The Preliminary Project for an Italian Penal Code

FROM the time of Beccaria, Italy has been a leader in criminology and criminal law reform. The names of Lombroso, Ferri, and Garofalo, among many others, are known to all students of the subject. After the life work of Ferri in working out the principles of the positivist school,[1] it must be a great satisfaction to him to be entrusted with the chairmanship of a royal commission for the reform of the penal law—to have the opportunity to put in practice all that has been worked out and preached, the power to smash the existing scheme of things to bits. It has been said, however, that continuity with the past is not a duty, but a necessity, and therefore the commission is not giving forth a new law from the skies. It would be entirely foreign to scientific principles to form a code that would break with the existing state of civilization. In fact, the work of the commissioners is to make the penal law responsive to the present demands of the people. For, as the commissioners point out, unfortunate practices continue long after the theories on which they were based have been exploded. This commission, however, is acting absolutely without fear and without restraint, so that while wisely preserving what is good in the past it is entirely free to work out what is absolutely best for the future. It is untrammeled in its project to remold the criminal law entirely to the heart's desire.

The principles on which this remodeling is to take place are well known. There are two parties to every crime—the offender and the state—and usually there is a third, the injured party. The principles on which the criminal law is to be based are the social defense, and the rehabilitation of the offender. The social defense must also take into consideration the guaranties of individual rights. In providing for the social defense the guiding principle is that the dangerousness of the offender is the prime consideration, not the offense. The accidental circumstance that the offender may have stolen $49 instead of $50, is absolutely immaterial. The offense itself, in other words, is important only as it bears on the dangerousness of the offender. The social evolution has been "from defensive vengeance by the offended and his family to public vengeance, from penitence to a chastisement pro-

[1] 11 Journal American Institute of Criminal Law 67.

portionate to the gravity of the offense, and now to a provision for social protection proportionate to the dangerousness of the offender."[2] In carrying out these guiding principles, there is of course a general similarity to the criminal law and procedure of all civilized countries. We see the same headings, attempts, parties to crime, etc.; we have the same modern institutions, juvenile court, probation, and parole. The whole project has been most carefully thought out. It would be impossible to criticize on superficial examination. Its merits, however, are obvious, and it is my purpose to call attention to a few of the important changes which the application of the principles above stated bring about in the criminal law. The project covers in the first book (a draft of which has been completed) the offender and the sanctions.[3] The second book will give the particular offenses. The third book will contain special penal statutes, and a penal code of procedure relating especially to the judicial police, the preliminary instructions for trials, and the organization of experts, the regulation of the prison system, and reforms relating to petty offenses. When completed the three books will be presented for enactment. Confining ourselves, therefore, to the part already published, the first book, which, by the way, is published for the purpose of inviting criticism and suggestion, let us see how the application of the foregoing principles works out in detail.

I. (a) Short jail sentences are abolished. Short sentences in jails or penitentiaries are simply stoves for the culture of criminal microbes.[4] The question then arises: what should be substituted? It is answered by the sanctions provided in the code, which are many and diversified.[5] For certain kinds of minor offenses there

---

[2] Preliminary Project for an Italian Penal Code, with Report Thereon by a Royal Commission. Roma, "L'Universelle" Imprimerie Polyglotte Villa Umberto I, 1921, p. 197.

[3] The word "sanctions" is substituted in place of penalties to remove every reference to a conception of chastisement in the provisions for social defense. "Sanctions" will be used in this article hereafter, although it would be more natural for us to speak of penalties or punishments.

[4] Preliminary Project, p. 184.

[5] Art. 39.—The sanctions for ordinary offences, committed by majors over 18 years of age, are:

1. the mulct;
2. local relegation;
3. confinement;
4. obligatory day labour;
5. simple segregation in a house of labor or an agricultural colony;
6. rigorous segregation in an establishment of seclusion;
7. perpetual rigorous segregation.

is an obligation laid to reside for a particular period away from the place where the offense was committed, and sometimes to reside in a particular place, this being considered an appropriate sanction where it is believed that a removal from bad associations or companionship may effect a cure.[6] Obligatory day labor is the sanction for most of the offenses for which we should sentence the person to the county jail. It means that the offender works for a period from a month to two years in a house of labor or an agricultural colony of the state without night detention.[7]

(b) For offenses more serious, there is what is known as simple segregation. This is always served in a house of labor or an agricultural colony with isolation at night, and for a period not less than three months and not more than fifteen years. It is applied by the judge in the house of labor or the agricultural colony, according to the previous life and the aptitude for labor of the condemned person.[8] For the most serious offenses, there is rigorous segregation in an establishment of seclusion, which consists in obligatory industrial or agricultural labor, with isolation at night for a period not less than three years, and not more than twenty years or for a period absolutely unlimited with a minimum of ten years, and this rigorous segregation may be per-

---

Art. 40.—The sanctions for social-political offences, committed by majors over 18 years of age are:
1. general relegation;
2. simple detention;
3. rigorous detention.

Art. 41.—The sanctions for offences, committed by minors under 18 years of age, are:
1. guarded freedom;
2. the professional correctional school or the school-ship;
3. the house of labour or agricultural colony for minors;
4. the house of custody.

Special divisions shall be set apart for those more dangerous who have committed serious offences, or more than one offence, or are recidivists or habitual offenders.

Art. 42.—The sanctions for offences, committed by majors over 18 years of age in a state of mental infirmity, are:
1. the house of custody;
2. the criminal lunatic asylum;
3. the special labour colony.

Art. 43.—Complementary sanctions, where they do not constitute sanctions standing by themselves, are:
1. special publication of the sentence;
2. caution for good behaviour;
3. suspension from the exercise of a trade or profession;
4. interdiction from public offices;
5. expulsion of the foreigner.

[6] Arts. 48, 49.
[7] Art. 50.
[8] Art. 51.

petual in the cases in which this is provided. As far as possible the work will be done in the open air on public improvements such as the reclamation of the malaria swamps.[9] It has not been deemed necessary to re-establish the death penalty which has been abolished in Italy, nor to provide for corporal or other degrading forms of punishment.

II. Naturally from the principles on which the project is based, the offender is more important than the offense, and the classification of offenders is of the greatest consideration.

(a) The positive school takes the text of the Bible literally, that "Vengeance is mine, saith the Lord, I will repay." In other words, no element of vengeance, retribution or moral fault enters into this code. As a consequence, the offense of insanity is eliminated. All persons, sane or insane, are responsible for what they do, in this sense, that society must be protected from their acts, and society needs just as much if not more protection against a person insane, or partially insane, as against one of full intelligence. The treatment may be in different institutions, but the fundamental principle is the same for both sane and insane criminals; both must be placed where society will be protected, and neither must be released until it is safe. The distinction between the accused who are held as responsible and those who are held as irresponsible is a distinction which, "owing to the grave practical consequence resulting, of acquittal or of conviction and of a more or less heavy sentence, transfers the trial into a logomachy between the public prosecutor and the counsel for the defence, and often into something worse, with the result of distorting the reality of the human facts."[10] "In fact, through this innovation, all disputes about the moral responsibility or irresponsibility of the accused will be prevented in the trials, which will be reduced, on the one hand, to a technical examination of the elements of proof (to establish whether the accused be the author of the offense or not) and, on the other hand, to an examination of the individual and social conditions of the accused in order to choose the sanctions best adapted to his personality. And so the social defense against crime will be much more effectual because it will be exercised—in appropriate forms—also against offenders who, though they be lunatics, or neuropathics, or otherwise abnormal

[9] Art. 52, p. 279.
[10] Preliminary Project, p. 189.

(and so held 'morally irresponsible') are not, on that account, the less dangerous."[11]

For serious offenses for which rigorous segregation is provided, or where the person is dangerous, confinement in a criminal lunatic asylum is the treatment. For less serious offenses segregation in a house of custody, and for those who without being alienated in mind are in a state of chronic intoxieation from alcohol or from any other poisonous substance, or in a state of grave psychic anomaly, there are special labor colonies. Where, however, the psychic anomaly consists exclusively or principally in the tendency to crime, congenital or acquired, the offender shall not be treated as one of unsound mind.[12] In other words, those whom we term psychopaths, demi-fou, "middle of the road" group, for want of better terms—those whom we know to have something the matter with them, but cannot diagnose it exactly—such persons are to be treated as ordinary criminals until medical science has advanced sufficiently to find out just what it is that makes them lead a life of crime, when, as far as appearances go, they might get along much better in society as law-abiding citizens.

(b) Minors constitute another class of offenders, and the age of majority provided by this project is eighteen and not twenty-one as with us. The reason for this may be that persons mature more rapidly in the Italian climate, or it may be that the Italians recognize what every police officer knows, that the criminals from 18 to 25 are the most dangerous. In fact, it is one of the weakest points in our system that these dangerous young thugs and gun men, by reason of their youth, work on the sympathy of the jury or of the judge and obtain an undeserved acquittal or probation. For minors, the sanctions are: guarded freedom in families where possible, the professional correctional school, or the school-ship; the house of labor or agricultural colony; the house of custody.[13]

(c) Another class is the political offender. Article 13 provides that social-political offenses are those committed exclusively from political motives or motives of the collective interest. In defining offenses, the second book will follow Article 10 of the French Declaration on the Rights of Man, and hold that the simple expression of an idea should always be free. When, however, the expression goes beyond the idea into overt acts, there

[11] Preliminary Project, p. 190.
[12] Arts. 32, 33.
[13] Arts. 34-38.

must be some restraint for the social good, but it will take a different form from the ordinary penalties. It may include general relegation—the obligation to reside outside of a territory of the kingdom; simple detention, or isolation at night, and detention in a special establishment. The condemned person may choose his own work, industrial, intellectual, or artistic, and shall be allowed liberty to speak with persons under observation, and to use books, reviews and papers. Where the offense is more serious and the state requires greater protection, rigorous detention is provided in a special establishment, or a special division of a common establishment with isolation at night and obligatory day labor.[14] At the risk of becoming the target for our political orators at high school commencements, and dubbed by them as parlor bolshevik, than which the vocabulary of contempt has no epithet more contemptuous, the observation is ventured that it seems strange that in the United States, the traditional land of freedom, men have been and can be sent to prison for the expression of an opinion. In this country, above all others, where the principles of freedom enacted in the Virginia Resolutions should prevail as expounded by Madison and drafted by Jefferson, there should be no restraint on the expression of ideas. " . . . that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them." The Italians have accepted these principles of Jefferson, although they have been abandoned in the country of their origin. This comparative immunity to political offenders in the Italian project seems at first glance somewhat unpractical to us who realize that while many political offenders act from fairly

[14] Arts. 55-57. Preliminary Project, p. 281.

worthy motives, they number in their following the worst of criminals, who take advantage of political agitation to gratify their criminal instincts. The framers of this project are fully aware of this, and have been careful to provide that if the social political offender is also a criminal he shall not receive any benefit from the milder treatment accorded to social political offenders.[15]

III. In the project, as under our law, there is provision for probation and parole. Probation is termed conditional condemnation; parole, release on condition. It is interesting to note, however, the care with which these institutions are guarded. Probation is never granted to one who has incurred any previous condemnation for which simple or rigorous segregation is the sanction, nor is probation granted more than once for any serious offense. Furthermore, under Article 78, probation is never granted unless there exist at least one of the circumstances of less dangerousness as enumerated in Section 22. In other words, an offender who committed the act under circumstances indicating a greater dangerousness as in Article 21, could never get probation. Parole is likewise allowed on terms. Those condemned to simple or rigorous segregation must serve a certain portion of the term, must not be recidivists, and must be placed in one of the higher categories in the prison. The prisoners seem to be classified as common, good, best. The prisoner must be at least in the category of good, and his application for release on condition may be made earlier when he has been raised to the category of best. If the condemned person is a habitual offender he cannot obtain release unless he has learned a trade and shown a constant aptitude for labor.[16]

IV. It was stated above that in every crime, there must be considered the offender, the state, and the person injured. The Italian project takes care of the person injured in a way that is very strange to us, and yet it seems thoroughly just. Every sentence of condemnation shall impose the obligation to restore what has been taken away from the injured party or his heirs and to repair the damage, and where the offense has not caused damage economically appraisable the judge may order a sum paid for the benefit of the fund for amends. Probation and parole shall always be subject to the condition that the condemned person pay off the damages, except that the judge shall have the power to exonerate

[15] Preliminary Project, p. 281.
[16] Arts. 78-89.

in whole or in part from such obligation the person condemned for not more than one offense who is not a recidivist nor a habitual offender, only when he can prove that it is impossible for him to satisfy any such obligation.[17] The person condemned to labor must, as has been said, work at productive employment. To avoid any difficulty with free labor, he receives the same compensation; part of it goes to the state, part to the injured party, and part to the family of the prisoner or to himself.[18] There is, furthermore, a fund for amends taken from fines, amends and other pecuniary condemnations, from the income of which those unjustly condemned and those unjustly accused are compensated, the commission considering that the experience of the Swiss cantons shows that the obligation does not entail excessive financial consequences. One third of the income is used for this purpose; another third is used to lend to the injured parties or their families money in case of urgent need. The last third of the income will be used to furnish the Council of Patronage (which combines the functions of our parole board and our probation boards) with the money necessary for the carrying out of its functions.[19]

V. Among the most satisfactory provisions are those relating to recidivists and habitual offenders. The two are not necessarily the same. But there is an increase in the severity of the penalty which may extend to rigorous perpetual segregation and

---

[17] Arts. 90-99. The reparation is awarded and enforced in the criminal proceeding. The injured party is not forced to bring a civil proceeding and try the case over again. "It is enough to have once seen an establishment directed by one who knows and follows the data of criminal anthropology and criminal psychology and uses as a lever for the social re-training especially of occasional offenders, who are the most numerous, their sentiment of personal dignity and the confidence placed in them—such an establishment, for example, as was that of Buenos Aires under the direction of the late regretted Antonio Ballve—in order to be convinced that the detained, no longer branded with a number, but personally known and called by their names, finding themselves told off to the work best suited for them, with an adequate wage and often charged with duties of trust, show in their behaviour, in their look, in their speech, serenity of mind and a will turned with decision towards their own moral redemption, all which things unhappily are not met with in the prisons managed on the old system of imperious repression—where 'the superior is always right . . . specially when he is wrong'—carried out by a staff that is inadequate and under-paid.

"This matter of the staff is indeed a condition fundamental and decisive. As even good laws give bad results if applied by one who has not the necessary qualifications for his office, and, vice versa, laws not so good give good results when carried out by wise and upright persons, so the prison arrangements depend chiefiy on the qualities and activities of the staff who will be charged with carrying them out." Preliminary Project, p. 292.

[18] Arts. 70-73.

[19] Preliminary Project, p. 323.

even for a time complete isolation. The habitual offender, whether he has been previously convicted or not, receives a longer sentence, the maximum, which means not less than six nor more than twenty years. To habitual offenders who have relapsed at least three times, into offenses for which simple segregation is set forth, or twice into offenses subjected to rigorous segregation, there shall be applied, besides the mulct or fine, rigorous segregation for a period absolutely unlimited and in no case less than fifteen years.[20] We have not yet the draft of the code of procedure, but the question as to who shall decide whether the defendant is an habitual offender will cause trouble.[21] It seems to be the opinion of the framers of this project that the judge responsible for the decision shall pass upon all subsequent questions of administration, having of course the assistance of persons competent in

[20] Arts. 23-31.

[21] "Above all it will be necessary, in the reform of the Code of Penal Procedure, to settle one preliminary question. The question is this: when the accused is tried in a Court of Assize, should the judicial declaration of habitualness (without which it is impossible to apply the special sanctions of Arts. 28 and 29) be made by the jury or by the President of the Court?

"The Commission has for the nonce only nibbled at this question; it must be settled later on.

"And it may be said that the prevailing conception is, to take out of the jury's hands a decision which demands technical knowledge and aptitudes for psychological and social observations beyond the workings of simple common sense.

"It may rather be said that the tendency of the Commission is in the sense of proposing now—instead of a reform, however radical—the abolition of the jury for ordinary offences, for this principal reason that, as the penal judgment must ever growingly become a technical process, it will growingly be necessary to entrust it to magistrates with a technical training, who are also specialists in the study of delinquency. Hence the appraisement of the personal condition of the accused, which now is made by simple intuition on the part of the jury and can easily be distorted, will, in the hands of judges who are specialists, be systematically applied in accordance with the rules of this Project.

"And for the same reason the system of judicial assessors acting together with the magistrate, must be held to be very inadequate, because the technical pre-eminence of the magistrate too often paralyzes and eliminates the personal judgment of the assessors.

"Naturally, through the aureole which surrounds the jury as a conquest of liberal ideas in times past, which none the less has not prevented the gradual weakening of its authority by continual mutilations of its jurisdiction in ordinary offences and by restrictions in the selection of its members from the various classes of society, it will be necessary that its abolition for the trial of ordinary offences be preceded by a radical reform in the recruiting of magistrates, in order to have men guaranteed as technically competent.

"The jury system, just because of its predominantly historical character as a liberal conquest, may be continued for the trial of social-political offenders, provided, however, that care be taken to avoid, in the calling-up of juries, the danger coming from the continual limitations placed on the choice of jurors, who should represent equally all classes and sections of society." Preliminary Project, p. 250.

sociology, psychiatry and psychology.[22] The report requests, however, that steps be taken at once to improve the quality of the judges, and to make it impossible for a judge to exercise these functions unless he has been thoroughly trained in criminology.[23]

---

[22] "In the third place, all the forms of sanctions, not only should emanate from the jurisdictional power of the judge, but should be regulated and supervised by him also during their administrative execution, thus offering a constant guarantee, not only for society, but also for the condemned, against any whatsoever abuse or empiricism following on the sentence. Hence by this carrying out of the jurisdictional function after the sentence, the grave defect of the actual administration of penal justice will be eliminated, through which its diverse functions and the organs charged with its execution remain foreign to one another. Indeed at present the magistrate for the inquiry (juge d'instruction) knows nothing of that which the magistrate who gives the decision may have done with his inquiry, nor does the magistrate who gives the decision know anything of what will be done with his sentence, and those who carry out the sentence know nothing of the reasons and the facts for which the offender was subjected to that sanction. And so the latter, as well as the former, lose the teachings given by the experience of the useful or hurtful effects of their own work, which is, on the contrary, the most effectual and suggestive guide in the ordinary experience of daily life." Preliminary Project, p. 270.

[23] At one of its first meetings the Commission passed the following resolution, which was presented to the Minister of Justice:

"Whereas any reform of legislation must prove ineffectual unless provision be made at the same time to secure greater technieal capacity—according to the most recent studies on criminal law, criminal psychology, and criminal sociology—in those who administer penal justice or aid in the administration of the same as counsel for the prosecution or the defence;

"Whereas such greater technical capacity is rendered absolutely necessary by the widened powers which all the most moderu legislation grants to the magistrate in the choice and measurement of the sanctions;

"The Commission for the Reform of the Provisions of Penal Law consider it to be needful that:

"1. as regards *magistrates,* a clear distinction should be made both as to their enrolment and as to their exercise of enquiring and deciding functions, according as penal or civil law is in question;

"2. that in the field of *university studies* provision be made for specialization, so that those students who wish to devote themselves to the study of penal law in preference to that of public or private law—after three years' study in common with their fellows—should be required to attend courses of Criminal Anthropology, Criminal Psychology, and Criminal Sociology, Statistics and Forensic Medicine, with the inducement of gaining a special diploma;

"3. that with regard to *counsel,* who from now onward will apply to be inscribed on the Advocates roll, it be enacted that, in order to admission as pleaders in the Courts of Assize, they must gain a special qualification, attested by inscription in a special roll, by passing a practical professional examination on the subjects of study indicated above."

The Minister Mortara replied that "for his part he recognized the opportuneness of the desired reforms and shared completely the rational and practical criteria by which their advoeacy was informed." And this approval was confirmed by him when transmitting to the Minister of Instruction this same resolution, and once again when transmitting it to the President of the Commission for the Reform of the Law of Forensic Practice. And as a matter of fact the relevant part of this resolution was embodied in the Scheme of Law for that reform. Preliminary Project, p. 232.

It is apparent that with our elected judiciary it would be undesirable to entrust any such responsibility to the judges. In fact, one may doubt whether in any case it is desirable that this authority should be parcelled out among a number of judges. There is too much uncertainty in the application of the discretion, according to the views of the individual judge. Accordingly, it would seem that if we adopt any such measures in this country, the function of the judge and jury should be limited to trying the case and ascertaining the fact. The disposition of the prisoner should be given to some central board which can have the advantage of an organization to ascertain the facts of importance in determining what to do with him. The other large question of doubt which the report also faces is the difficulty of administration; for the various kinds of treatment of condemned persons many and diversified institutions would be required. Can the country afford it? The answer to this, of course, is to look at the question from the point of view of a business man who scraps unhesitatingly an expensive piece of machinery to install a more expensive piece if it will pay in the resulting production. When we reflect that it is probable that crime in the state of California costs the people in money over seventy-five million dollars in a single year, any measures or institutions, that would reduce materially that cost, would pay for themselves in a very short time.

There are several other innovations that merit discussion but any adequate commentary on the project would require a volume. Enough has been said, however, to indicate that any real plan of reform of our criminal law, and we must undertake it seriously and soon, should regard most carefully the experience and theory of Italy as crystallized in this project.

A. M. Kidd.

University of California,
Berkeley, California.