse as it is conducted today.

Since this paper aims to break away from the impasse between the proponents of the Classical and Positivist schools of penal law in the Philippines, it chooses the second path of study and aims to begin an alternative discourse on penal law and policy stimulated by Foucaultian analysis.

A. Archaeology, genealogy

One reason why Foucault has not gained the following of many legal scholars is the fact that he is not a lawyer. In addition, it is difficult to classify Foucault and his work. Because of this, some have tried to give a name to the Foucauldian body of work by describing the latter through the method Foucault uses in his analysis.

The first method used by Foucault has been called an "archaeology," a "patient and careful archive research in order to de-build and rebuild the process of a series of discourses and practices within the Western institutional and scientific development since the Classical Age."⁴ Through this method, Foucault reveals that the creation of "positive" notions such as reason, health,

³ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 307-308 (Alan Sheridan trans., 1979) (hereafter FOUCAULT I).

⁴ Valencia-Villa, *supra* note 1, at 356.

knowledge are simultaneous with the creation of "negative" notions such as madness, illness, and ignorance.

The second method Foucault employs is "genealogy." In contrast to the attempt of philosophers and historians to search for and establish the origins of ideas, society and other phenomena, genealogy "rejects the metahistorical deployment of ideal significations and indefinite teleologies. It opposes itself to the search for origins."⁵ Rather, by examining "a vast accumulation of source material" and by paying attention to details left out of the expert's field of study and discourse, genealogy intends to "identify the accidents, the minute deviations — or conversely, the complete reversals — the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us; it is to discover that truth or being does not lie at the root of what we know and what we are, but the exteriority of accidents."⁶

Through the use of this method, Foucault is able to create a new discourse about the production of established fields of study and their corresponding discourse. "In any society," he writes, "the production of discourse is at once controlled, selected, organized and re-distributed according to a number of procedures whose role is to avert its powers and its dangers, to master the unpredictable event."⁷

B. Juridical discourse and the carceral state

In *Discipline and Punish*, Foucault characterizes juridical discourse as the bright side of penal discourse. Corresponding to the codification of laws protecting human rights was the increasing employment of the prison as a means of exerting social control over growing populations. Whereas the emerging juridical discourse during the Classical age (1660-1810) consisted in the development of criminal codes, which were increasingly aimed at reforming the incarcerated offender, the rehabilitation of the offender was

⁵ MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, in THE FOUCAULT READER 77 (Paul Rabinow ed.; Donald F. Bouchard and Sherry Simon trans., 1984) (hereafter FOUCAULT II).

⁶ *Id.* at 143-144.

⁷ MICHEL FOUCAULT, *The Discourse on Language*, in THE ARCHAEOLOGY OF KNOWLEDGE 81 (A. M. Sheridan Smith trans., 1972).

never accomplished. The prison, the dark side of the humanitarian promise of the Classical age, served as the means by which control was exerted over the individual. Paradoxically, in maintaining this control over individuals, the prison *created* delinquency.

In writing this history of the prison, Foucault aimed to describe the use of "a new technology of power that makes possible and viable the accumulation of men which is functional to the accumulation of capital in the rise of the bourgeois order."⁸ This new technology, which emerged simultaneously with the *bourgeois* class and the codification of French laws, including French penal law during the Classical age, was the technology of discipline. According to Foucault, discipline was inherently found in the structure of the *prison*. The disciplinary model, in fact, is Jeremy Bentham's Panopticon — a circular building whose major feature is the constant and total surveillance of its inmates. The major effect of the Panopticon is "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."⁹ This function of the prison made it possible for authorities to exert maximum control over problematic populations by using the least amount of resources. Because it made individuals feel that their every move was being watched even when *no one* was watching, the prison, as a technology of discipline, created power with greater utility. This, Foucault proposes, is the reason why the carceral apparatus prevailed over another technology of punishment — torture — at the end of the eighteenth century.¹⁰

The replacement of torture with imprisonment was accompanied by the rise of a penological discourse that presented imprisonment *not* as punishment, but as an opportunity for the rehabilitation of the prisoner. Despite the noble goal of prison reformers, however, Foucault notes that

⁸ Valencia-Villa, *supra* note 1, at 360.

⁹ FOUCAULT I, *supra* note 3, at 201.

¹⁰ In contrast to imprisonment, penalties consisting of the death of the offender, torture and hard labor posed serious challenges to the State. Torture was a public demonstration of the vengeance of the sovereign, against an individual who had violated the monarch's law. However, the excessively brutal display of the sovereign's power often reminded the public of the sovereign's extreme arbitrariness in daily life. The spectacle of the scaffold, therefore, made the public identify with the criminal, and often incited people to revolt against the sovereign. Thus, torture, unlike imprisonment, consisted in the sovereign's excessive demonstration of power, but achieved only a minimal amount of control over the populace. FOUCAULT I, *supra* note 3, at 67.

"[t]he prison, in its reality and visible effects, was denounced at once as the great failure of penal justice."¹¹ Even with repeated attempts at reform, prisons continually fail to achieve the object of reforming those within their walls.¹² Says Foucault: "[w]ord for word, from one century to the other, the same fundamental propositions are repeated. They reappear in each new, hard-won, finally accepted formulation of a reform that has hitherto always been lacking."¹³

This perpetual failure of prison reform, however, serves a purpose:

The prison ... and punishment in general, is not intended to eliminate offenses, but rather to ... assimilate the transgression of the laws in a general tactics of surveillance.... The penal institution, after purging convicts by means of their sentence, continues to follow them by a whole series of brandings [through continued surveillance, the existence of the offender's police record], and which pursues as a "delinquent" someone who has acquitted himself of his punishment as an offender.

Penalty appear[s] to be a way of handling illegalities, of laying down the limits of tolerance, of giving free rein to some, of putting pressure on others, of excluding a particular section of making another useful, of neutralizing certain individuals and of profiting from others.¹⁴

¹¹ *Id.* at 264. Foucault notes that the arguments against imprisonment which were expressed in 1820-1845 are the same arguments advocates of penal reform spout today. They are: (1) Prisons do not diminish crime nor the quantity of crime; (2) Detention causes recidivism by exposing first time offenders to delinquents; (3) Prisons produce delinquents by the unnatural, useless, dangerous, violent existence and constraint imposed on inmates; (4) Prisons encourage a milieu of delinquents loyal to one another; (5) Freed inmates are condemned to recidivism because they remain under the surveillance of the police, and are unable to find work because of their record; and (6) Prison indirectly produces delinquents by throwing the inmate's family to destitution. *Id.* at 265-268.

¹² The penal reformers' answer to the above critique of prisons has likewise remained the same through the years: (1) Penal detention must be geared toward reforming the convict; (2) Convicts must be classified in accordance to the gravity of their act, age, mental attitude, technique of correction needed, and stage of rehabilitation; (3) Penalties must be modulated to suit the individual; (4) Work and education is essential in reforming the convict; (5) The prison must be administered by a specialized staff possessing moral qualities and technical abilities required of educators; (6) After the inmate's release, imprisonment must be followed by means of supervision and assistance till the full rehabilitation of the latter. *Id.* at 269-270.

¹³ *Id.* at 270.

¹⁴ *Id.* at 272.

Simply put, the failure of the prison was necessary for the production of *delinquents*. The prison alone, however, does not accomplish the production of delinquents. Foucault points out that the structure of the Panopticon, as well as the technology of discipline, "has extended to every institution and to every organizational level and region in our society."¹⁵ This network of institutions is what Foucault calls the "carceral archipelago."

What, then, does juridical discourse serve? The law — the bright side of the prison, the product of the carceral apparatus — not only masks the operation of discipline, but is a tool through which discipline operates:

The real corporal disciplines constitute the foundation of formal, juridical liberties. The [social] contract may have been regarded as the ideal foundation of law and political power; [but] panopticism constituted the technique, universally widespread, of coercion....The "Enlightenment" which discovered the liberties also invented the disciplines.¹⁶

Although the law seemingly defines and treats individuals according to universal norms and seems to fix limits on the exercise of power, "the minute disciplines, the panopticism of everyday," reinforce the imbalance of power, repression, exclusion and marginalization of the delinquent. Law, therefore, is the discourse of reason that justifies the irrational operation of the prison.

Bearing this theory of law in mind, this paper proceeds to examine the history of Philippine penal law and identify the inconsistencies inherent in the unresolved debate between the Classical and Positivist schools of penology. These inconsistencies will be the starting point of a critique that suggests, not an answer to the problem of diminishing crime or reforming the criminal, but an alternative conception of law, one which may be used to empower, and not oppress, individuals.

¹⁵ Valencia-Villa, *supra* note 1, at 361.

¹⁶ FOUCAULT I, *supra* note 3, at 222.

II. RIGIDITY AND REVISION: A CHRONICLE OF CONTROVERSIES

The Revised Penal Code is popularly conceived to be a model of a permanent statute — one which has substantially remained unaltered amidst the vagaries of time.

Unlike the 1987 Constitution, which was drawn up shortly after the EDSA Revolution, the Revised Penal Code was not the child of a turbulent period in history. It was approved during the American occupation by the Philippine Legislature on December 8, 1930.¹⁷ By its very provisions, the Revised Penal Code, also known as Act No. 3815, became effective on January 1, 1932.¹⁸

The Revised Penal Code is a compilation of the penal laws already in force in the country during the time it was enacted. It has been described as "a consolidation of the penal laws enacted by the Philippine Legislature and the Philippine Commission, as well as various provisions of the Spanish Penal Code of 1870, which were then currently in force."¹⁹ The committee which accomplished this task was created by Administrative Order No. 94 (dated October 18, 1927) of the Department of Justice. The Order that created the committee also defined its task: to make a "Revised Draft" of the old Penal Code. Hence, one of the committee members, Guillermo Guevara, expressed that the Committee "did not consider itself empowered to present a radically different penal code."²⁰

The old Penal Code, to which the Revised Penal Code traces its roots, was the first consolidated body of penal laws in the Philippine Islands. It contains virtually the same provisions composing the Penal Code of Spain of 1870, but exhibits minor changes recommended by the Code Committee for the Overseas Provinces.²¹ The old Penal Code was extended to the Philippines

¹⁷ GUILLERMO GUEVARA, A TEXT BOOK ON PENAL SCIENCES AND PHILIPPINE CRIMINAL LAW 14 (1974).

¹⁸ REV. PEN. CODE, art. 1.

¹⁹ Bienvenido Ambion, *Penal Code Revision: Vignettes, Vagaries and Varieties*, 54 PHIL. L.J. 141 (1979).

²⁰ GUEVARA, *supra* note 17, at 14-15.

²¹ *Id.* at 15-16.

pursuant to a Royal Decree dated December 17, 1886. The old Penal Code was published in the *Gaceta de Manila* on March 13, 1887.²² It became effective in the Philippines on July 14, 1887, four months after its publication. Because the Revised Penal Code is derived from the Spanish code, both codes easily may be perceived as remnants of Spanish rule, belonging to a system of law which governed the Philippines for 300 years.

Neither the declaration of Philippine Independence in 1898, nor the American occupation of the islands shortly thereafter, is said to have caused substantial changes in Philippine penal law. After the capitulation of the Spanish Army to the American forces on August 13, 1898, the Commander of the American Army, General Merritt, issued a proclamation dated August 14, 1898, which declared that the old Penal Code, among other municipal laws, remained in full force and effect.²³ Thus it was the old Penal Code that survived the Spanish regime and ultimately was reincarnated as the Revised Penal Code in 1932.

Legal historians, however, note that the roots of the Revised Penal Code go even deeper. The old Penal Code, upon which it was based, was in turn a version of the Spanish Penal Code of 1870. This Spanish code was a modified version of the Spanish Penal Code of 1848, which was in turn heavily influenced by the French Penal Code of 1810.²⁴ Inspired by Napoleon's success in codifying French laws, Spain began codifying its loosely arranged compilations of law in 1811. Although the codification was initially begun by a resolution of the *Cortes* of Cadiz, the 1812 Constitution of Spain expressly provided for the same, and in 1813, a Code Commission was appointed. However, political agitation in the country prevented any further developments until the latter half of the century.²⁵ In 1848, a revised version was drawn, but this was hardly published. The more published revision was made in 1850. A subsequent Penal Code was completed in 1870, and this code became the basis for the old Penal Code of the Philippines.²⁶

²² *Id.* See also Ambion, *supra* note 19.

²³ GUEVARA, *supra* note 17, at 16.

²⁴ Alfredo Tadiar, *The Administration of Criminal Justice*, 47 PHIL. L.J. 547, 594 (1972).

²⁵ Antonio Cuyugan, *Origin and Development of Philippine Jurisprudence*, 3 PHIL.L.J. 191, 204 (1917).

²⁶ *Id.*

III. CLASSICAL JURISPRUDENCE: THE RULE OF RIGIDITY?

The Revised Penal Code's permanence, however, has little to do with the letter of the law. Certainly its provisions are a far cry from those of the French Penal Code of 1810, and even some of those in the old Penal Code. The Code's permanence properly pertains to the endurance of its underlying philosophy. Judge Guillermo Guevara expresses it thus:

The Revised Penal Code...is a compilation of the penal laws in force in the country without radical changes in structure. The backbone of this Code is the Penal Code of Spain of 1870, which was in force in the country up to December 31, 1931; and as such, belongs to the Old or Classical School. It is eminently retributive in its purpose, and considers crime only as an issue of free human will, as a juridical entity pure and simple, paying little or no attention to the person.²⁷

It was a penal reformer, whose studies were based on Auguste Comte's positivist philosophy, who coined the term "Classical School." This reformer, Enrico Ferri, used the term to refer to an earlier period of penal reform which began with Beccaria and which was developed by Carrara. He used the term "to chronologically distinguish it from the new and more radical tendencies implanted by positivism."²⁸

While the "Classical School" was primarily a nomenclature referring to a variety of schools of thought existing at a particular point in history, it nonetheless referred to a penal movement which is believed to possess certain attributes. It has been noted that the Classical School "[c]ertainly has a unitary sense. Though its theorists differed on some points, particularly regarding the nature of the penalty, there is nevertheless an ensemble of materials and common lines within its bosom which gives harmony and unity to the scientific direction."²⁹

²⁷ GUEVARA, *supra* note 17, at 8.

²⁸ Lorenzo Padilla, *The History of Penal Law*, 40 ATENEO L. J. 109, 111 (1996).

²⁹ *Id.*

Journal articles that discuss the Classical and Positivist schools of thought in the Philippines³⁰ often consult Judge Guevara's writings on the matter. Thus, the following description of the Classical School, penned by Judge Guevara, contains the popularly accepted list of attributes allegedly inherent in the Classical School. This list of characteristics has often been the basis for calling the Classical School rigid, unyielding and unmindful of the humanity of the criminal:

- (1) The classics built their majestic conceptions upon simple reasoning. Criminal law was a dogmatic system based upon essential principles. Other authors have called this attribute "The Essentially Speculative Methodology" and have explained it by saying that "[t]he Classical school adopted for its scientific methodology the abstract logic method." Penal law was a science that derived its precepts from the "logical deductions of eternal reason."³¹
- (2) Liability is based on free will and moral blame. The Classical School raised to the highest category of dogma the assertion of free will and the moral character of liability. Its formula was: action or omission plus free will equal crime.
- (3) Crime is considered as a juridical entity which authors explain as "a juridical attack, an assault against the pure norm and an infraction of the law of the State, a juridical entity. Hence, it does not solely remain on the terrain of pure acts."³²

³⁰ The author consulted all volumes of the PHIL. L. J. from 1914 to 1994, and 1996, as well as the ATENEO L. J. from 1952 to 1996.

³¹ Padilla, *supra* note 28, at 112.

³² *Id.*

- (4) Penalty is an evil; a means of juridical tutelage. According to Francisco Carrara, its most authoritative expounder, the only justification for penalty is juridical tutelage.³³

This, however, being a very generalized rendition, has led others to seek a better understanding of the Classical School's line of thought. A more recent article gives a comparatively thorough discussion of the Classical School and its philosophy. This article notes a fifth attribute not found in Guevara's work:

Essentially Individualist and Humanitarian in Orientation. A final distinguishing characteristic of the Classical School, Cuello Calon points to its individualist sentiment of protection and guaranty against possible abuses and arbitrariness. The Classical school has brought about the penal system, consolidated with it, with the individualist spirit of the philosophers and the principles of the French revolution. From these arose its efforts to maintain the principle of legality of crimes and penalties (*nullum crimen, nulla poena sine lege*), its aspiration to define in a detailed and restrictive manner the circumstances modifying the crime especially the aggravating circumstances, the careful dedication to the subtle examination of the crime in its internal aspects, the minuteness of detail in the definition of the figures of the crime, and its tendency toward the prevention of all possible cases of delinquencies.³⁴

Since criticisms hurled at both the Penal Code and the present penal system — both of which are described as rigid and inhumane — are often based on the generally accepted description of the Classical School, the widespread critique of the Penal Code and its Classical origins becomes suspect.

Nevertheless, it cannot be denied that the Classical School has exerted a profound influence on penal law and practice around the world. The Philippines is not the only country whose criminal law demonstrates the influence of this school. Cuello Calon is cited as saying: "[a]lmost all the totality of the penal codes and laws elaborated in the past century were completely inspired by the orientation of this school to

³³ GUEVARA, *supra* note 17, at 5-6.

³⁴ Padilla, *supra* note 28, at 118.

whose essence some of the codes more recently promulgated remained faithful....³⁵

For this reason, the Revised Penal Code, along with all other codes worldwide which reveal aspects of the Classical School, betrays what many perceive to be a timelessness and permanence necessary for the law to bring and maintain its promise of peace and order.

The apparent timelessness of the Revised Penal Code, however, masks a corresponding narrative of friction and challenge.

A. A forgotten flashpoint: Historical fiction and friction

In recounting the origins of the present penal code, narratives often gloss over the fact that the introduction of the old Penal Code in the Philippine Islands was met with widespread opposition. Prior to the extension of the old Penal Code to the Philippines in 1887, a colonial legal system dating back to the 16th century formed the basis of law in the islands. Only a decade after the discovery of the islands by Magellan, the laws of the Spanish peninsula were applied to the colonies by one of the *Las Leyes de los Reinos de Indias* (Laws of the Indies), which was promulgated in 1530.³⁶ The *Las Leyes de los Reinos de Indias*, a collection of enactments which evolved from Spain's experiences in the Americas and supplemented by royal orders and decrees, constituted the law in force in Spain's other colonial possessions, including the Philippines.³⁷ In cases where any matter — criminal or civil — was not covered by this collection, the laws of Castile governed. By 1805, Spanish authorities consulted laws and royal orders issued by Castile in the succeeding sequence: the royal decrees and ordinances pertaining or extending to the Philippines; the Laws of the Indies; the *Novisima Recopilación de Castilla*; the *Nueva Recopilación* of 1567; the Laws of Toro; the royal ordinances of Castile; the

³⁵ EUGENIO CUELLO CALON, *DERECHO PENAL* 48 (1951), quoted in Padilla, *supra* note 28, at 112.

³⁶ Cuyugan, *supra* note 25, at 205.

³⁷ GREG BANKOFF, *CRIME, SOCIETY AND THE STATE IN THE NINETEENTH CENTURY PHILIPPINES* 93-94 (1996). Bankoff notes that an attempt to codify laws, which began in 1548, was first published in 1681 as the *Recopilacion de los reinos de Indias*. After its first publication, subsequent editions were made in the years 1754, 1774, 1791, and 1841.

Ordenamiento de Alcala of 1348; the *Fuero Juzgo*; the *Fuero Real*; and the *Siete Partidas*.³⁸ In addition to these, the *Autos Acordados* of the *Audencia de Manila* and the *Ordenanzas de Buen Gobierno* had penal features.³⁹

The old Penal Code, being extended to the Philippines by royal decree in 1887, was actually the first real measure of reform to enter the colony in three centuries of Spanish rule. Its importance is underscored by the fact that it was one of the means by which "the appurtenances of a modern legal system were established in the colony."⁴⁰

Prior to its extension to the Philippines, the Spanish crown jealously guarded its monarchic rule in the islands, as well as the inquisitorial system through which it dispensed justice,⁴¹ notwithstanding the fact that major legal reforms were in progress in Castile. In *Crime, Society and the State in the Nineteenth Century Philippines*, Greg Bankoff writes:

[T]he reforms that began to modernize many aspects of the legal system in Spain were not allowed to seep into the Philippines by default. No law passed after 1805 applied in Spain's remaining Asian and American territories unless specifically extended to include them. Only in 1887 and 1889 respectively were the Penal and Civil Codes based mainly on their metropolitan equivalents, introduced into the colony....⁴²

It is not surprising, therefore, that the introduction of the Penal and Civil Codes was met with "formidable opposition from certain sectors of society."⁴³ In particular, government officials decried the introduction of the Penal Code because of the allegedly inherent "ambiguity of some provisions and the inappropriateness of the scale of punishments in relation to local

³⁸ *Id.* at 210.

³⁹ GUEVARA, *supra* note 17, at 17.

⁴⁰ BANKOFF, *supra* note 38, at 94.

⁴¹ In addition, the judicial process was highly politicized, and the application of laws emanating from Spain dependent on immediate political considerations in the colony. This was due to the fact that the Spanish colonial bureaucrat frequently possessed both executive and judicial power, as well as to the Spanish administrative concept of *obedezco pero no cumpla* — I obey but do not comply — which allowed the colonial bureaucrats to apply the laws emanating from Spain in accordance with what they perceived as proper for the colony. *Id.* at 8.

⁴² *Id.* at 94.

⁴³ *Id.*

circumstances.”⁴⁴ Notwithstanding the fact that certain provisions in the Spanish code on which the Penal Code was based were tailored to the colony’s needs, the Governor General wrote to the minister of Overseas Provinces to protest the “inconveniences” attending the introduction of the Code.⁴⁵ It is more likely, however, that such protests were born from the authorities’ aversion to seeing the reforms initiated in the mainland applied in their tiny fiefdom overseas.

This forgotten flashpoint in legal history debunks the fiction that the old Penal Code and its offspring, the Revised Penal Code, are laws which embody substantially the same provisions which existed during the greater part of the Spanish era. The old Penal Code, in fact, was the child of reform. However, its introduction to the Philippines at the end of the nineteenth century was too late to stop the populace from revolting against, among other things, the patent arbitrariness of the colonial justice system. Less than a decade after its extension to the islands, the Philippine Revolution began.

B. The positivist phantom, the juridical debate

It was General Merrit’s proclamation on August 14, 1898, declaring that the Penal Code remained in force, which ushered the Penal Code into the 20th century. However, it was clear from the outset that the retention of the Code was meant to be merely *provisional*. Sinco observes in an article that

[i]t should be remembered that the [old] Penal Code...in force in the Philippines is the same old Code of Spain enacted way back in the year 1870. *Many of its provisions have been found inadequate to changed conditions, and quite a number of them were held contrary to the Organic Law of the Islands and the spirit of American institutions introduced by the United States into the Philippines.* A great portion of the code has been subjected to amendments by the Philippine Commission and the Philippine Legislature at various times during the last three decades. (emphasis supplied)⁴⁶

⁴⁴ *Id.* at 211.

⁴⁵ *Id.*

⁴⁶ Vicente Sinco, *The Revised Penal Code: A Brief Review*, 10 PHIL. L.J. 165 (1930).

In *The Origin and Development of Philippine Jurisprudence*, published in 1917, Antonio Cuyugan writes:

For the greater portion of our criminal jurisprudence, therefore, we have for basis its Spanish ancestors.... But this branch of our jurisprudence did not remain unaltered with the change of sovereignty. On the contrary, *perhaps on the grounds of humanity and convenience*, our legislators, from the beginning of the present administration, began to import portions of Anglo-American jurisprudence. Thus several provisions of the Penal Code have been repealed or superseded by subsequent enactments, among the most important of those suffering some change being the provisions of Book II [definition of crimes and their corresponding penalties]. (emphasis supplied)⁴⁷

The article, however, goes on and states that the following are the particular provisions amended during the American era:

Several titles of this book have suffered mutilations, especially Title II, which provides for crimes and penalties against the fundamental laws of the State.... Among the most important changes introduced are the Libel Law (Act No. 277); Treason, Insurrection and Sedition Law (Act No. 292 and amendments); The Customs Administrative Act (Act No. 255 and amendments); Internal Revenue Law (Act No. 1697); and several others. Almost all of those Acts are, without exception, borrowed from Anglo-American jurisprudence.⁴⁸

thereby suggesting that the amendments were made for political, rather than for humanitarian reasons. Other reasons for revising the old Penal Code can be gleaned from the following passage:

For some time now, there has been felt an imperative need for a thorough revision of the Penal Code in order that the criminal laws of the Islands may be presented in a more orderly and systematic arrangement, consolidating the various penal statutes, as well as those provisions of penal character scattered in the existing codes.⁴⁹

⁴⁷ Cuyugan, *supra* note 25, at 207-208.

⁴⁸ *Id.* at 208.

⁴⁹ See note 25, *supra*.

These reasons notwithstanding, the most popular reason for embarking on the revision of the old Code has been the observation that "*it is too rigid and that many of its penalties are too severe and not proportionate to the seriousness of the offense.*" (emphasis supplied)⁵⁰

These words, uttered by the Honorable Eugene A. Gilmore, Acting Governor-General of the Philippines, on the occasion of the Third Convention of Provincial Fiscals on April 28, 1929, demonstrate the popular sentiment in those days which equated the old Penal Code with harsh punishment. In the same speech, the Acting Governor-General says that this criticism of the Code is the reason for the move to reform it:

This criticism has happily born fruit in a movement that has been underway for some time to revise the Penal Code and to give it more elasticity. Judging from my own experience in dealing with petitions for pardons, I am inclined to believe that the time has come for a careful revision of our Penal Code with a view to eliminating some of its rigidity and anomalies and to place in the hands of the judges more discretion in the application of penalties.⁵¹

The movement Governor-General Gilmore spoke about is popularly known in the Philippines as the *Positivist School*. Its most famous proponent in the country was Judge Guillermo Guevara, who enumerated the following general characteristics of the school:

(1) It uses experimental, rather than logico-abstract reasoning, in finding solutions to crime. It attempts to eradicate crime by studying and treating the human mind, being and condition, instead of formulating laws punishing wrongful acts. In the most glowing terms, Judge Guevara writes of this characteristic thus:

The positivist method is purely experimental. Starting from the evident difference between criminal law and several juridical branches, a difference based upon the fact that in criminal law, man is the most

⁵⁰ Eugene Gilmore, *The Administration of Criminal Law in the Philippines*, 9 PHIL. L.J. 30, 35 (1929).

⁵¹ *Id.* at 35-36.

essential factor, the Positivists condemned the dogmatic system and the cry of Ferri, "Down with syllogism!" shook the old punitive temple. The Positivists School applied the experimental method, and by it, suddenly aggrandized to a large extent the small territory which of old had been colonized by the jurists. Since the publication of the work of Lombroso, books inspired by the new anthroposociological tendencies are distinguishable, by the most superficial inspection, from those following the purely speculative method — their pages are interspersed with maps, tables, graphs, photographs and sketches.⁵²

(2) It holds that the basis of criminal liability is the human being's existence in society. Judge Guevara explains the relationship of the human being's existence in society and his criminal responsibility thus:

This school bases the responsibility of the criminal upon his dreadfulness or dangerous state. The foundation of the doctrine is that man is liable for external criminal acts done by him, only because he lives in society and so long as he lives therein, society has a right and it is its mission as well, to provide for its own defense from the very moment the conditions of physical imputability appear. Hence determinism and social responsibility are not supposed to be a denial of the right to punish but a change in its character and foundation. If man is fatally determined to commit a crime, society is equally determined to defend the conditions of its own existence against all those who menace it. But for the investigation of defensive means, and of its waiver in the proper cases, the only guiding criterion is the *personal dangerous condition* the formula of which was first given by Garofalo calling it *dreadfulness*, a term meaning "the constant and active perversity of the delinquent and the amount of foreseen evil which is to be feared from the delinquent himself."⁵³

(3) It believes that crime is not a juridical entity but a natural and social fact resulting from personal, environmental, and other conditions. Thus Judge Guevara writes:

The Positivists consider crime as a natural and social phenomenon produced by man, in opposition to the formula of Carrara that crime is a juridical entity. Positivists verified that a punishable act is a natural

⁵² GUEVARA, *supra* note 17, at 6.

⁵³ *Id.* at 6-7.

and social fact, an act of man that occurs in society whereby the latter is damaged. Therefore, crime is both an individual phenomenon and a social phenomenon. This discovery made the Positivists arrive at the conclusion that it becomes necessary to study man who performed the act punishable by law, and the environment in which crime is engendered and brought forth.⁵⁴

(4) It believes that penalties corresponding to certain acts are society's means of defending itself, and are not means to teach the erring criminal not to do wrong (juridical tutelage).⁵⁵

Understood in this context, the Positivist School in the Philippines has gained adherents from those concerned about the purportedly retributive nature of the old Penal Code. Humanitarians who claim to be "concerned about the criminal more than the crime" have allied themselves with the "Positivists" and, throughout the history of both the old and Revised Penal Codes, repeatedly attempted to overhaul the penal code and install a positivist code in its stead. As yet, however, none of these attempts have succeeded.

1. The case against Del Pan's Correctional Code

The first attempt to revise the old Penal Code was undertaken by Rafael del Pan. He authored a *Codigo Correccional* in 1916.⁵⁶ The Correctional Code was striking in its adherence to the Positivist School's ideas of rehabilitation and sanctions. An October 1927 article entitled "Some of the Salient Features of the Proposed Correctional Code" reveals a few proposed changes sought by Del Pan:

- (1) It replaced the terms "punishment" and "penal" to "correction" and "correctional"; the terms "crime" and "criminal" to "infraction" and "infractor" or "transgressor."
- (2) Instead of retribution and punishment, the defense of society is made the object of punishment. This is to be accomplished through

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

⁵⁶ Ambion, *supra* note 19.

the correction of the transgressors and the reparation of the damage caused.⁵⁷

The first modification mentioned was attacked for being a meaningless change in the use of terms:

It is perhaps because of...the moral stigma that attaches to the words, "crime" and "criminal" that the framers of the proposed Correctional Code, with an eye to the social rehabilitation of the wrongdoer, have abstained from their use and have preferred the use of the terms "infraction" and "infractor" or "transgressor" to signify a violation of existing laws, and the lawbreaker.

But, after all, what is there important or noteworthy in a name aside from the association to the particular act or object which it represents? The moment that such deeds...begin to be called "infractions" [and their doers] "transgressors", just as soon will the public begin to regard with the same prejudice and contempt these newfangled words.

Then shall we realize the wisdom of reverting to the classical terminologies of "crime and "criminal"; and the advantage of separating and distinguishing the more atrocious "crime" from the lesser fault of "misdemeanor."⁵⁸

The rehabilitative aim of the proposed code was also criticized for being impractical:

On the whole, the correctionalist doctrine is beautiful in theory but impracticable in its application. Especially is this true in the Philippines, particularly as regards to our provincial and municipal jails, for neither the provinces nor the municipalities have [a] superabundance of funds to hire the services of expert criminologist[s] to carry on the work of reforming the criminals.⁵⁹

However, the Del Pan Correctional Code was most widely opposed for adopting, in section 21, the sterilization of an incorrigible, abnormal,

⁵⁷ Emiliano Panis, *Some Salient Features of the Proposed Correctional Code*, 7 PHIL.L.J. 125, 126-127 (1927).

⁵⁸ *Id.*

⁵⁹ *Id.* at 130.

degenerate or habitual offender by means of vasectomy or salpingectomy as punishment for recidivism. Sterilization was then recommended by the adherents of the Positivist School in cases of crimes committed because of hereditary factors.⁶⁰

It seems, however, that the widespread rejection of the Correctional Code was not so much due to its proposal to use eugenics as it was due to its openly being influenced by the Positivist School. Critics attacked the proposed code using arguments culled from the Classical School:

The one important fact to remember is that no act is a crime which the law does not so regard and punish. Crime, therefore, is, as Carrara said, a fact dependent upon the law, an infraction rather than an action.... Crime, therefore is not a character which attaches to an individual. It is not a simple phenomenon of ethical aberration from a standard type. It is rather a complex relation, a variable quantity, which the law creates between itself and the law breaker.⁶¹

In this brief passage alone, it is evident that the tenets of the Classical School — crime being a juridical entity rather than a social fact; criminal liability being a result of a violation of law, and not the result of the delinquency of an abnormal human being — made it difficult for legislators of the period to accept the conceptual changes introduced by the Positivist School.

2. The case against the Code of Crimes

Because of the brouhaha resulting from Del Pan's proposed Correctional Code, the government's next attempt at changing the old Penal Code took a more conservative turn. Administrative Order No. 94 (dated October 18, 1927), issued by the Department of Justice, created a committee whose task was to make a "Revised Draft" of the old Penal Code. According to Judge Guevara, who was a member of the Committee, the latter was ordered to take into consideration the following in revising the old Penal Code:

⁶⁰ Sinco, *supra* note 46, at 171; see also Ambion, *supra* note 19.

⁶¹ Panis, *supra* note 57, at 126-127.

- (1) The Penal Legislation found in the State's statute books, amending or in some manner affecting the provisions of the Penal Code;
- (2) The rulings laid down by the Supreme Court in its decisions applying, interpreting, or otherwise discussing the provisions of the Penal Code; and
- (3) The present conditions in the Islands, social and otherwise.⁶²

Because the powers of the Committee were well-defined by the Administrative Order, and because of the directives given, the Committee "did not consider itself empowered to present a draft of the Penal Code in harmony with the theories of the Positivist School or of modern criminology."⁶³ As a result, the Committee accomplished their task by compiling the Penal Laws in force in the country, without radical changes, into the Revised Penal Code.⁶⁴ Judge Guevara notes that "[t]he Revised Penal Code, therefore, like the old Penal Code, continues to be based on the principles of the Old or Classical School, although many provisions of eminently positivistic tendencies were incorporated in the present code."⁶⁵ But even before the stalwarts of the Classical School could rejoice at what could be construed as an affirmation of their line of thought, a Code Commission authorized by President Manuel Roxas to codify all substantive laws of the Philippines "in accordance with the progressive principles of law and the traditions and customs of the Filipino people"⁶⁶ began working on a proposed Code of Crimes. But no sooner was the draft of the Code of Crimes completed and submitted to Congress in 1950 when it came under attack.

Thus, it was not until the sixth and seventh Congress in 1972 that the Code passed first reading and was eventually approved by the House of Representatives as House Bills No. 1200 and 1855. However, before the Senate could discuss the Code, Martial Law was declared in September 1972, and

⁶² GUEVARA, *supra* note 17, at 14-15.

⁶³ *Id.* at 15.

⁶⁴ *Id.*

⁶⁵ *Id.* Among the "positivist provisions" noted by Guevara are those having reference to the punishment of impossible crimes, juvenile delinquency, etc.

⁶⁶ Ambion, *supra* note 19, at 152.

Congress was abolished.⁶⁷ Judge Guevara then began to work for the conversion of the proposed code into a presidential decree. In 1974, President Marcos referred the Code to a Committee of Undersecretaries, which passed the work to a legal panel composed of representatives from the U.P. Law Center, the Department of Justice, the Legal Office of Malacañang, the Department of Social Welfare and the National Economic Development Authority. An updated version of the proposed code, completed in February 1977, was submitted to the Interim Batasang Pambansa as Cabinet Bill No. 2.⁶⁸

Some of the salient features of the Code of Crimes can be gleaned from the words of the Code Commission that drafted it. While these features echo certain attributes of the Positivist School of thought,⁶⁹ the Code Commission increasingly cloaks these characteristics in words that emphasize the “humanitarian” nature of the Code of Crimes. The following are examples of this shift in language employed by the Code Commission:

- a. *The defense of society is the primary objective of the Code of Crimes*

While reiterating that the objective of the Positivist-inspired code was to defend society from the “socially-dangerous person,” the Code Commission now gives more emphasis to the Positivists’ vaunted concern for the individual. In doing so, it contrasts the proposed code’s “humanitarian” concern for the delinquent with the retributive nature of the existing Code, thereby fanning the debate between adherents of the Classical and Positivist Schools:

The ... proposed Code of Crimes ... leans toward the positivist school, which considers the actor rather than the act itself. The Code Commission, criticizing the present Penal Code, said that the present

⁶⁷ Vitonio San Juan, *Comments on the Provisions on Socially Dangerous Persons as Provided for in the Proposed Code of Crimes*, 54 PHIL. L.J. 217, 218 (1979).

⁶⁸ *Id.*

⁶⁹ *Id.* San Juan notes that while the Code Commission combined both the Classical and Positivist schools of thought in the Code of Crimes, it nevertheless laid a heavier emphasis on the Positivist School’s ideas.

criminal code bases criminal liability of human free will and emphasizes the retributive aspect of penalty.⁷⁰

In the name of social defense, article 112 of the Code of Crimes provides for the "promotion of public weal, welfare and safety," through the following measures, among others:

- A "socially dangerous person" may be confined in an agricultural or labor camp, hospital, asylum or reformatory even before the commission of a crime or after service of his or her sentence.
 - Detentive security measures shall be executed immediately after the service of the principal repression [penalty], if any and shall last until the Court has pronounced that the subject is no longer socially dangerous.
 - A person may be committed in a therapeutic institution on the basis of information obtained from him by psychiatrists and experts during interviews, generally without assistance of counsel.⁷¹
- b. *Crime is a social and natural phenomenon, not a juridical entity.*

As to the basis of criminal liability, certain provisions of the Code of Crimes express the retention of the Classical School's principle of free will in every act or omission.⁷² Article 15, for instance, defines a crime as "an intentional or voluntary act repressed by law." These provisions, however, are accompanied by others which express that "the actor is considered as more important than the act itself."⁷³ The humanitarian flavor of the latter provisions, however, are based on a less kindly positivist tenet, which

⁷⁰ Report of the Code Commission, cited in Reynaldo Alhambra and Alfredo Duran, *Comments on Crimes against Family Solidarity as Provided for in the Proposed Code of Crimes*, 52 PHIL. L.J. 562, 564 (1977).

⁷¹ As cited in Ambion, *supra* note 19, at 154, 155.

⁷² Arts. 13 and 15.

⁷³ Arts. 103 and 110. Alhambra and Duran, *supra* note 69, at 565.

recognizes the existence of a "socially dangerous" individual whose "morbid predisposition, congenital or acquired by habit, or by destroying or enervating the inhibitory controls, favors the inclination to commit crime."⁷⁴

The theoretical foundation of these provisions is the positivist belief that since societal conditions fatally determine a person to commit a crime, society is equally determined to defend the conditions of its own existence against those who may potentially harm it. This axiom points to the person's very existence in society as the source of criminal liability, as well as the source of the State's power to "repress" the "socially dangerous" individual. A consequence of this belief is in the Code of Crimes' non-imposition of fixed penalties for particular criminal acts. In an attempt to escape from the "rigidity" of the Revised Penal Code, the Correctional Code gives judges greater discretion in imposing particular penalties for erring individuals. This is because

the positivist school takes the view that crime is essentially a social and natural phenomenon and as such, it cannot be checked by the application of abstract principles of law nor by the imposition of a punishment, fixed and determined "a priori." Rather, individual measures in each particular case, after a thorough personal and individual investigation conducted by a competent body of psychiatrists and social scientists is ideal.⁷⁵

The present code, which observes a mathematical proportion between crime and penalties...[reduces] the courts into a mere manipulator of a calculating machine in the administration of justice...[T]he proposed Code of Crimes will give the courts greater leeway in correcting criminals since the positivist school believes that penalties should not be retributive but curative.⁷⁶

There is an uneasy tension between the Code Commission's adherence to the Positivist tenet that social defense is the main objective of the Positivist school of thought and its attempts to frame the Correctional Code's Positivist philosophy in more humanitarian terms. Although it claims that "man is

⁷⁴ *Id.*

⁷⁵ *Id.* at 564-565.

⁷⁶ *Id.*

primary, and his deed, secondary,” and aims to eradicate crime by treating “socially-dangerous” individuals, it uses this very axiom to justify the State’s invasion into an individual’s life; to define a person as a “socially-dangerous person” without him or her having committed a felonious act; and to indefinitely deprive a person determined to be “socially-dangerous” of his or her liberty. Because of these reasons, the U.P. Law Center criticized the Code of Crimes on the following constitutional grounds:⁷⁷

- the Code of Crimes’ provisions on preventive commitment of “socially dangerous persons”⁷⁸ as well as article 105’s definition of the latter term, violate the due process requirement;
- its provisions requiring the indefinite detention or confinement of convicts even after the service of sentence amount to excessive penalty and was therefore unconstitutional;
- provisions requiring the confinement in agricultural or labor camps amount to involuntary servitude; and
- the provisions allowing the commitment of a person on the basis of information obtained from him by psychiatrists during interviews without assistance of counsel violate the right against self-incrimination.

While the Code of Crimes has been criticized on other grounds,⁷⁹ it is this

⁷⁷ Ambion, *supra* note 19, at 154.

⁷⁸ Article 105 of the Code of Crimes, which defines the “socially dangerous person,” makes it possible for the Court to order the commitment of a person solely on the basis of personal circumstances, and not on the basis of acts which violate the law. Article 105 defines the “socially dangerous person” as one who “shows a certain morbid predisposition, congenital or acquired by habit, which by destroying or enervating the inhibitory controls, favors the inclination to commit a crime. Such a predisposition may be deduced from any one or more of the following facts or conditions: 1. The nature, object, time, place and other circumstances of his behavior; 2. His criminal antecedents, if any, the mode of life of the offender; 3. His individual, family, domestic and social background; 4. Other analogous circumstances.

⁷⁹ The Code of Crimes has been criticized for being an impractical and costly means to rehabilitate criminals; for making judges perform the functions of psychologists in determining whether a person is “socially dangerous”; for potentially clogging court dockets with petitions to declare persons who have not committed an unlawful act as “socially dangerous”; for intruding into the sphere of morality by penalizing acts “which would in no way endanger public welfare,” thereby unduly restricting individual liberty. See Ramon Aquino, *Observations on the Proposed Code of Crimes*, 35 PHIL. L.J. 1015 (1960); San Juan, *supra* note 67, at 217; Alhambra and Duran, *supra* note 70, at 562.

rupture between the Code of Crimes' positivist concern for the person, and its provisions' bent toward violating civil liberties, in the guise of treating the delinquent, which is most disturbing. Could the purportedly rehabilitative ends of positivism really be instruments of social control, instruments that impose social order at the expense of the individual's liberty?

c. *The myth of the rigid Code*

Another fact casts doubt on the plausibility of the Positivist promise that rehabilitative laws shall rid the world of crime: Far from being a rigid body of law, Philippine penal law and the Revised Penal Code have in fact acquired a more Positivist bent throughout the years. This, however, has done nothing to stop the increasing incidence of crime.

Although the Positivist-inspired Code of Crimes did not succeed in replacing the Revised Penal Code, legislature has enacted several laws whose aim was to temper the retributive nature of Philippine law with means by which prisoners may be rehabilitated. For instance, Act 4103 of the Philippine Legislature, as amended by Act 4225, provides for an indeterminate sentence and parole for persons convicted of certain crimes. This law created a Board of Indeterminate Sentence, which is now known as the Board of Pardons and Parole.

The Indeterminate Sentence Law makes it possible for the "individualization of punishment" since its purpose is "to uplift and redeem valuable human material and prevent unnecessary and excessive deprivation of personal liberty and economic usefulness."⁸⁰ In a Positivist tone, the Supreme Court, speaking in the case of *People v. Ducosin*,⁸¹ expounds on the way by which convicts may be rehabilitated by the aforementioned law:

It is necessary to consider the criminal first, as an individual and second, as a member of society.... It is the duty of the court to explore in each case, as far as humanly possible, with the end in view that penalties shall not be standardized but fitted, as far as is

⁸⁰ Ramon C. Aquino, *Observations on the Proposed Code of Crimes*, 35 PHIL. L.J 1015, 1025 (1960).

⁸¹ 59 Phil. 109 (1933).

possible, to the individual, with due regard to the imperative necessity of protecting the social order.

Considering the criminal as an individual, some factors that should be considered are: (1) His age, especially with reference to extreme youth or old age; (2) His general health and physical condition; (3) His mentality, heredity and personal habits; (4) His previous conduct, environment and mode of life (and criminal record if any); (5) His previous education, both intellectual and moral; (6) His proclivities and aptitudes for usefulness or injury to society; (7) His demeanor during trial and his attitude with regard to the crime committed; (8) The manner and circumstances in which the crime was committed; (9) The gravity of the offense.

Act 4103 also creates the Board of Indeterminate Sentence (now the Board of Pardons and Parole) which shall ascertain whether a prisoner may be eligible for parole. A trained sociologist, a clergyman or educator, a psychiatrist and a woman are the members of this board, which looks into the prisoner's physical, mental or moral record in order to determine whether the latter "is fitted by his training for release, [and] that there is a reasonable probability that such prisoner will live and remain at liberty without violating the law, and that such release will not be incompatible with the welfare of society." Although released into society, he or she is still placed under surveillance and is required to report to parole officers or government officials. The prisoner is finally released after he or she has shown the willingness to be "a law-abiding citizen" who shall "not violate any of the laws of the Philippines."⁸² Clearly, the Board's task of assessing whether the prisoner has shown signs that his or her incarceration has reformed his or her character is consistent with the Positivist aim of reforming the criminal.

The Revised Penal Code likewise breaks away from the myth of being a retributive code by exhibiting the following provisions that are more consistent with the Positivist school of thought:

⁸² Act No. 4103, secs. 3- 8, cited in Aquino, *supra* note 80, at 1024.

i. Impossible crimes

Article 4, paragraph (2) of the Revised Penal Code states:

Criminal liability shall be incurred:

x x x

By any person performing an act which would be an offense against persons or property, were it not for the inherent impossibility of its accomplishment or on the account of the employment of inadequate and ineffectual means.

Under the old Penal Code, impossible crimes were not punished because "they injure nobody and the juridical order is not disturbed."⁸³ Following the Classical School axiom *nullum crimen, nulla poena sine lege*, an impossible crime is impossible to punish because the act punishable by the law was impossible to perform. The penalization of impossible crimes was clearly an innovation with Positivist underpinnings:

Although the [Positivist] school admits that there may be no injurious consequences proceeding from the commission of impossible crimes, it is nevertheless certain that the actor has exhibited himself as a criminal personality from whom the community might expect a future manifestation of moral turpitude...[I]f by the commission of an impossible crime, an individual has shown himself to be inadaptable [sic] to social life, there is therefore a reason *for his elimination in the interest of social defense*. (emphasis supplied)⁸⁴

In other words, article 4, paragraph (2) is a provision that makes no sense to adherents of retributive justice. It punishes no criminal act. Neither does it imprison the offender in retaliation for a wrong the latter had committed against another, for there is no one hurt by the commission of the impossible crime. Rather, the individual "convicted" of an impossible crime is sentenced to prison in order that society may be shielded from the danger he or she poses. The incarceration of the offender is also aimed at rehabilitating the latter by ridding him or her of criminal tendencies.

⁸³ Jose Cabatuando, *Should Impossible Crimes be Punished?*, 13 PHIL. L.J. 1, 23 (1933).

⁸⁴ *Id.* at 23-24.

ii. Victimless crimes

Like article 4, paragraph (2) of the Revised Penal Code, article 202 of the same code is a provision that is not found in the old Penal Code.⁴⁵ It likewise betrays the influence of the Positivist School. Article 202 states:

- (1) Any person having no apparent means of subsistence, who has the physical ability to work and who neglects to apply himself or herself to some lawful calling;
- (2) Any person found loitering about public or semi-public buildings or places, or tramping or wandering about the country or the streets without visible means of support;
- (3) Any idle or dissolute person who lodges in houses of ill-fame; ruffians or pimps and those who habitually associate with prostitutes;
- (4) Any person who, not being included in the provisions of other articles of this Code, shall be found loitering inhabited or uninhabited place belonging to another without any lawful or justifiable purpose;
- (5) Prostitutes. For the purposes of this article, women who, for money or profit, habitually indulge in sexual intercourse or lascivious conduct are deemed to be prostitutes.
- (6) Any person found guilty of any of the offenses covered by this article shall be punished by *arresto menor* or a fine not exceeding 200 pesos, and in case of recidivism, by *arresto mayor* in its medium period to *prision correccional* in its minimum period or a fine ranging from 200 to 2000 pesos or both, in the discretion of the court.

The forerunner of this provision was found in Act No. 519, enacted during the early years of the American occupation, and modeled after

⁴⁵ Greg Bankoff, however, notes that indigenous people were arrested for vagrancy for moving around the country without *cedulas personales* in nineteenth century Philippines. See BANKOFF, *supra* note 37, at 25.

American vagrancy statutes.⁸⁶ The positivist influence over this provision is related to the fact that article 202 penalizes an individual because of his or her *status* as vagrant or prostitute. Like article 4, paragraph (2), article 202 does not punish by imprisonment an individual for the commission of an act or omission of a duty imposed by law. Rather, the objective of this provision is to *defend society* from persons who may potentially commit crimes. In the case of *People v. Rivera*,⁸⁷ the Court of Appeals explains:

[W]hen a man without means of support, and having ability and the health to work, neglects or disdains to employ himself and then, to cap it all, loiters about public places, [h]is behavior oftentimes leads him to an irresistible temptation to prey upon his fellowmen by raking away their property through force, stealth, deceit or other illegal means. He becomes a public nuisance and menace, and is a potential lawbreaker, pickpocket, thief and even robber.⁸⁸

In other words, the vagrant is a "socially dangerous" individual whose very presence in society justifies his or her incarceration *even if he or she has not performed an act that violates the law*.

Similarly, this provision justifies the State's incarceration of an individual who associates with ruffians, pimps and prostitutes simply because he or she is habitually seen with these persons. It has also been noted that this provision justifies the imprisonment of prostitutes solely because of their status as women who solicit sexual intercourse for profit. In the article "Victimless Crimes: Enforcing the Unenforceable," Victor Eleazar writes:

It is submitted that under the legal definition of prostitution, what is punished is the status itself, i.e., the fact of being a prostitute. There is no necessity for the individual to be caught in the act of sexual intercourse for pay nor in the act of peddling her services. Since the provision does not make any qualification, a woman may be convicted for vagrancy on the mere ground of *having a reputation of being a prostitute*. (emphasis supplied)⁸⁹

⁸⁶ Victor Eleazar, *Victimless Crimes: Enforcing the Unenforceable*, 57 PHIL. L.J. 421 (1982).

⁸⁷ C.A.-G.R. NO. 127-R, July 20, 1947.

⁸⁸ Eleazar, *supra* note 86, at 425.

⁸⁹ *Id.* at 428.

Because vagrancy and prostitution are crimes relating to one's status, persons of the aforementioned status may be arrested again and again so long as they remain vagrants and prostitutes. Unless they are rehabilitated while in prison, they remain "socially dangerous" individuals whom society is given leave to imprison until they have shown signs of reform. However, it has been noted that crimes relating to status make it difficult for those convicted to reform. Eleazar writes:

Since...a woman may be convicted...on the mere ground of having a reputation of being a prostitute...There is no assurance that a prostitute previously convicted will not be further harassed, giving her little or no chance at all to reform.⁹⁰

Thus, the tension between the Positivist objectives of social defense and rehabilitation rears its ugly head again. Although the imprisonment of certain individuals because of their status and associates is justified by the need to defend society, the fact that individuals can be convicted of vagrancy and prostitution on the basis of their *reputation* makes it highly impossible for a convicted person to live a reformed life. It is as if society has doomed him or her to a status of a vagrant or prostitute, without any future of being treated any differently. This leads to a speculation as to whether the Positivist School — which is primarily geared toward protecting social order — really contributes to the rehabilitation of criminals.

It is also interesting to note that while crimes against status, such as vagrancy, are justified by a reliance on the State's capacity to defend society from harmful individuals, the criminalization of vagrancy dates back to the fourteenth century — centuries before the advent of the Positivist School. The American vagrancy statute upon which article 202 is based is itself based upon English vagrancy laws which were "originally enacted in order to control the labor market and to prevent crime in Medieval England."⁹¹ The article "Vagrancy-Type Law and its Administration"⁹² further states:

⁹⁰ *Id.*

⁹¹ *Id.* at 423.

⁹² Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L.REV. 603, 615 (1956), cited in Eleazar, *supra* note 86, at 423.

While prevention of worker migration was undoubtedly one of the purposes of the early English [vagrancy] laws, an examination of the statutes reveals that their enactment was motivated from the beginning by a desire to prevent crimes. Lawmakers then were of the belief that industry is necessary for the preservation of society and that he who is able to work yet unable to support himself deliberately plans to exist by the labor of others and is an enemy of society and the states.

The English view of vagrants being probable criminals who needed to be prevented from committing crimes was quickly adopted by thinkers who treated vagrancy as a kind of disease:

As early as 1837, the U.S. Supreme Court noted that it was "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and convicts, as it was to guard against the physical pestilence which may arise from unsound and infectious disease."⁹³

That the defense of society was the justification for crimes regarding class even before the advent of the Positivist School questions the veracity of the Positivists' claim that their school of thought proposes a new solution to crime and delinquency.

d. A disturbing discourse, a discourse disturbed

Thus far, this paper has framed the debate between the Classical and Positivist schools of thought in the context of the development of, and challenges to, the Revised Penal Code. It has illustrated that far from being a code the origins of which are rooted in a rigid penal philosophy, the Revised Penal Code is the product of a process of penal reform that was initiated in the early 1800s.

It has also argued that the simplistic equation of the Classical School with retributionists and Positivists with humanists is imprecise. In support of this, the following were demonstrated:

⁹³ *City of New York v. Miln*, 36 U.S. 102, 143 (1837) cited in Eleazar, *supra* note 86, at 424.

- (1) the Classical School was the product of reforms which were humanitarian in orientation and its philosophy is likewise influenced by this humanitarian bent;
- (2) the Positivist philosophy proposes means of reforming criminals and persons perceived to be "socially dangerous" which violate fundamental human liberties;
- (3) the Positivist School's emphasis on social defense makes rehabilitation more difficult, if not impossible, for the offender. In other words, the theory of social defense seems to *breed delinquency* instead of reform the criminal; and
- (4) certain tenets of the Positivist School — such as its justification of imprisoning offenders on the basis of social defense — have been used by penal reformers and legislators prior to the advent of the aforementioned school.

Finally it has noted that the Revised Penal Code, far from being a rigid clone of its predecessor, has actually adopted a number of provisions which exhibit positivist tendencies. Furthermore, the body of Philippine penal laws, including the Indeterminate Sentence Law, evinces an increasing orientation toward the rehabilitation of the offender.⁹⁴

IV. HISTORIES INTERTWINED: THE PRISON AND THE DELINQUENT

Despite Philippine law's increasing orientation toward rehabilitation, crimes continue to be committed. In 1993, the increasing incidence of crimes so alarmed Congress that capital punishment⁹⁵ was re-imposed by Congress for

⁹⁴ Other landmark legislation which aim to rehabilitate the offender are Pres. Dec. No. 68, which establishes a Probation System, and the Child and Youth Welfare Code, which amends article 80 of the Revised Penal Code.

⁹⁵ Conditionally abolished by the 1987 Constitution, capital punishment, which was provided for in the Revised Penal Code of 1932, was re-introduced for clearly retributive purposes. Republic Act No. 7659 begins:

WHEREAS, the crimes punishable by death under this Act are heinous for

the following reasons:

WHEREAS, due to the alarming upsurge of such crimes which has resulted not only in the loss of human lives and wanton destruction of property but also affected the nation's efforts towards sustainable economic development and prosperity while at the same time has undermined the people's faith in the Government and the latter's ability to maintain peace and order in the country;

WHEREAS, the Congress, in the justice, public order and the rule of law, and the need to rationalize and harmonize the penal sanctions for heinous crimes, finds compelling reasons to impose the death penalty for said crimes;⁹⁶

Perhaps the key to the problem lies in the discourse of penal law reform that has revealed striking similarities between two allegedly opposing schools of thought, to wit:

A. Reformist agenda

Although the Positivist School has contrasted itself with the Classical School by characterizing itself as a reform movement, the Classical School, at its inception, was likewise concerned about replacing torture with a more lenient mode of punishment.

In *Discipline and Punish*, Foucault notes that in the late 18th century France, a need arose for a punishment without torture, a new leniency in the

being grievous, odious and hateful offenses and which, by reason of their inherent or manifest wickedness, viciousness, atrocity and perversity are repugnant and outrageous to the common standards and norms of decency and morality in a just, civilized and ordered society;

x x x

WHEREAS, the Congress, in the interest of justice, public order and the rule of law, and the need to rationalize and harmonize the penal sanctions for heinous crimes, finds compelling reasons to impose the death penalty for said crimes; (emphasis supplied)

x x x

⁹⁶ Rep. Act No. 7659 (1993).

punishment of criminals. This new leniency was justified by the prisoner's humanity.⁹⁷ However, Foucault observes that the reform set forth by the Classical reformers was not so much an attack against the cruelty of existing penalties as it was an attack against the irregularity with which courts dispensed justice. In late 18th century France, the latter was criticized thus:

- The offices of judges were sold; they were hereditary, they had a commercial value, and, for this reason, the justice that was handed out was onerous;
- The judge dispenses the law, and creates the law itself; and
- There were courts, procedures, litigants and offenses that were privileged and fell outside common law.⁹⁸

Similarly, the period preceding the introduction of the old Penal Code in the Philippines was characterized as a period where colonial authorities were forced to initiate judicial and legal reforms to combat the abuses which resulted from the fact that executive and judicial powers were reposed in the same offices of government, to wit:

- The *alcalde-mayor* "constituted in himself the entire court of justice in the province," being both the politico-military governor and provincial magistrate. In his role as the provincial governor, the *alcalde mayor* was often more concerned with raising revenue to finance the expansion of the colonial service. "The administration of tribute collection and the insatiable manner in which [the *alcaldes mayor*] conduct their own business activities makes it impossible for them to attend to the dispensation of justice, [which] is left to their native directors."⁹⁹ Furthermore, it was commonly known that the *alcalde mayor's* business ventures often influenced him in dispensing (or failing to dispense) justice.¹⁰⁰
- The governor-general was both chief executive of the colony and also the president of the *Audencia Real*, the highest court of the

⁹⁷ FOUCAULT I, *supra* note 3, at 76.

⁹⁸ *Id.* at 78, citing *Archives Parlementaires*, XII, 344.

⁹⁹ DENNIS ROTH, *THE FRIAR ESTATES OF THE PHILIPPINES* 157 (1977), cited in BANKOFF, *supra* note 37, at 102.

¹⁰⁰ BANKOFF, *supra* note 37, at 103.

land, and appellate body whose judgment in criminal matters was always final.¹⁰¹ However, the *Audencia Real* not only administered justice but also initiated law. The *Recopilación* states that governor-generals are required to convene the high court as a consultative body "in the interests of good government" where matters were resolved by voting in agreement.¹⁰² A decision reached by the *Audencia Real* presided over by the governor-general gradually "gained the force of law in the form of administrative ordinances embracing a wide range of subjects."¹⁰³

- Prior to 1855, judges exercised absolute discretion in determining the circumstances of a crime and the penalty it merited.¹⁰⁴ This discretion disappeared with the extension of the old Penal Code to the Philippines, which prescribed that "all a magistrate's discretionary powers ceased and future judgments had to be rendered solely in accordance with all the requisites prescribed by law and limited to circumstances in such a manner that a judgment, in accordance with law, must contain all the elements of decisive reasoning."¹⁰⁵

Obviously, the non-separation of executive and judicial powers in the Philippines, as well as the magistrate's absolute discretion in meting penalties corresponding to crimes led to manifold instances of abuse. While the excessive punishment and abuse of these magistrates were met with reforms aimed at separating executive and judicial powers and limiting the discretion of judges, Classical reformers pleaded for less agonizing penalties, arguing against the use of torture and for the adoption of imprisonment as the chief penalty for crimes in general. These parallel reforms were justified with the argument that the prisoner's humanity was entitled to respect.

¹⁰¹ *Id.* at 104.

¹⁰² *Recopilación*, law 45, title 3, book 3. See *id.* at 104-105.

¹⁰³ *Id.* at 105.

¹⁰⁴ *Id.* at 112.

¹⁰⁵ Cayetano Arellano, Historical resume of the administration of justice in the Philippine Islands. *Reports of the Taft Philippine Commission: Message from the president of the United States transmitting a report of the secretary of war, containing the reports of the Taft Commission, its several acts of legislation, and other important information relating to the conditions and immediate wants of the Philippine Islands*, 239 (1901), cited in BANKOFF, *supra* note 37, at 112.

In sum, the entire humanitarian thrust of the Classicists' penal reforms was a parallel response to the over-concentration of power in the hands of arbitrary magistrates. Classicists responded to the excessive punishment caused by the latter's abuses not only by curbing the magistrate's power, but also in lobbying for a punishment which was perceived to be a less excessive display of power than torture. The punishment that gained pre-eminence in this period of reform, was incarceration and expulsion from Spanish territory. Apart from the death penalty and the penalty of *cadena temporal* ("labor for the benefit of the Government; they shall always carry a chain at the ankle, hanging from the waist, they shall be employed in hard and burdensome labor, and shall not receive any assistance whatsoever from without the institution"),¹⁰⁶ the old Penal Code eschewed forms of sanction which primarily inflicted pain on the body.¹⁰⁷

Although Positivists seem to be diametrically opposed to the Classicists' thrust of *punishing* the criminal, their own movement of reform constitutes the logical consequence and continuation of the Classicists' own reforms.

In the Philippines, for example, Positivists followed the Classicists in eschewing corporal punishment. The Revised Penal Code's repeal of the old Penal Code provisions prescribing *cadena* — which required the convict to perform hard labor while in chains — and *presidio* was supported by Classicists

¹⁰⁶ THE PENAL CODE OF THE PHILIPPINE ISLANDS (1887), art. 106. (The Attorney General trans., 1911).

¹⁰⁷ The penalties prescribed by the old Penal Code are listed in article 25 thereof, and are as follows — Afflictive Penalties: Death, *Cadena perpetua*, *Reclusion perpetua*, *Relegacion perpetua*, *Extranamiento perpetua*, *Cadena temporal*, *Reclusion temporal*, *Relegacion temporal*, *Extranamiento temporal*, *Presidio mayor*, *Prision mayor*, *Confinamiento*, Perpetual absolute disqualification, Temporary absolute disqualification, Perpetual special disqualification, Temporary special disqualification; Correctional Penalties: *Presidio correccional*, *Prision correccional*, *Destierro*, Public censure, Suspension from public office, the right to vote or be voted for, or the following of profession or calling, *Arresto mayor*; Light Penalties: *Arresto menor*, Private censure. The penalties of *cadena* (Art. 106) and *presidio* (112) consist of incarceration with hard or forced labor; *reclusion* (109), *prision* (112), and *arresto*, incarceration; *relegacion* (110), confinement within a penal institution but with the privilege of performing their profession therein, under the surveillance of authorities. Penalties which do not involve incarceration are: *confinamiento*, (114) which consists in bringing the convict to a town some 30 to 300 kilometers away from the place where the crime was committed, and where he or she shall be at complete liberty, but under the surveillance of authorities; and *extranamiento*, (111) or the expulsion of the offender from Spanish territory.

who argued that such penalties were too severe and not proportionate to the seriousness of the offenses for which they were meted. Positivists echoed this sentiment, and, in addition, prescribed that the offender be *treated*, not punished. Despite the difference in the ends they wished to achieve, both Classicists and Positivists consistently contributed to the emergence of *incarceration* as the mode by which prisoners may be placed under the control of the State.

The emergence of the prison as the primary State response to crime signaled that the old method of exercising power over individuals had changed both its locus and form. Whereas the pre-Classical sovereign used public executions to control the populace by instilling fear in them, the prison exerted control directly upon the *individual*, whose body, while in prison, was subject to the scrutiny of authorities in the Classical age. The Positivists' quest to reform and treat the convict continues the Classicists' practice of controlling the individual by prescribing "cures" based on the knowledge they had gained from subjecting the convict to an unremitting scrutiny.

A. The humanitarian element

Current juridical discourse, which characterizes the Positivist movement as one which "places man at the center," by making its paramount concern the rehabilitation of the prisoner, downplays the humanitarian basis of Classical thought.

The reform sought by the Classical School centered on the limitation of the sovereign's exercise of power and the protection of individual rights. On the other hand, the reform initiated by the Positivists consisted in breaking away from a retributive view of penal law. It must be remembered, however, that at the center of these two conflicting discourses is the human person. Foucault notes this fact while differentiating the Positivists and Classicists:

The day was to come, in the nineteenth century, when this "man" discovered in the criminal would become the target of penal intervention, the object that it claimed to correct and transform, the domain of a whole series of "criminological" sciences and strange "penitentiary" practices. But at the time of the Enlightenment, it was

not as a theme of positive knowledge that man was opposed to the barbarity of the public executions, but as a legal limit: the legitimate frontier of the power to punish. Not that which must be reached in order to alter him, but that which must be left intact in order to respect him.¹⁰⁸

In seeking to rehabilitate the prisoner, the Positivist used methods discovered and utilized by the Classicist. In particular, the Positivist's emphasis on the use of individualized penalties and punishments (as applied, for example, in the Philippines' Indeterminate Sentence Law) is presaged by the Classicist's emphasis on studying the human individual:

The classical age discovered the body as object and target of power.... [I]n every society, the body was in the grip of very strict powers, which imposed on it constraints, prohibitions or obligations. However, there were several new things in these techniques.... It was a question not of treating the body *en masse*, "wholesale", as if it were an indissociable unity, but of working it "retail," individually; of exercising upon it a subtle coercion, of obtaining holds upon it at the level of the mechanism itself.¹⁰⁹

Just as the Positivist desired to treat the socially dangerous individual, Bentham's Panopticon, the model carceral of the Classical age and the increasingly popular alternative to torture, was designed not only to observe, but also "to train or correct individuals...to reform prisoners."¹¹⁰ Under the gaze of the Panopticon, the prisoner feels subject to an unblinking and judgmental gaze — the gaze of the prison director or inspector who may impose upon each prisoner the method he thinks will best reform his or her behavior.¹¹¹ Seen in this light, the allegedly "humanitarian" bent of both the Classical and Positivist schools is transformed into nothing more than a justification for the exercise of power over the prisoner sought to be rehabilitated or reformed.

¹⁰⁸ FOUCAULT I, *supra* note 3, at 74.

¹⁰⁹ *Id.* at 136.

¹¹⁰ *Id.* at 203, 205.

¹¹¹ *Id.* at 202.

An analysis of the Classical School's principle of *nullum crimen, nulla poena sine lege* further illustrates the similarity between Classicists and Positivists.¹¹² This maxim is explained by the Classical School's concern to limit the sovereign's power and to respect the prisoner's humanity. Evidently, this provision limits the State's power to punish. The sovereign cannot punish an individual arbitrarily. Rather, the former can only sanction those who have violated the law, which is presumed to have been adequately promulgated to the public, and which the offender is presumed to have known when he or she committed the act. Only when the offender persists in committing that which he or she knows is wrong is the State justified in meting out a corresponding punishment. The justification for punishing the offender lies in the fact that he or she had acted in violation of human reason itself, and thus in contravention of his or her *humanity*. Thus, while the Classical School is popularly perceived as one which holds that punishment must be meted for retributive ends, it nevertheless seems to justify the imprisonment of those whose acts betray irrational, and thus inhuman behavior.

This last point underscores the convergence between the Classical and Positivist schools. In the same way that the Classical School justifies the punishment of the irrational, and therefore inhuman individual does the Positivist School justify the treatment of the socially-maladjusted, socially dangerous individual. And while both schools seem to differ in what they wish to do to the offender (one punishes; the other treats), the method by which they carry out their intent — incarceration — remains the same.

B. Humanitarianism vs. Social Defense

Despite the central position occupied by the human being in the Classicist-Positivist debate, both schools justified incarceration with the need for social defense. Thus the validity of the humanitarian claims of both schools was perpetually challenged by acts purportedly done in defense of society.

¹¹²This legal limit imposed on the sovereign's power to punish was embodied in the old Penal Code extended to the Philippines in 1887. Article 1 of the old Penal Code (now article 3 of the Revised Penal Code) reads: "All voluntary acts and omissions punishable by law are felonies (*delitos*) or misdemeanors (*faltas*)."

In a previous chapter, this paper has discussed the tension between the humanitarian and social defense tenets of the Positivist School. On the one hand, the Positivists claim to prescribe a more humane solution to the problem of crime by curing a person of his or her propensity to commit crimes. On the other hand, their belief that the treatment of such persons is only a means of social defense justifies their desire to incarcerate — for purposes of treatment — even persons who may not have committed a crime, but whose actions show evidence of their propensity to do so. The latter comes into conflict with the humanitarian and libertarian aims of the Classical School.

Because of this, one may easily be led to believe that Classicists do not face this tension between the needs of the individual and those of society. However, the aforementioned tension actually afflicts the Classical School as much as it does the Positivists'. This is because the Classical School itself utilizes punishment as a means for social defense. Although Classical penal philosophy has popularly been tagged by Positivists as retributive, vengeance has not been the sole and primary aim of the school. A recent journal article enumerates the nuances between the different schools of thought comprising the Classical School:

Considering the nature of the penalty, there are a variety of nuances showing different tendencies making up the Classical School:

- (1) Absolute theories are retributionist. Penalty has no social function except to punish the criminal simply because he has been delinquent.¹¹³
- (2) Relative theories consider penalty as a means to an end.

There are different ends recognized:

- (a) Penalty is the guaranty of the social contract.
- (b) Penalty is a means of general prevention — either intimidating, psychically coercing, notifying, or controlling the impulse of the public in general in order

¹¹³ Padilla, *supra* note 28, at 114.

to deter it from committing crimes. (emphasis supplied)¹¹⁴

That penalty was a guaranty of the social contract means that the State used penalties to defend society from harmful individuals, in exchange for the fealty of its constituents. In addition, a leading figure of the Classical School in the person of Beccaria is said to have believed that social defense was an important justification for the power to punish.¹¹⁵

Having suggested that Classicists were just as concerned about social defense as were the Positivists, this paper now notes that both Classical and Positivist schools may justify the criminalization of vagrancy, on the ground of social defense.

As discussed in the previous chapter, the Positivist influence over this provision is related to the fact that the objective of article 202 of the Revised Penal Code is to *defend society* from vagrants who are deemed to be potential criminals. The position of the vagrant, then, is analogous to that of a “socially dangerous person” in the Positivist-inspired Code of Crimes. As such, he or she may be arrested, even without his or her committing a single act in violation of the law. However, Classicists may likewise defend article 202 by saying that the vagrant was arrested and imprisoned primarily to protect society from the danger he or she poses. The imprisonment of the vagrant is an exception to the rule of *nullum crimen, nulla poena sine lege* because of the State’s duty to fulfill its part of the social contract — and not because the State wishes to rehabilitate the vagrant.

On the point of social defense, therefore, not much distinguishes Classicists from Positivists. The main difference between the schools is the fact that they employ different means to defend society. The Absolute Retributionists of the Classical School prescribe the destruction or imprisonment of the criminal in order that society may be rid of the latter and the threat he or she poses. Positivists seek to fulfill the same object by

¹¹⁴ *Id.* at 115-117.

¹¹⁵ Abelardo Albis, Eleano Madrona, Alice Marino, and Leonides Respicio, *A Study on the Effectivity of the Philippine Prison System*, 52 PHIL.L.J. 60, 62 (1977).

restraining and treating the socially dangerous individual. In either case, the offender is imprisoned — deprived of his or her liberty and other rights, and in addition, is subject to surveillance of the Classical retributionist and the Positivist reformer.

V. AN ALTERNATIVE DISCOURSE

A. Birth of the prison

The prison is the place where the humanitarian claims of both schools — the rehabilitation of the prisoner — meets the mechanism by which social defense is realized. Through the employment of the prison, penal leniency became a technique of power.¹¹⁶ It is the structural model of the prison — the Panopticon — that has remained the same amid the purported changes of penal philosophy and the codification of criminal laws. The emergence of the prison signaled a break from the old monarchical exercise of power that employed the spectacle of the scaffold to cow its subjects into submission. When the excessive display of power excited revolts instead of sowing fear, the prison immediately replaced torture. The prison, therefore, communicates a type of power that “the law validates and that justice uses as its favorite weapon.”¹¹⁷ The law is merely the discourse that legitimizes the operation of the prison, and its creation of delinquents. It gives the power to punish, “[a] context in which it appears to be free of all excess and all violence,” “naturalizes the legal power to punish” and “legalizes the technical power to discipline.”¹¹⁸

True enough, the development of this country’s penal laws has an intimate connection with the development of the prison system in the Philippines. Just as there was no single codification of penal laws in the Philippines until the old Penal Code was extended to the country in the late 19th century, neither was there a single penal system until 1866, when the *Carcel y Prisdio Correctional* — later known as the Bilibid prisons — was opened by the Spanish government.¹¹⁹

¹¹⁶ FOUCAULT I, *supra* note 3, at 24.

¹¹⁷ *Id.* at 301.

¹¹⁸ *Id.* at 302-303.

¹¹⁹ Albis *et al.*, *supra* note 115, at 64.

The debate between the Classical and Positivist schools of thought during the American regime was marked by an increasing reliance on imprisonment as the means of punishing and correcting offenders. During this same period, a Bureau of Prisons was established, along with a number of state prisons: the Iwahig Penal Colony, the San Ramon Prison, the Corregidor Stockade, the Bontoc Prison, the Correctional Institute for Women and the Davao Penal Colony. The enactment of the Revised Penal Code was followed by measures designed to ensure the rehabilitation of prisoners. In 1949, the Department of Justice issued rules for the treatment of prisoners that asserted that "the purpose of the prison system was not merely to punish the crime but to rehabilitate or correct the criminal."¹²⁰ Like the Revised Penal Code and the Classicist-Positivist debate, these rules "did not significantly alleviate the actual condition of the prisons," nor stop "the growing prison population."¹²¹

The plea to rehabilitate prisoners was again made in the late 1960s when the Senate Committee on Justice of the Fourth Session of the Sixth Congress investigated several jails and found inmates living in "sub-human conditions."¹²² To decongest the National Bilibid Prisons, the government erected two satellite camps in 1971 — Camp Sampaguita, for medium-security prisoners, and the Reception Diagnostic Center for youthful offenders. By 1976, the government had more than 1,500 correctional institutions.¹²³ The increasing number of prisons in the country, together with the increasing number of offenders, suggests that the call for rehabilitation promises nothing.

B. Birth of the delinquent

Through the prison and its technology of discipline, power was exercised with much greater utility. It subjected entire groups of offenders to an unrelenting gaze which increasingly desired to control and *define* the individual through disciplinary measures: it examined and categorized offenders, and prescribed varying penalties in accordance with the category to

¹²⁰ *Id.* at 66.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

which one belonged; it prescribed a schedule and rules of behavior ostensibly to reform the offender, but which actually mold the individual into a malleable cog in carceral system. The individualized measures designed to rehabilitate the criminal, therefore, were the very means by which *delinquents* were created.

Foucault believes that the infinitely knowable and infinitely curable delinquent emerged at a time when a struggle against popular illegalities was being waged.

Popular illegalities pertained to localized practices such as refusing to pay taxes, dodging military conscription or forced labor, smuggling, looting shops, etc.¹²⁴ These practices were indirect forms of resistance against state authority, and hence were likely to lead to political struggles and revolution.¹²⁵ Thus it became more likely that the execution of a leader of one of these popular illegalities would incite a revolt instead of deterring the public from committing the same crimes. In the Philippines, the political threat of popular illegalities can be gleaned from a discussion about the penalization of vagrancy — a crime relating to status.

Although it was not penalized under the old Penal Code, vagrancy was deemed a popular illegality for which indigenous Filipinos were punished during the Spanish regime.¹²⁶ Colonial officials believed vagrancy was a threat to Spanish authority, and deemed a form of economic sabotage.¹²⁷ Although vagrants were forced to choose a nomadic existence because of economic pressures, colonial authorities saw the vagrants' propensity to move from place to place as means by which indigenous people evaded tax and the performance of forced labor. In addition, the lifestyle of the vagrant was deemed to encourage criminal activity, petty thievery, and sometimes, assault and banditry. In the popular mind, vagrants and *ladrones* (bandits) were among the greatest threats to peace and order.¹²⁸ It is no surprise, therefore, that vagrancy was formally criminalized by the Revised Penal Code.

¹²⁴ FOUCAULT I, *supra* note 3, at 273. See also BANKOFF, *supra* note 37, at 24.

¹²⁵ FOUCAULT I, *supra* note 3, at 273.

¹²⁶ BANKOFF, *supra* note 37, at 24.

¹²⁷ *Id.*

¹²⁸ U.S. v. Gandole, 6 Phil. 253 (1906).

The belated criminalization of vagrancy merely justified the already accepted equation of vagrants — who belong to an economically vulnerable class — with criminals. Hence, even in the absence of having performed an act in violation of law, the law itself repeats social practice and punishes the vagrant for belonging to his social class. The criminalization of vagrancy has been subject to abuse, especially by law enforcers who have used vagrancy laws to “accomplish under color of legal right an illegal object.”¹²⁹ For instance, it has been reported that police officers who were not able to gather sufficient evidence to prosecute an accused for the actual crime for which he was arrested, would harass the latter.¹³⁰ In this manner would suspected criminals be hauled off to prison, in order that they be kept off the streets: “Frequently, the police would *repeatedly* arrest for vagrancy a known or suspected criminal against whom no serious crime can be proven in order to...dissuade him from committing any further crime.”¹³¹ The repeated arrests of the vagrant are clearly *not* for the purpose of reforming him but to keep him off the streets — to protect society from the potential danger he poses. In defending society by imprisoning the individual, the state thus condemns the latter to his status as vagrant.

The prison, therefore, became the means by which the class of people most likely to participate in these popular illegalities — those who are most likely to revolt against social order — are controlled, under the guise of rehabilitation and reform:

In their emerging form and despite their dispersal from being a massive movement of illegality both political and social, they were sufficiently marked to serve as a support for the “great fear of a people who were believed to be criminal and seditious as a whole, for the myth of a barbaric, immoral and outlaw class haunted the discourse of legislators, philanthropists and investigators, into working class life.”¹³²

¹²⁹ Eleazar, *supra* note 86, at 435.

¹³⁰ *Id.* See also Alfredo Tadiar, *A Philosophy of a Penal Code*, 52 PHIL. L.J. 165 (1977).

¹³¹ Eleazar, *supra* note 129, quoting Eimbeck, *Some Recent Methods of Harassing the Habitual Criminal*, 16 ST. LOUIS L. REV. 148, 151-158 (1931).

¹³² FOUCAULT I, *supra* note 3, at 275.

In serving this purpose, the prison cannot but fail in its crusade of rehabilitating the delinquent. This is due to the following:

- (1) By assigning the social class at the bottom rank of the social order to play the part of delinquents, authorities are able to exercise power with greater utility. Instead of looking after an entire population of individuals who each commit an occasional illegality, the designation of the aforementioned social class as delinquents gives authorities a relatively smaller and enclosed group of individuals on whom constant surveillance may be kept.
- (2) The prison goes beyond ensuring social defense and separating delinquents from society: it separates delinquents from other less dangerous illegalities performed and tolerated in society. The isolation of delinquents turns the latter's violence inwards, of which members of their own social class are the victims. The violence of delinquents, therefore, is deflected away from the State, and toward the same class of delinquents being watched and penalized by authorities.
- (3) Because of the constant surveillance to which the class of delinquents is subjected, authorities are able to exert greater control on the former, which is forced to remain on the fringes of society.¹³³

Thus, the prison — as well as all philosophical and juridical schools which employ it as its weapon — ensures that delinquents shall never be rehabilitated, for it is the prison itself which gives birth to the delinquent, and defines individuals as such.

¹³³ *Id.* at 278.

C. Empowerment, not oppression

[T]he prison is not the daughter of laws, codes or the judicial apparatus; it is not subordinated to the court and the docile or clumsy instrument of sentences that it hands out and of the results that it would like to achieve; it is the court that is external and subordinate to the prison.¹³⁴

By taking a close look at the history of juridical penal discourse — particularly the enactment of penal law — in the Philippines, this paper has focused on the conflicting propositions propounded by both the Classical and Positivist jurists in their debate concerning the better way of eradicating crime. It has likewise examined the moral justifications of each school of thought.

In so doing, this paper has found that the aforementioned debate fails to propose viable means for eradicating crime or reforming the criminal. It likewise has discovered that both the humanitarian end of the Classical School and the rehabilitative enterprise of the Positivists merely justify the operation of the carceral — an institution which both creates and fosters delinquency.

Philippine penal law, which has been formed and influenced by both the Classical and Positivist schools, is the discourse that validates the oppressive operation of the carceral. This being so, our “egalitarian law” has a “conflicting, but functional relationship” with a discipline which is inherently asymmetrical — one which makes possible the formation of social order by repressing a particular social class.¹³⁵

In other words, although the law is currently the mode in which power presents itself in a legitimate form, the law itself does not constitute the sole or main tool of social control and domination. Thus, if reformers are truly concerned about initiating social change, they must *not* begin their reform by changing the law: “It is necessary to appeal to a strategic model to explain the power structures and relations which hold the key for social change.”¹³⁶

¹³⁴ *Id.* at 307-308.

¹³⁵ Valencia-Villa, *supra* note 1, at 366.

¹³⁶ *Id.*

A rather novel notion of the law emerges from this reflection: far from being the source of power, law is the mere handmaid of power. It is a tool used by power:

Although the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread panopticism enables it to operate on the underside of the law, a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law.¹³⁷

More important, however, is the task of recognizing law as a *discourse* on order. The power manifested and exercised in and through the rise of the prison has produced order, and law is itself a "knowledge of order" which may be used to empower those familiar with its operation.

For Foucault, all knowledge is political, because knowledge has its conditions of possibility in power relations. There is no knowledge without power, nor power without knowledge.¹³⁸ What is crucial, therefore, is for legal thinkers to realize that the power of law does not consist so much in its ability to repress or control individuals, but in its ability to empower them.

In searching for a strategy to initiate social change, therefore, the legislator, the lawyer, the legal scholar or activist are invited to seek avenues for reform beyond the law and grand legal theories. Rather, they are invited to study first the operation of power through social institutions, and use their knowledge of the law to open doors leading beyond the limits that bind us to useless theories, empty debates.

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¹³⁷ FOUCAULT I, *supra* note 3, at 223.

¹³⁸ Valencia-Villa, *supra* note 1, at 366, quoting ALAN SHERIDAN, MICHEL FOUCAULT, THE WILL TO TRUTH (1980).