PREVENTIVE DETENTION AND THE METAPHYSIC OF REPRESSION

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Introduction

The Code of Crimes has been pending legislative [1] consideration since 1951. It seemed consigned to sleep in congressional committees with no hope of passage for reasons that will be discussed below. When martial law was proclaimed in the Philippines,[2] however, its principal architect, former Judge Guillermo Guevara, launched a new campaign for its enactment into law, and with the assistance of a few well-placed sympathizers nearly succeeded. The protests that followed the discovery of the Code's surreptitious journey to the presidential palace resulted in its reference to a committee "for further study". Nonetheless, given the ease and simplicity with which rules of law were mandated in the Philippines during martial law, the Code came close to enactment.[3]

The principal obstacle that came in the way of the Code's passage by the pre-martial law Congress is its open advocacy of the so-called positivist theory of penology. Drawn basically from the words of Italian legal scholars Raffaele Garofalo,[4] Cesare Lombroso,[5] and Enrico Ferri,[6] some of its central theses are the denial of free volition in the commission of criminal acts,[7] and the existence of criminal types [8] who are predisposed

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[1] Before the declaration of martial law in the Philippines, the Code was submitted to the Philippine Congress, CONST. Art. VI, (1935). After the proclamation of martial law, legislative power was assumed by the President. Art. XVII, sec. 1, CONST. (1973). Legislative power was jointly exercised by the President and the Interim Batasang Pambansa from 1978 to 1981, when the latter body was organized. The President continues to hold reserve legislative power indefinitely under certain emergency conditions, as provided in Amendment No. 6, 1976 amend., CONST.

[2] Proc. No. 1081, September 21, 1972.

[3] The President could enact a law by the issuance of a presidential decree.

[4] CRIMINOLOGY (1885).

[5] CRIME: ITS CAUSES AND REMEDIES (1912).

[6] CRIMINAL SOCIOLOGY (1917).

[7] Ferri, for instance, asserts: "The habitual reasoning by which public sentiment, traditional philosophy, and the classical criminal science justify the right to punish man for his misdeeds is reducible to this: man possesses free choice or moral liberty; he can will either good or evil, and be punished for it; and accordingly, as he is or is not free, or rather as he is more or less free in the choice he makes of evil, he is more or less responsible and punishable. The positivist criminal school does not accept this unanimous reasoning of the jurists, for two main reasons. The first is, that positivistic physio-psychology has completely destroyed the belief in free choice or moral responsibility, in which it demonstrates, we should recognize a pure illusion of psychological observation. The second is, that even accepting this criterion of individual responsibility, insurmountable theoretical and practical difficulties are met in applying it to each particular case, and the field is left open to a mass of exceptions, as a result of false deductions drawn from the new and incontrovertible data furnished by the study of the criminal man. FERRI, *supra,* note 6 at 289.

[8] *Id.,* at 86-88; 285; LOMBROSO, *supra,* note 5 at 365-369.

to commit crime.[9] Proceeding from these premises, its theoreticians came to the conclusion that the function of the criminal law is not penalty nor retribution but the defense of society from those who by nature are likely to commit crime. Since the criminal type can be identified by means of scientific investigation [11] the defense of society from possible criminal conduct justified the use of criminal law to prevent this type from committing crime.[12]

The movement to incorporate the positivist philosophy in the criminal law naturally started in Italy. On September 14, 1919, a royal decree was issued organizing a ministerial commission to draft a new penal code for Italy. Enrico Ferri, who was then professor of criminal law in the University of Rome, was named chairman of the commission. Despite his influence, a complex of reasons frustrated Ferri's efforts to have enacted a criminal code embodying his philosophy.[13]

In 1930, however, during the regime of Mussolini, his Justice Minister Alfredo Rocco secured the enactment of a new penal code that was openly part of a political program to make a fascist Italy.[14] Social dangerousness and preventive detention had become effective and enforceable law for the first time.[15]

The influence of the positivist theory extended far beyond Italy. Provisions authorizing preventive detention founded on the concept of social dangerousness can be found in the penal codes of a number of European and Latin American countries.[16] The measures vary sharply in their nature;

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9 FERRI, *op. cit., supra,* note 5 at 87-88.

10 *Id.,* at 285.

11 LOMBROSO, *supra,* note 5 at 151-172.

12 Lombroso of course advocated the detention of insane criminals in asylums, but there is no suggestion that individuals who had not committed crime should be subject to precautionary detentive measures. See, LOMBROSO, *op. cit., supra,* note 4 at 385-405. Judge Guevara, on the other hand, states: "The Positivist . . . has as principal aim social defense or defense of society. It is not concerned whether the offense is avenged, or whether the offender receives due punishment. For the positivist, the whole question boils down to whether or not the offender is dangerous, or, very likely will be a menace to society. That is why, instead of the classical penalty the positivist provides for social security. GUEVARA, COMMENTARIES ON THE CODE OF CRIMES xvi (1977). Again, "What matters, in the fight against crime and criminals, is the study of the man-criminal himself, the selection of ways and means whereby a criminal would be deprived of an opportunity to commit crime, or if he has already committed any, that he may not be given a chance to repeat his anti-social activities." *Id.* at xvii-xviii.

13 WISE, INTRODUCTION TO THE ITALIAN PENAL CODE xxx-xxxi (1978).

14 *Id.,* at xxxi.

15 *Ibid.*

16 For example, Arts. 66-76 of the Penal Code of Puerto Rico provide for security measures in cases of mental incapacity, alcoholism, toxicomania, addiction or dependence, and those involving habitual delinquents or habitual criminals. No security measure is imposed without previous psychiatric and/or psychological examination and report made by a clinical psychiatrist or psychologist and a social report prepared by a probation officer. No security measure is imposed without a prior criminal charge. Except for an accused acquitted because of mental incapacity, no

purpose and degree of repressiveness. The Code of Crimes provides the broadest and the harshest threat to personal liberty, surpassing the Italian Penal Code from which it draws its inspiration.

Social dangerousness in the Code of Crimes

As provided in the Code of Crimes, security measures may be enforced against persons who under authority of law are considered socially dangerous.[17] Social dangerousness embraces a broad range of circumstances that may be considered when a person is charged with an offense[18] or which may be established even when there is no offense.[19]

Persons who are sentenced to heavy or medium imprisonment are conclusively presumed to be socially dangerous and are automatically subjected to detentive security measures. These convicts as well as those who are sentenced to lower penalties but are found to be socially dangerous under Art. 107, are subjected to preventive security measure consisting of compulsory residence in an agricultural settlement or labor establishment.[22] Preventive detention is executed immediately after the service of the penalty. It lasts until the court pronounces that the subject is no longer socially dangerous.[23] The judge is directed to reexamine the condition of the person subjected to the security measure six months after the commencement of the same to determine whether the person continues to be socially dangerous.[24] In the case of habitual criminals,[25] however, or those who are professional criminals,[26] no review can be made of their preventive detention until the lapse of two and five years respectively.[27] The notion of security measure, therefore, works to pro-

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security measure lasts beyond the maximum term of imprisonment provided by law for the offense. The Codigo de Defensa Social of Cuba, on the other hand, by amendments introduced in January 1942 during the term of Fulgencio Bautista, authorized preventive detention without the necessity of criminal charge for a number of grounds including imbecility, vagabondage, venereal diseases, or doing morally reprehensible acts, and suspicion of illegal political activity during the periods of emergency. Arts. 48-A and 48-B.

17 Arts. 107, 108, 109, 110.

18 Art. 107 provides for 9 grounds as bases for declaring a person accused of crime as socially dangerous.

19 Arts. 108 and 110.

20 Heavy imprisonment lasts for 9 years and 1 day to 15 years. Art. 43, cl. 2.

21 Medium repression lasts for 3 years and one day or longer. Art. 43, cl. 3.

22 Art. 109 (1).

23 Art. 114.

24 Art. 116.

25 Art. 67 defines a habitual criminal as "one who, after having been sentenced to imprisonment for terms together exceeding three years, for three separate intentional crimes of the same character, committed within a period of six years . . ."

26 Art. 68 provides that "A person who, having been declared and sentenced as a habitual criminal, receives another sentence for another intentional crime, shall be considered a professional criminal whenever, bearing in mind the nature of the crimes, the conduct and manner of life of the guilty party, and the circumstances specified in article 107 of this Code, it is found that he has been and is living, wholly or partly, on the proceeds of his crimes."

27 Art. 114.

long deprivation of liberty and subjection to involuntary servitude beyond the penalty provided for the offense with respect to persons who are found guilty of committing a criminal offense. More, it gives the court whence the original decision of conviction emanated the sole authority to subject the convict to indefinite detention for as long as it is not satisfied that the subject has ceased to be socially dangerous.[28]

Article 108 of the Code establishes another category of socially dangerous persons. Even if no criminal charge were brought against a person, he may be subjected to detentive security measures if he shows any symptom, evidence or manifestation of habitual rowdyism or ruffianism. Habitual rowdyism or ruffianism is defined as public and habitual attempt, through words, threats, attitudes, use of arms or any similar conduct, to intimidate others or to impose one's will on others. If this behavior were established to the satisfaction of the court, a person against whom no criminal charge has been brought, can be subjected to measures prescribed in Art. 114 as follows: (1) compulsory residence and work in an agricultural settlement or labor establishment; (2) confinement in an establishment for medical treatment and custody; (3) confinement in a lunatic asylum; and (4) confinement in a reformatory. Like service of detentive security measures incident to a conviction for a criminal offense, the same is subject to review by the judge after the lapse of six months from its commencement to determine whether the person detained continued to be dangerous to society, and shall last until the court has pronounced that the person is no longer socially dangerous.[29] Preventive detention on this ground can therefore be as extensive and as indefinite as that which attaches as a consequence of criminal conviction.

Article 110 enumerates a third category of socially dangerous persons against whom preventive detention may be imposed, as follows: (1) Those afflicted with permanent, temporary or intermittent insanity which affects the normal exercise of the mental faculties in such a way as to produce danger to other persons; (2) those who are habitual drunkards; (3) those who are opium or drug addicts; and (4) those who are suffering from some venereal diseases. A habitual drunkard or an opium or drug addict is defined as one "who has been seen in any of these conditions or acts at least on three different occasions, at intervals of not less than one week." For this type of socially dangerous individual, the detentive security measure prescribed is either (1) confinement in an establishment for medical treatment and custody; or (2) confinement in a lunatic asylum. Again, as in the other instances, preventive detention under this section is subject to review after a period of six months and may be extended by the court indefinitely.[30]

[28] Art. 116.
[29] Art. 116.
[30] Art. 116.

New explanation for Code of Crimes

The extreme repressiveness, vagueness and broadness of the provisions that authorized preventive detention drew vigorous criticisms, not only from the neoclassicists among the penologists but also among the civil libertarians.[31] Partly as reaction to this, Judge Guevara, during his post martial law campaign to get the Code enacted,[32] published a slightly modified version of the Code claiming that the same

> does not belong exclusively to either of the two opposing schools. It belongs to the third school, or to Criminal Politic being the result of a compromise between the two fundamental conflicting theories.[33]
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> The Code Commission still believes that free will would be the basis of criminal responsibility, instead of the dreadfulness of the offender, as vigorously maintained by the Positivists.
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> As has been stated, the repression, be it restraint or imprisonment, is imposed for the sole purpose of satisfying the ends of justice, that is, for ethical reasons. Such repression, surely will not protect the community from the nefarious and anti-social activities of certain types of criminals whom the Code classifies as "socially dangerous persons". For this type of offenders, the proposed Code reserves, in addition to the conventional repressions, the security measures, which consist in the internment of the offender for an undeterminate period, in some diagnostic center or labor establishment.

A new Art. 105 now reads:

> *Nature and types of security measures.* Security measures provided for in this Code shall not be deemed to be penalty or retribution for the commission of an offense but they are being imposed in the exercise of the police power of the state for the attainment and promotion of public weal, welfare and safety.

As an explanatory note to the revised provision Judge Guevara declares:

> The Code Commission takes advantage of this opportunity to allay the fear of the guardians of our civil liberties to the effect that preventive or detentive security measure provided for in Art. 105 may eventually end in the imprisonment of a citizen without due process of law. In the first place, as premised under the definition of Art. 106 the Code, Security Measures are neither a punishment, repression or retribution but only an administrative (sic) or shall we say an exercise of the police power of the State designed for the promotion of public weal, welfare and safety.
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> In the exercise of the Police Power of the State, special laws had been passed by the Philippine Commission and the Legislature providing for detention of lepers in leper camps and colonies, the confine-

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31 Padilla, Crime and Responsibility (1964) mimeo; See also, Proceedings on Criminal Law Reform, Univ. of the Phil. Law Center (1964).

32 GUEVARA, *op. cit., supra,* note 12 at xviii-xix.

33 It is interesting to note that Ferri rejected the position of eclecticism as wrong and subjected those who take this compromise position to an extended criticism. FERRI, *op. cit., supra,* note 6 at 364-405. The Italian Code adopted through the efforts of the fascist Minister Rocco also claimed to be eclectic.

> ment of vagrants, lunatics, alcoholics or persons suffering from communicable disease. The constitutionality of these laws have not been assailed. No lawyer at the present time will dare contend that these laws violate the constitutional guarantee against deprivation of liberty without due process.[34]

Like its progenitor, the Italian Penal Code, the Code of Crimes ends up in apparent compromise. It retains the notion of moral responsibility for crime and the imposition of penalty conformable with the nature of the crime committed which are fundamental tenets of the neoclassicist school. On the other hand it accommodates preventive security measures which is at the core of the positivist doctrine.

Issues raised by preventive detention measures

The proposal on preventive detention of socially dangerous individuals raises a number of practical, policy, and constitutional questions. Briefly, the questions are as follows:

1. Is there a criminal type? If there is, is it possible to isolate him by scientific methods from the non-criminal type? What possible biological and psychological criteria can be used to identify the criminal type?

2. If there is no way of scientifically isolating the criminal type, ought policy makers be allowed to enforce their vision of the orderly and safe society by allowing the detention of persons who are thought to pose danger to society? What are the criteria to be used in determining social dangerousness?

3. What are the consequences of accepting the existence of the criminal type and the notion of social dangerousness and the imposition of preventive security measures on the constitutional, and, ultimately, political order of the country?

The debate over the possibility, the soundness and the fairness of predicting criminal behavior unleashed by the Italian positivists is a continuing one. While the concept of the criminal type has not been seriously advanced in the United States since the early 1940's social dangerousness is a current controversy, albeit circumscribed to possible preventive detention in cases of prisoners awaiting criminal trial[35] and affecting pardon and parole benefits[36] of persons previously convicted of crime.

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[34] GUEVARA, *op. cit., supra,* note 12 at 58.

[35] See, Preventive Detention, Hearings before the Subcommittee for Constitutional Rights, U.S. Senate Committee on the Judiciary, 91st Cong., 2d Sess. (1970).

[36] See, for a broad discussion of the issues connected with prediction in pardon and parole cases, Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment,* 88 YALE L.J. 1408 (1979).

Positivism reexamined

To get to the heart of the controversy, it is necessary to reexamine the fundamental tenets of positivism especially as expounded by its founders. One of the prominent exponents of the positivist philosophy was Cesare Lombroso. He was a professor of psychiatry and criminal anthropology in the University of Turin, who previously worked as a medical officer in the Italian Army. He claimed that what led him to pursue his theory of the criminal type was the atypical physical characteristics of soldiers who were troublesome. This observation led him to continue his investigation of criminals in Italian prisons whose cadavers he examined over time.[37]

On the basis of his investigation he claimed to have discovered the physical as well as the psychological characteristics of the criminal type. The physical characteristics he summarized as a certain physical atavism which he likened to the structures of primitive man. The physical atavism had correspondence in the psychological structure which manifested itself, among others, in the proclivity for tattooing the body.[38] Despite some later modifications of his theory,[39] he basically stuck to his description of the criminal type or in his words, "the born criminal." Thus, in his book entitled Crimes: Its Causes and Remedies,[40] he asserts

> The born criminal shows in a proportion reaching 33% numerous specific characteristics that are almost always atavistic. Those who have followed us thus far have seen that many of the characteristics presented by the savage races are very often found among born criminals. Such, for example, are: the slight development of the pilar system; low cranial capacity; retreating forehead; highly developed frontal sinuses; great frequency of Wormian bones; early closing of the cranial sutures; the simplicity of the sutures; the thickness of the bones of the skull; enormous development of the maxillares and the zygomata; prognathism; obliquity of the orbits; greater pigmentation of the skin; tufted and crispy hair; and large ears. To these we may add the lemurine appendix; anomalies of the ear; dental diastemata; great agility; relative insensibility to pain; dullness of the sense of touch; great visual acuteness; ability to recover quickly from wounds; blunted affections; precocity as to sensual pleasures; greater resemblance between the sexes, greater incorrigibility of the woman (Spencer); laziness; absence of remorse; impulsiveness; physiopsychic excitability; and especially improvidence, which sometimes appears as courage and again as recklessness changing to cowardice. Besides these there is great vanity; a passion for gambling and alcoholic drinks; violent but fleeting passions; superstition; extra-ordinary sensitiveness with regard to one's own personality; and a special conception of God and morality.
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> This atavism explains the diffusion of certain crimes, such as pederasty and infanticide, whose extention to whole companies we could not

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[37] BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 161-162 (1945).
[38] LOMBROSO, *op. cit., supra,* note 5 at 306.
[39] *Id.,* at 245.
[40] LOMBROSO, *op. cit., supra,* note 5 at 365, Chapter I, part III (1912).

> explain if we did not recall the Romans, the Greeks, the Chinese. and the Tahitians, who not only did not regard them as crime, but sometimes even practiced them as a national custom. Garofalo has admirably summed up the psychical characteristics of born criminal as being the absence of the feelings of shame, honor, and pity, which are those that are lacking in the savage also.

Apart from the concept of the born criminal, he also elaborated an extensive theory that purported to explain the relation between various conditions and criminality.

Thus, he asserted that he established the influence of high temperature, the mountainous formation of certain regions and various physical ailments such as malaria and goiter on the prevalence of various types of crimes. He also proposed a racial explanation for crimes, coming to the conclusion that Africans and Orientals are more likely to commit homicide and other crimes against persons, and dark haired individuals more disposed to commit these crimes than light haired ones. He also sought to explain the connection between civilization, density of population, the level of subsistence of a community, the influence of the press, alcoholism and drug addiction, economic conditions, education, religion, heredity, the prison system and political leadership, and so forth, and the increase in criminality. He likewise discussed political crimes and their causes.

The second part of the Lombroso's philosophy which has been seized by later positivists elsewhere, and taken apart from the specific suggestions that he made to implement it, is the theory of social defense which he summarized as follows:

> It is no longer enough to repress crime; we must try to prevent it. If we cannot suppress it, we can at least seek for means to decrease the influence of the causes we have been studying upon occasional juvenile and partial criminals.[41]

How did he propose to prevent crime? Recent positivists would propose restrictive measures on socially dangerous persons to prevent opportunity to commit crime. Lombroso came up with an assortment of proposals. Some of them are quaint and some remain in large measure valid and forward looking.

He called these proposals penal substitutes, and a number of them did not have direct relations to the criminal law.

For instance, he advocated the establishment of a real liberal government like that of England on the theory that this set-up prevents anarchistic insurrections and acts of revenge. Corollary to this he proposed the liberty of the press to combat corruption of the government and avoid insurrections of the governed. He supported autopsies in order to prevent poisoning, acknowledgment of illegitimate children, investi-

[41] LOMBROSO, *op. cit., supra,* note 5 at 245.

gation of their parentage and indemnification for breach of promise to marry because these would diminish abortions, infanticides, and homicides for revenge. He likewise proposed divorce, marriages for the clergy and abolition of pilgrimages on the ground that they would cause the disappearance of many sexual crimes. He suggested cold baths to counteract the effect of heat and clearing of forests to combat barbarism.

To counteract crimes committed on account of extreme poverty or wealth, he proposed the creation of work and regulation of conditions of employment, the authorization of strikes and support of labor unions. He also suggested profit-sharing schemes, progressive taxation and confiscatory taxes on legacies.

To prevent political crimes he advocated political decentralization, universal suffrage, free elections, an independent judiciary and legal aid societies to assist poor people to secure equal justice.

He attacked the existing system of prisons on the ground that it favored inertia on the part of the prisoner and transformed him into an automaton incapable of taking part in life's struggle. He proposed a system that would develop love of work among criminals, and when the latter are released from prison, they would be extended assistance only on condition of payment by future work. He criticized criminal procedure then in existence as too lenient in favor of criminals.[42]

While identifying the criminal type, therefore, Lombroso did not propose security measures apart from the commission of crime. Making acute critical observations about the prisons system at the time[43] his proposals for penalties apart from indeterminate sentence of imprisonment in a criminal asylum, or in institutions[44] and corporal punishment,[45] were directed to humanize the criminal law.[46] It is clear that he did not advocate any defensive measure prior to conviction.

Ferri, for his part, while not rejecting the physical characteristics of the criminal type posited by Lombroso and Garofalo, asserted that

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[42] For extensive discussion of his penal substitutes see LOMBROSO, Chapters I-IX, Book II.

[43] He observed: "We ought as much as possible to avoid the short and repeated sentences to prison, which, as we have seen, is the school for crime and especially for associated crime, the most dangerous of all. . . . We might say, writes Krohne, that most countries have adopted the principle of sending to prison as many men as possible. He might have added that they do this in a way to make prison do as little good and as much harm as possible. I have seen in prison 11 children arrested under the very grave charge of being a band of malefactors, for having stolen a herring, and 4 others who had stolen a bunch of grapes. At the same time three ministers in the legislative chamber were defending a thief who had stolen 20 millions. *Op. cit.*, at 387-388.

[44] *Id.* at 387.

[45] *Id.* at 388.

[46] He proposed the imposition of fines adjusted according to the wealth of the criminal, indemnity for the victim, reprimand, a probation system patterned after that of the United States, and praised the reformatory in Elmira. At 393-394.

for every crime "there intervenes a complex and decisive determinism of the anthropological constitution and the geographical and social medium".[47]

Applying various methods of observation, he concluded that there were five categories of criminals.

The first category is the criminal insane. They are those who are "morally insane afflicted with hitherto little defined phrenopathic form to which science has given so many names, from 'moral imbecility' used by Pritchard to 'reasoning insanity' employed by Verga. This mental infirmity . . . consists, in the last analysis in the absence or atrophy of the moral sense (which I prefer to call social sense of what is permitted or forbidden). It is most often congenital but sometimes acquired. It coexists with apparent integrity of logical reasoning and presents the fundamental psychological condition of the born criminal.[48] Subsumed in this category are criminals that he calls half-insane a huge contingent of which are epileptics.[49]

The second type is the born-criminal, who "are unable to distinguish murder, robbery and crime in general from honest industry,"[50] and "whose anti-human conduct is the inevitable effect of an indefinite series of hereditary influences which accumulate in the course of generations."[51]

The third kind is the habitual delinquent category. These are criminals without the anthropological marks of the born-criminal but who commit repeated offenses often against property such as theft largely because of conditions of the environment.[52]

The criminal through passion category includes individuals whose lives are previously blameless and whose temperament are sanguine or nervous and who often commit crimes under the impulse of uncontrolled passion such as anger, jealousy and rage.[53]

The last category is that of the occasional criminal. The fundamental difference between a chance criminal and a born-criminal is that in the latter the external stimulus is secondary to the internal criminal tendency which impels the individual to crime while in the former it is the failure to resist the external stimulus which becomes the determining force in the commission of crime.[54]

Like Lombroso, he advocated a system of indefinite segregation until "proof of real amelioration,"[55] which would shorten service of those

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47 FERRI, *op. cit., supra,* note 6 at 45.
48 *Id.,* at 139-142.
49 *Id.,* 142-143.
50 *Id.,* at 144.
51 *Id.,* at 145.
52 *Id.,* at 145-152.
53 *Id.,* at 152-154.
54 *Id.,* at 154-157.
55 *Id.,* at 503.

who are rehabilitated and no longer pose a danger to society[56] and a prolongation of detention of those who are found to be incorrigible.[57] For the criminal insane, he proposed the establishment of criminal asylums, although he did not assert the necessity to detain those who had not committed offense. In fact, he was willing to compromise to keeping there only those who had committed serious crimes.[58] While he had no difficulty in approving of capital punishment,[59] he nevertheless doubted its efficacy to check criminality.[60] He therefore strongly supported deportation[61] and "indeterminate perpetual imprisonment" for the most dangerous and incorrigible delinquents.[62] Permanent isolation or segregation should be imposed upon those whom experts recognize as born-criminals, even for single offenses if they are serious such as murder or robbery with homicide. For lesser offenses, permanent imprisonment is to be imposed when there is a third or fourth repetition.[63] Nowhere in the thick volume of his treatise, however, did he propose, preventive detention prior to criminal conviction.

To be fair to the positivists, there were a number of progressive proposals that they made or endorsed about changes in the criminal law. It is not, however, within the scope of this paper to discuss them. What has happened is that most of the Codes that espoused positivism have laid emphasis only upon the notion of social dangerousness, ignored the forward looking aspects of the positivists school, and extended the notion of social defense by authorizing pre-conviction preventive detention.[64]

The notion of the criminal type was repudiated by Dr. Charles Goring. A physician of English prisons, he worked with Dr. Karl Pearson, a statistician, to study the physical types of convicts. His book *The English Convict* repudiated Lombroso's physical characteristics theory of the criminal type.[65]

Gault summarizes the finding of Goring as follows:

> Comparing convicts with Cambridge students, the difference is 33.8 c. cm. (1431 c. cm. — 1397.2 c. cm.) the convicts' skulls having the smaller capacity. This difference corresponds to 2½ mm. which is in excess of head length of the student group compared with that of the convicts. The difference in capacity referred to, Dr. Goring regards as insignificant when considered in relation to the total magnitudes.

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[56] *Id.*, at 504.
[57] *Id.*, at 503-504.
[58] *Id.*, at 526.
[59] *Id.*, at 528.
[60] *Id.*, at 530.
[61] *Id.*, at 534.
[62] *Id.*, at 537.
[63] *Id.*, at 539.
[64] The Italian Penal Code, the Cuban Penal Code and the proposed Code of Crimes are the best examples.
[65] BARNES & TEETERS, *supra*, note 37 at 165.

> Dr. Goring took notice also of the physique of criminals as Lombroso had done: their height and weight; span of arms; general health (robust, good, delicate); physical constitution (stout and strong; stout and weak; thin and muscular; thin and weak). When corrections were made for age, there were no significant correlations whatever between physique and kind of crime committed.
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> Comparing with non-criminal groups, Dr. Goring's comparisons of his physical measurements of prisoners with corresponding measurements of large groups from the non-criminal population serve to clinch his argument. In these last, he included students from Oxford University, Cambridge University, Aberdeen University, the University of London, and the teaching staff of the University of London, and non-commissioned officers and men of the Royal Engineers. *No important differences were found. Indeed it was easier to point out physical differences between* Oxford and Cambridge students than between either of these groups *and any sub-group of criminals. It was easier to determine on the basis of physical measurement that one was a Scottish or an English student than to determine whether he was a thief or murderer.*[65a]

Despite the findings of Goring, some modified version of Lombroso's theory surfaced in the United States. Dr. Earnest A. Hooton, an anthropologist from Harvard University, published *Crime and the Man* in which he reasserted the thesis that there is a difference between the physical characteristics of the criminal from the non-criminal. He advocated the sterilization of convicts who showed a marked physical inferiority and the breeding of better stock of human beings to combat the growth of criminality.[66]

The book drew vigorous criticisms from an assortment of scholars and criminologists both as to method of research and to the substantial conclusions made.[67] No further attempt to scientifically establish a criminal type has been made up to this time, and it is generally recognized that crime is a product of a complex of factors that cannot be expressed in simple formulas.[68]

The notion of the socially dangerous person or the born criminal proposed by the positivists to justify preventive detention proves to have no basis in science. It reveals itself a working hypothesis that has not been verified, in fact falsified by evidence, and therefore partakes of the character of fiction no less than the fiction of moral responsibility attributed to the positivists, but harsher and more vindictive, even beyond the original contemplation of the founders of the positivist movement.[69]

[65a] GAULT, CRIMINOLOGY 87-88 (1932).
[66] *Id.*, at 166-167.
[67] *Ibid.*
[68] *Id.*, at 168.
[69] Neither Ferri nor Lombroso ever advocated the curtailment of liberty apart from the commission of a criminal offense. Ferri proposed as substitutes for penalty to prevent crime, free trade, freedom to emigrate, taxes upon the rich, public works, regulation of the manufacture and sale of alcohol, freedom of marriage and divorce, etc. BARNES & TEETERS, at 164.

The proponents of the Code of Crimes traverse a different and more metaphysical ground, opening to great possibility for error and arbitrariness, when it embarks upon the creation of a number of legal fictions to prove the existence of social dangerousness that would authorize preventive detention.

Italian positivism misapplied by present day advocates

As discussed above, it appears in all the major works of the positivist philosophers that there was no proposal to use preventive detention in the name of social defense to curtail or limit the liberties of individuals prior to criminal conviction. And even as they proposed indefinite detention for those who are convicted of crime on some dubious physical and psychical grounds, there is no suggestion of using grounds as broad and as vague as those established in some provisions of the Code of Crimes.

The metaphysic of social dangerousness

Firstly, there is the conclusive presumption that persons who are sentenced to serve medium or heavy imprisonment are socially dangerous and therefore, after the expiration of their prison terms can be kept indefinitely in agricultural or labor camps until such time as the judge determines that they are no longer socially dangerous. Since the detentive measure automatically follows a sentence of at least three years imprisonment, how is the amelioration of the convict to be determined after the automatic extension of his detention? The Code does not provide a criterion. A convict is socially dangerous because the provision of law says that he is.

For all other offenses,[70] the Code also provides extremely vague criteria. Art. 107 begins by stating that a person is socially dangerous when he shows a certain morbid predisposition which by destroying or enervating the inhibitory controls favors the inclination to commit crime.

What is morbid predisposition? When does the tendency towards the commission of crime exist? The Code enumerates certain factors from which the predisposition might be deduced as follows:

(1) The nature, means, object, time, place and other circumstances of the act.

(2) The gravity of the injury or of the danger caused to the person injured by the offense.

(3) The extent and seriousness of the alarm or apprehension occasioned by the offense.

(4) The intensity of the criminal intent or the degree of negligence.

[70] Arts. 107, 108.

(5) The motives in the commission of the offense and the character of the offender.

(6) The criminal antecedents and in general, the mode of life of the offender prior to the offense.

(7) His conduct contemporary with or subsequent to the offense.

(8) The individual, domestic and social conditions of the offender, or,

(9) Other analogous circumstances.

The enumerated circumstances are hardly helpful in establishing definite yardstick on the basis of which to curtail indefinitely the liberties of a person. It is to be noted that Art. 107 is meaningful only with respect to offenses punishable by light repressions and lower. This means that a person who by provision of the Code is directed to be penalized by fine[71] or imprisonment not exceeding three years,[72] can be subjected to preventive detention for being socially dangerous. It is to be noted that apart from offenses traditionally penalized by the Revised Penal Code, the framers of the Code of Crimes have also introduced new offenses, such as crimes against family solidarity, and an entirely new book on misdemeanors. The latter comprises 232 articles penalizing all manner of conduct which, while heretofore have been considered unpleasant or disagreeable, have been outside the operation of the criminal law. Thus, it can apply to first offenses and for something as trivial as being "drunk or under the influence of intoxicating liquor in public, or in hotels or restaurants, or in gatherings in a private house"[73] or taking or exporting "any picture of a member of any non-Christian ethnical group who is in a naked or semi-naked condition, or any other picture which is derogatory to the Filipino nation."[74] Some definitions of acts constituting offenses are so vague and general as to provide a *carte blanche* to any judge to impose preventive detention for any conduct whatsoever.

Judge Guevara makes the sanguine announcement that rather than the mathematical subdivisions and fractions which characterize the mechanism of the classical school, what the judge will need would be a profound knowledge of human nature and psychology.[75] It must be wondered how a judge can resist trying his notions of human nature and playing amateur psychologist while experimenting with the liberties of the persons brought before his court on any charge whatever.

The Code of Crimes goes one step farther. It proceeds to provide that "[A] person may also be judicially declared socially dangerous,

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[71] Generally imposed on light offenses and misdemeanors. Arts. 38 and 40.

[72] This is classified as light penalty under Art. 43.

[73] Art. 763.

[74] Art. 774. There is a whole chapter enumerating many acts not heretofore considered offenses as criminal misdemeanors.

[75] GUEVARA, *op. cit., supra,* note 12 at xxii.

and be subjected to the applicable measures prescribed in Article 114,[76] even if he has not been prosecuted for another specific crime, when upon petition and proper showing made by the police or the fiscal, the court of first instance is satisfied that the subject is a known pickpoket, thief, burglar, holdupper either by his own confession or his police records; or the subject being an able-bodied person is not engaged in any means of livelihood and who lies in wait or loiters around along public streets, highways or backyards for no apparent licit purpose at all; or that the subject is a habitual ruffian or rowdy.[77] Since security measures imposed for criminal conviction is covered by the provision of Article 107,[78] it follows that this provision covers cases where there is no charge, or if one were filed, there is no conviction. Thus, a series of police reports against a particular person wholly unsupported by evidence sufficient to sustain a conviction is nevertheless sufficient to send a person to an agricultural farm or labor establishment for an indefinite period in the course of which he will be compelled to render work imposed upon him without his consent or against his will. Vagrancy even if it arises from poverty might bring the same result.[79]

Some practical effects of preventive detention

The broad terms which can be invoked to apply security measures in criminal offenses (and the framers of the Code of Crimes proudly announce the criminalization of acts not heretofore considered offenses)[80] and even where no criminal offense is claimed or proved can easily lead to abuse, or, even with the best of intentions, to mischievous and sinister results.

The procedure can be used as a weapon to persecute political opponents, real or imagined. It can provide a means for exacting vengeance upon personal enemies. It may also be used by some officer, judge or prosecutor to force his notion of some proper order of the universe. In a word, preventive detention measure as allowed in the Code, opens the door to a whole range of arbitrary and capricious exercise of power at the expense of the liberties of the people.

The criminal law almost always operates with greater efficiency against the lower classes of society. When its net is cast, the consequent haul often reveals an overwhelming majority of the poor, the illiterate, the dispossessed, the people ignorant of their rights, or the ones too poor to afford defending themselves adequately. The Code of Crimes

[76] Compulsory residence and work in an agricultural settlement or labor establishment; confinement in an establishment for medical treatment and custody; confinement in a lunatic asylum; and, confinement in a reformatory.

[77] Art. 108, revised draft 1977.

[78] Cases where the sentence is light penalty or lower but the Judge is convinced that the accused is socially dangerous.

[79] Art. 108, revised draft 1977.

[80] See, Rationale, Code Commission (1954) at 42-82.

exacerbates the innate bias of the criminal law against the lower sector of the community. Thus, in the section on precautionary preventive detention, it is the "known" pickpocket, thief, burglar, holdupper, the vagabonds and loiterers or the habitual rowdies and ruffians by their confession or police records who must be kept in agricultural camps or labor establishments because they are likely to disrupt the peace of society. The provision does not include a similar procedure for persons who are known or reputed big-time embezzlers, government grafters, abusers of power who have cultivated and refined the art of intimidating, usurers, and so on. The misdemeanors newly defined will also work largely against the poorer sectors of society. As a rule, they are the ones who cannot insulate boisterous and exuberant behavior by the thick walls of their residence.

As in cases where criminal charge is brought, preventive security proceedings against persons who are not so charged or are acquitted gives the judge the power and the authority to play amateur psychologist. Judges cannot, given their training and background, be expected to discharge the function with competence and prudence. Even if they wished to avail themselves of the services of psychiatrists and psychologists, it is doubtful whether the country has adequate pool of professionals who would be able to assist judges of the court of first instance who are given jurisdiction to determine whether a person is socially dangerous. The most obvious thing that can happen is that the judge will try as best as he can to recall some general principle of psychology taken in some basic course in college or take some passage from some books that he is not professionally able to interpret or proceed on the basis of common sense or hunch.

Even where expert opinion is available, and the criteria for assessment of psychological disorder are more precise, criminologists caution against drawing conclusions as to relationship between psychological imbalance and crime, much less the tendency to commit crime. Studies indicate that an overwhelming percentage of imprisoned criminals are intellectually normal, while psychological imbalance may be an ingredient in the commission of crime, it is now accepted that crime is a multi-causation social phenomenon that cannot be addressed properly by oversimplification.[81]

Difficulty of Prediction

Finally, the question must be examined whether there is any way apart from the criteria advanced by the positivists, of predicting criminal behavior. To some degree, prediction is being made in acts related to the criminal process. It influences to a certain the extent the sentence

[81] GAULT, *op. cit., supra,* note 65a at 176; BARNES & TEETERS, *op. cit., supra,* note 37 at 265.

that a judge imposes upon a convict.[82] It is certainly a major premise in considering the matter of extending pardon or parole.[83]

In the United States sophisticated statistical studies have been conducted to test the accuracy of predicting criminal behavior. They have been demonstrated to be highly inaccurate,[84] and have been challenged by critics even in connection with sentencing and parole.[85] Refinement of methods of prediction to minimize the margin of error are open to objection on moral and value considerations.[86] In recent years, legislation has been enacted[87] and proposals made[88] to extend prediction to cases to determine whether a person accused of criminal offense should be set at liberty, either on bail or recognizance, pending trial or whether they should continue. It remains a matter of great controversy[89] whether legislation should be enacted that would expressly confirm standards sometimes used albeit *sub rosa* by some courts.[90]

In the Philippines, where empirical studies are sparse, no effort has been exerted so far to determine the validity of prediction of criminal behavior. Although, it is not applied to cases outside of sentencing and

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[82] The Revised Penal Code increases the penalty for an offense for conduct showing an inclination to commit crime. Thus recidivism (Art. 14, par. 9) and habituality (Art. 14 par. 10) are listed as aggravating circumstances. Habitual delinquency brings about the imposition of additional separate penalty graduated in accordance with the number of convictions the accused previously suffered. (Art. 62, par. 5) Quasi-recidivism, the commission of a felony after having been convicted by final judgment before serving sentence or while serving the same is also deemed an aggravating circumstance that will require the imposition of the maximum penalty. (Art. 160) See, REYES, THE REVISED PENAL CODE 301-307 (1963).

[83] The Indeterminate Sentence Board in considering the release on parole of a convict, considers, among others, that such prisoner is fitted by his training for release, and that there is reasonable probability that such prisoner will live and remain at liberty without violating the law. Act. No. 4103, sec. 5. Among the conditions that may be imposed upon a probationer by a court is that he or she shall refrain from violating any law, statute, ordinance, or any by-law or regulation. Act No. 4221, sec. 3.

[84] Underwood, *supra* note 36 at 1141.

[85] Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Kogol Boucher and Garofalo.* The Diagnosis and Treatment of Dangerousness, 18 CRIME AND DELINQUENCY 371, 394-396 (1972); Wenk, Robinson & Smith, *Can Violence Be Predicted?* 18 CRIME & DELINCUENCY 393, 394-396 (1972).

[86] Von Hirsh, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons,* 21 BUFFALO L. REV. 717, 745 (1972).

[87] D.C. Code secs. 23-1321 to 1332 (1973).

[88] For text of proposals, see, Preventive Detention, *op. cit., supra,* note 35 at 512-573.

[89] *Id.,* at 1-508. See also, Thaler, *Punishing the Innocent: The Need for Due Process and The Presumption of Innocence Prior to Trial,* 1978, 2 WISCONSIN 441 (1978).

[90] Thaler, *op. cit., supra,* note 89 at 446-447. Some courts have openly used social dangerousness as a criterion in the determination of bail. In People v. Melville, 308 N.Y.S.2d 671 (1970), Judge Irving Lang stated: "Under what circumstances then may bail be denied? It is this court's view that bail may be denied for two reasons. First, where it is reasonable to assume that the defendant will flee the jurisdiction and avoid trial if admitted to bail. Second, if his release on bail poses a threat to the welfare and safety of the community . . . . I conclude, therefore, that pre-trial detention for the safety of the community, as well as to avoid flight from prosecution; is constitutionally justifiable in extraordinary cases." At 677, 678. See also, Bean v. County of Los Angeles, 60 Cal. Rptr. 804 (1967).

parole and probation of convicts, the 1975 case of *Almeda v. Villaluz*[90a] suggests by dictum that danger to the community might be taken into consideration in the matter of setting bail.

In reversing the trial court's requirement for the posting of cash bond, the Supreme Court held:

> In this jurisdiction, the accused, as of right, is entitled to bail prior to conviction except when he is charged with a capital offense and evidence of guilt is strong. This right is guaranteed by the Constitution (Art. IV, sec. 18), and may not be denied even where the accused has previously escaped detention or by reason of his prior absconding.
>
> In order to safeguard the right of an accused to bail, the Constitution further provides that "excessive bail shall not be required". This is logical because the imposition of an unreasonable bail may negate the very right itself...
>
> The amount fixed for bail while reasonable if considered in terms of surety or property bonds, may be excessive if demanded in form of cash.
>
> But while we repudiate the particular measure adopted by the respondent judge, we cannot fault the motive that caused him to demur the petitioner's offer of a surety bond. Based on petitioner's past record, the range of his career in crime weighs heavily against letting him off easily on a middling amount of bail. The likelihood of his jumping bail or committing other harm to the citizenry while on provisional liberty is a consideration that simply cannot be ignored.
>
> Fortunately, the court is not without devices with which to meet the situation. First, it could increase the amount of the bail bond to appropriate level. Second, as part of the power of the court over the person of the accused, and for the purpose of discouraging likely commission of other crimes by a notorious defendant while on provisional liberty, the latter could be required, as one of the conditions of his bail bond, to report in person periodically to the court and make an accounting of his movements. And, third, the accused might be warned though this warning is not essential to the requirements of due process, that under the 1973 Constitution "Trial may proceed notwithstanding his absence provided that he has been duly notified and his failure to appear is unjustified."

This pronouncement itself raises constitutional and policy issues. Suffice it to say here that even if this predictive procedure were held to be constitutionally permissible, there is a qualitative difference between the situation contemplated by bail applications and those covered by the Code of Crimes. In the former, an offense is alleged to have been committed for which accused has to stand trial and to suffer penalty in case of conviction. In the latter, detention is imposed either *after* service of sentence without any allegation of committing another crime or without prior conviction, but in anticipation of the possibility of committing crime.

[90a] G.R. No. 31665, August 6, 1975, 66 SCRA 39 (1975).

Constitutional Considerations

If the scientific foundation of the proponents of preventive detention were clearly established, it would seem that constitutional restraints would be a mechanical obstacle that can be dispensed with by change of provisions. In the absence of such proof, however, it becomes important to determine whether the proposed measure is consistent with the Philippine Constitution, and whether by calling preventive detention an administrative or police power measure, the constitutional objection has been overcome.

Under normal circumstances,[91] the Philippines is a republican democratic state.[92] It has a Constitution that defines and delimits powers of government[93] and provides for the protection of rights of individuals.[94] To a number of Filipino constitutionalists, the Bill of Rights lies at the heart of the Constitution.[95]

Since this paper specifically treats of proposals for changes in the criminal code, it shall not engage in lengthy analysis of judicial and scholarly formulas that claim to resolve tensions between constitutionally guaranteed individual liberties and constitutionally granted powers of the State to regulate human behavior in society's interest. Suffice it to state here that this paper assumes as constitutional axiom, that the State cannot intrude into or interfere with the liberties of the people or dictate the individual's mode of existence unless it can demonstrate by clear and convincing evidence an overwhelming necessity to do so.

This paper shall rather directly address itself to the scope and limits of the criminal law system under the constitution of a republican democratic State.

Deprivation of liberty and involuntary servitude as consequence of valid conviction for crime is an accepted and established constitutional

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[91] The Philippines remains in the extraordinary situation where martial law is theoretically inoperative but the decrees and letters of instruction issued in connection therewith remains in force. The President also retains all his emergency powers including concurrent authority to legislate. Preventive detention under the regime continues to be exercised through arrest, search and seizure orders issued by the Ministry of National Defense. No recourse can be made to civil courts to question arrests made in this manner. See, General Order No. 3 issued September 21, 1972.

[92] Art. II, sec. 1 of the Phil. Const. provides: The Philippines is a republican state. Sovereignty resides in the people and all governmental authority emanates from them.

[93] The 1973 Constitution departs from the 1935 Constitution in its provisions for structure of government. Thus while the 1935 Constitution followed the U.S. model of the presidential system, the 1973 Constitution establishes a parliamentary system of government patterned after the French parliamentary system with a strong Prime Minister. Both systems, however, assume a limitation of governmental authority by the basic rights of the people. CONST., Arts. VII, VIII, IX, X.

[94] CONST., Art. IV.

[95] FERNANDO, THE BILL OF RIGHTS 4-6 (1972); SINCO, PHILIPPINE POLITICAL LAW 93 (1962).

principle.[96] Save in some extraordinary situations,[97] it is only when a person is duly convicted of criminal offense that he can be held against his will and compelled to render imposed labor. As a matter of general proposition, therefore, without a criminal conviction, there cannot be any impairment of individual freedom.

To ensure that individual liberties are not easily transgressed by the use of the criminal law, the Constitution has expressly set up a number of procedural and substantial safeguards that must be met to secure a conviction.

The Philippine Constitution is a progeny of the American Constitution. In the extension of American public law to a colony, however, the United States laid the basis[98] for the inclusion of certain provisions in the fundamental law of the Philippines which are not expressly stated in the American Constitution. Thus, while at present, there is vigorous debate in judicial and academic circles of the United States whether there exist constitutional rights to presumption of innocence and to bail, these two rights are expressly included in the Philippine Constitution.[99]

In addition the accused is afforded a host of other rights. He is entitled to be informed of the nature and cause of the accusation against him, to a speedy and public trial, the right to be heard by himself and counsel, the right to confront witnesses against him, to the compulsory attendance of witnesses in his behalf, the right against excessive fines and cruel and unusual punishment.[100] The criminal statute under which a person is sought to be convicted must have a degree of certainty to satisfy the requirements of due process.[101] In the words of a Filipino jurist, "no one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes."[102] This elaborate structure of rights can only point to one constitutional policy: utmost respect for liberty.

The proposed Code of Crimes in its preventive detention provisions collides with this constitutional command. It authorizes curtailment of liberty in addition to the penalty attached for the offense, and allows this to continue indefinitely. It authorizes involuntary confinement even in the absence of proof of charges of criminal culpability, also indefinitely.

The grounds on which preventive detention is authorized are so vague and so broad as to authorize the measure for any reason that the

[96] CONST., Art. IV, sec. 14,; sec. 3, U.S. Act of August 29, 1916.
[97] For instance, the commitment of an insane person to an asylum.
[98] See, Sec. 5, Philippine Bill of 1902.
[99] See, notes 89 and 90, *supra.*
[100] CONST., Art. IV, sec. 19.
[101] Ermita-Malate Hotel and Motel Operators Assoc. v. City Mayor, G.R. No. 24693, 20 SCRA 849 (1967).
[102] FERNANDO, *supra,* note 9 at 242.

judge might find disagreeable or uncongenial with the person who is subjected to it.

It does not change anything that its proponents claim it is not a penalty. This is an exercise in casuistry that establishes distinctions where none exists. The end result is violation of liberty of the individual, and worse, without the guarantees that accompany a criminal trial. Its proponents claim that it is an administrative measure and not a penalty. This distinction has implications for the due process requirements and the quantum of evidence required to sustain the judgment.[103] The net effect might be that the procedure will be resorted to in instances where the government is convinced that the evidence for criminal conviction is flimsy.

Police Power

The Code's proponents finally assert a claim of police power. Like many general statements of constitutional doctrines, the notion of police power presents an extremely elusive and abstract formulation that makes it difficult to apply in concrete situations. In the Philippines, it has been defined as the authority of the state to enact legislation that may interfere with personal liberty or property in order to promote the general welfare[104] or the power to prescribe regulations to promote the health, morals, peace, education, good order or safety, and general welfare of the people.[105] In general, it has been a doctrine resorted to by the courts to uphold governmental intrusion into the private domain, such as the regulation of liberty or the use of property.

Some standards have been laid down to sustain a claim of exercise of police power, namely, that the public interests in the case are more important than the interests of the individual; and second, that the means employed must have substantial relations to the end sought to be achieved.[106] While the power has been held to validate a resolution of a provincial government to require members of non-Christian tribes "who are not advanced in civilization" to live in reservations akin to those of Indians in the United States[107] and to compel able-bodied men in town of certain ages to assist the authorities in apprehending criminals,[108] police power had generally been applied to the regulation of use of property which were considered harmful to the morals, the health or the sense of esthetics of the community.

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[103] While due process is required even in administrative cases, it is an established principle that administrative proceedings are not narrowly constrained by technical rules of procedure. The administrative body must simply act in accordance with justice and equity and the substantial merits of the case. See, Ang Tibay v. CIR, 69 Phil. 635, 641 (1940).

[104] Calalang v. Williams, 70 Phil. 726 (1940); Primicias v. Fugoso, 80 Phil. 71 (1948); Lao Ichong v. Hernandez, 101 Phil. 1155 (1957).

[105] U.S. v. Gomez, 31 Phil. 218 (1915).

[106] U.S. v. Toribio, 15 Phil. 85 (1910); U.S. v. Villareal, 28 Phil. 390 (1914).

[107] Rubi v. Provincial Board of Mindoro, 39 Phil. 660 (1919).

[108] U.S. v. Pompeya, 31 Phil. 245 (1915).

There is no precedent, however, for the use of police power to completely curtail the civil liberties of individuals, and to the mind of this writer any such measure is constitutionally impermissible. Preventive detention collides with principles of due process and presumption of innocence and wipes out the distinctions between a convicted criminal and those who are not criminals. It authorizes prolongation of detention and indefinite detention that only the pedantic or the insensitive would characterize as different from penalty. Indeed, it will reinstitutionalize the system of involuntary servitude. The intention and the construct are belied by actual effects.

Summing up

In sum, the preventive detention provisions of the proposed Code of Crimes directed to social defense against the so-called criminal type or socially dangerous persons do not stand practical, policy or constitutional scrutiny. It presents some proper gentlemen's vision of a neat, sanitized, homogenized society, where members of the community conform to their notions of civility. Those who do not are to be kept away. It is also a perfect vehicle for those who dream of absolute power to eliminate and intimidate those who come in their way. For the community, it can only mean drab conformity and unremitting banality.