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## Editorial

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## EDITORIALS.

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### PROSPECTIVE LABORATORIES FOR THE STUDY OF CRIMINALS.

The doctrine that the criminal is what he is because of his original character; because he has reverted mentally and physically toward his savage ancestors; or because, as a savage he has been driven to crime by his very nature, was in the past a simple way of conceiving a complex situation, and one that could hardly fail to bear fruit both good and bad. On the one hand, it stimulated observation and hence had a scientific value. On the other hand, it eliminated or crippled the doctrine of individual responsibility without immediately offering a substitute or compensation, and therefore encouraged the development of a sentimentality, in dealing with criminals, a result that is hardly conducive to social security, to say the least. The reaction of the French school, particularly through M. Lacassagne, was especially salutary, since it properly emphasized the social factor in the life history of the criminal, and so the idea of the modified responsibility of the offender is supplemented by that of an obligation on the part of society to protect the interests of the group by various means—among others by dealing with the culprit, not merely in the light of the fact that he has done a wrong against organized society, but in the light of all the circumstances surrounding the case, including his health, record, education, and educability.

This is a modified Positivism and it has found expression in the establishment of numerous laboratories of criminology in prisons, which confine their researches to no limited sphere. It has already found substantial recognition, furthermore, in courts of criminal jurisdiction. The reliance of the court upon the report of probation officers, for example, as one item to be taken into account in disposing of a case, is an illustration of the practical application in courts of law of the broad Positivism of our generation.

Committee A of the Institute of Criminal Law and Criminology, Chief Justice Harry Olson of the Municipal Court of Chicago, chairman, recommends the establishment of criminological laboratories in all such courts. The committee report contemplates such a diagnosis of a criminal from the psychological, neurological, and sociological points of view, as may be of immediate practical value to the judge who must sentence

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the defendant before the bar. To be of practical service to him it must supply him with exhaustive knowledge of the individual case, in order that through his sentence he may adequately protect society; while doing the best that is possible for the prisoner as an individual; and this purpose is made a hundred fold more difficult of realization because it involves the education of the prisoner in as far as he may be capable of such transformation. The data supplied to the court by the laboratory experts will assist the judge in determining how he may best perform his protective service to society.

The committee has another purpose in view; the accumulation of a body of anthropological, psychological, neurological, and sociological data concerning criminals that will ultimately be of great scientific value in a field that has until now been too much neglected. The laboratory, under the committee's plan, will be an institution for research as well as for more immediate practical service.

Judge Olson himself is earnestly working toward the adoption of the committee recommendations and the establishment of a laboratory by the city of Chicago in the Municipal Court over which he presides. It is not improbable that, in the near future, something may be accomplished in this direction. It should be noticed here, by the way, that he has made very substantial progress toward securing favorable action by the Commissioners of Cook County on a proposition to establish a chemical laboratory in the office of the County coroner. If the practical details could be arranged, such an institution could co-operate in numerous ways with the proposed criminological laboratory in the Municipal Court.

As a further indication of the growing scientific attitude toward criminological problems, there is quoted here a bill that has been recently introduced in the Assembly of the State of New York by the Honorable Louis D. Gibbs:

"An act to amend the code of criminal procedure, in relation to creating a board of criminal examiners in cities of the first class and defining the powers and duties of such board.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. "The code of criminal procedure is hereby amended by adding thereto, after section 485-a thereof, a new section, to be section 485-b, to read as follows:

§ 485-b. "Board of criminal examiners; powers and duties: The judge or judges, justice or justices of every court of record having criminal jurisdiction within any city of the first class shall appoint a professional criminologist, a physician and an attorney and counsellor-at-law to be members of a board, thus constituted, to be known as the board of criminal examiners of such city. Vacancies in the membership of such board shall be filled by appointment in the same manner, as such vacancies may occur from time to time. The governing body of such city shall provide suitable offices for such board in or near the court house or other place in which the sittings of such court are held, and

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may provide necessary clerical and other assistants therefor. The members of such board shall be deemed officers of the court. The members of the board shall select one of their number chairman. The board may adopt rules and regulations governing the exercise of its powers, subject to the approval of the judge or judges, justice or justices of the court. The powers, duties and functions of such board shall be as follows: After any person has been convicted of a crime or has pleaded guilty to a criminal charge, the judge or justice before whom such conviction was had or plea made shall report the fact of such plea or conviction to the board immediately, and before any sentence is pronounced upon the defendant the board shall examine him and report to the court its opinion as to the suitable classification and disposition of such convicted person. Sentence shall not be pronounced upon the defendant until the board has made such report or has, within a reasonable time to be prescribed by the court, failed to make a report. The said commissioners shall each receive an annual salary of two thousand five hundred dollars, to be paid in the same manner and from the same funds as the salaries or wages of other officers of the court, in such city. The members of such board are removable at any time at the pleasure of the judge or judges, justice or justices by whom they were appointed.

§ 2. "This act shall take effect September first, nineteen hundred and thirteen."

The bill as quoted above evidently contemplates only the immediate practical service that the criminologist and his collaborators may render to the court. It could easily be made a means of recording a body of data that would have permanent and increasing scientific value. The opportunity for modifying the bill in this particular should not be neglected. What a lawyer can accomplish on such a board as that contemplated that will not already have been secured through a fair trial of each individual culprit is not apparent. It would seem that without him the board would be complete.

It is high time that we had such laboratories as those proposed to place before the courts with the weight of scientific authority all the facts concerning a prisoner's life history and family history as well, which may properly influence the action of the bench. It should then be unnecessary—if it is not already so—and even impossible for a district attorney to take it upon himself, for any reason, assumed or otherwise, to make and fulfil a promise of clemency to a prisoner on the basis of a deficiency which he himself supposes to exist in the accused or in his ancestors.

ROBERT H. GAULT.

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## THE COURTS AND THE DIVORCE LAWS.

The greatest failure of our courts is not in respect to the administration of the criminal law, but in respect to the administration of our divorce laws. Divorce is, to be sure, not a matter which lies strictly within the realm of criminal law, and so perhaps may be regarded by some as outside of the field of this JOURNAL. However, divorces are rarely granted

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in this country excepting upon allegation of misconduct on the part of one of the parties to the divorce suit which constitutes an infraction of the social order if not of the criminal law. Over ninety-four per cent of all the divorces granted in this country are granted on the grounds of adultery, wilful desertion, cruelty, habitual drunkenness, imprisonment for felony, or the neglect of the husband to provide for his family. All of these grounds constitute, or imply, infractions of the criminal codes of most of our states. Nevertheless, if we exclude imprisonment for felony, less than one per cent of all the cases in which such acts are alleged as grounds for divorce come before our criminal courts.

Moreover, the student of crime must be interested in divorce because of his interest in the family. A wholesome family life probably forms the best preventive of both juvenile and adult crime of which we have knowledge. On the other hand, a demoralized and unstable family life seems to be one of the most productive factors in crime. An investigation conducted by the writer in 1910 showed that out of 7,575 children in thirty-four state reform schools in the United States, 29.6 per cent came from families in which there had been either divorce or desertion; 35.03 per cent from families in which either father or mother were dead; and 38.05 per cent (including a number of cases which overlapped) from homes demoralized by drink, vice, or crime. Four juvenile courts, dealing with 4,278 children, also reported that 23.7 per cent of this number came from families in which father and mother were separated by desertion or divorce, while 27.8 per cent came from families in which one or both parents were dead. In St. Louis, in the year 1909, according to the juvenile court report for that year, out of 687 children under the care of the juvenile court, not less than 400 had not both their own parents living at home. These facts prove conclusively the close relation between desertion and divorce, on the one hand, and juvenile crime on the other.

Yet, as was said at the beginning, in no respect are our courts of law greater failures than in respect to this matter of administering divorce laws. While divorce laws may be shamefully lax in some of our states, the administration of them is even more lax. Collusion, for example, is supposed to constitute a bar to divorce in most of our states. Yet in a few cases carefully investigated by a judge in St. Louis, collusion was shown to exist in sixty per cent of the cases applying for divorce. Thus, the courts virtually encourage divorce by mutual consent, although no state has a law on its statute books permitting divorce by mutual consent. This charge is borne out very fully by the experience of Kansas City, Missouri. In 1911 Kansas City had one divorce to every three

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marriages, and for a number of years previous it had one divorce to every four or five marriages. Such a rate is not uncommon among the cities of the Central West, Rocky Mountain and Pacific Coast states. In 1912, however, Kansas City appointed a Divorce Proctor, Mr. W. W. Wright, who made it his business to investigate so far as possible every case applying for divorce in the courts of the city, to see that there was no collusion and that the offenses alleged in the petition for divorce actually existed. Although the divorce laws of the state of Missouri are very liberal, recognizing eleven grounds for absolute divorce, this simple precaution of carefully investigating every case that came before the courts by an officer of the court, reduced the number of divorces granted in Kansas City in 1912 twenty-eight per cent.

That our courts are now encouraging divorce with collusion or by mutual consent, could hardly be otherwise when we consider divorce procedure in the average court. It is very seldom that a court in one of our large cities in the West takes longer than fifteen or twenty minutes, on the average, to decide a suit for divorce. Many courts take very much less time than this. In a recent issue of the *Chicago Tribune* the conditions under which divorces are granted in the city of Chicago are well set forth. Says *The Tribune*: "The record of fifty divorces an hour repeats itself day after day. There is no time for inquiry, little opportunity for reconciliation, multitudinous chances for fraud. The court hears the story of the plaintiff, and the corroboration of one or possibly two other witnesses. A prima facie case is made out. The evidence is "written up." It comes back to the judge in due course of time and he has no choice under the law but to enter the judgment which the bill of complaint granted. The divorce courts make more orphans in Chicago than death. Judge Kavanagh said that an average of 175 persons die in Cook county every week. The divorce decrees granted in the same weekly period quadruple that number."

However, our courts are not all as lax as the above statements would seem to imply. Many judges are very careful about the matter of granting divorce, and insist that every case shall be carefully tried. This is shown by the fact that out of 1,302,000 applications for divorce in the United States, from 1887 to 1906 inclusive, only 945,000 were granted by our courts. Apparently about twenty-five per cent of all applications for divorce are refused. But this only serves to emphasize the failure of our divorce courts, as social agencies for dealing with the instability of the family; for it is scarcely probable that in the twenty-five per cent of cases in which divorce is refused there is any real reconstituting of the unity of the family life. Our courts must evidently be transformed to

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deal at all effectively with the instability of the family. The formal procedure of both the criminal and the civil court is as much out of place as "Police Court procedure" in dealing with a divorce case. The judge should have all the freedom which characterizes the juvenile court, and should feel that he is the representative of society in this weighty matter of severing family bonds. He should have one or more "divorce pro-

tors" at his disposal to carefully investigate every case that comes before the court, and to ascertain whether the interests of society will be served or not in dissolving a particular family group. If it be for the best interest of society that the family group should remain intact, then the judge should informally exercise his good offices, and even the power of the law, to effect a reconciliation.

These proposals are not impractical dreams, because they are already beginning to be carried out in some of our courts. They perhaps amount in effect to saying that in every city of any size there should be special Courts on Domestic Relations, before which should come in the first instance all cases applying for divorce. These courts should investigate the cases carefully to see if reconciliation can be effected, or if the interests of society demand that family bonds be severed. Only after all efforts to maintain the family life have failed should the cases finally go before the divorce courts for the formal decree of separation. The city of Chicago is to be congratulated upon being the first to establish an efficient Court on Domestic Relations; but it has not gone far enough until every application for divorce is brought primarily before this court.

CHARLES A. ELLWOOD.

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## STOPPATO ON JURY SERVICE.

Alexander Stoppato, of the University of Bologna, has written a most interesting and instructive article in the March-April number of *Il Progresso del Diritto Criminale*. This magazine, published in Rome, is dedicated to the promotion of practical reforms in criminal law by the application of true juridical theories. Stoppato's article deals with the reform of the present jury system in Italy. The system there differs in some respects from our own, but his observations are of interest to American readers because of the many complaints against existing systems in the several states. It is strange to discover that he would make the jury a more practical institution by giving it more power, whereas the American reformers think that it should be abolished, and in fact in many states a jury trial is merely demandable by the parties if they want it;

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otherwise their case is tried by a judge alone. In those states we may well observe that the retention of the jury as a right was due to constitutional provisions and not from any desire to retain it.

Stoppato thinks that the jury is not a political institution existing to counterbalance the institution of the judgeship in the way somewhat analogous to Montesquieu's tri-divided government, but he states that it serves a social duty, and that its true sphere lies in "declarations that show the development of the public conscience which determines the degree of criminality under changeable social conditions." In other words, as criminality is admitted by all philosophers of law to be relative, it is apparent that a jury chosen from the people is better adapted to determine what the exact existing state of criminality is than a judge whose life is given over to the study of statutes and precedents; that is, that a jury—to use a figure of speech—has its ear closer to the ground and can better weigh the morality or immorality of a crime. By this Stoppato does not mean to throw over the law of the statutes, but merely to hold that two elements should enter into a conviction for a crime; first, the consideration of whether the act is against a written law, and, secondly, the amount of unsocial mentality that entered into its commission, and that a jury is best fitted to consider the latter.

He holds that the fact that good results are not always obtained by the jury system does not reflect on the justice of the institution, but upon the rules that govern it. Many judges complain of it, and yet in the majority of cases substantial justice seems to be obtained and public opinion seems satisfied. To consider this without bias we must discard some convictions which are the result of a rigorous legal training, and conservative members of the legal profession must become less conservative. To-day, punishment for crime is no longer considered as a revenge, or entirely as a preventive; it is reformatory, and reformatory powers must be contingent and relative. Admitting that the jury is a better judge of the trend of life on the street, it should surely be allowed the control of the part of the criminal prosecution which deals with the circumstances under which the crime was committed. He thinks that jurors show stringency where there is a popular demand for it, and are lenient where the feeling is not so strong against the crime. This he thinks is evidence of the claim that the jury is the thermometer of the popular conscience, and he thinks that the popular conscience is the originator of criminality, and should be followed by the law.

Having thus outlined the general reasons for giving the jury more power, he takes up details of specific reform. The social conscience should of course be worthily represented. To obtain this end he thinks

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that the number of jurors could be lessened (to avoid an unwieldy body), and the right to challenge could be reduced to obtain juries more representative of the people at large. He thinks that—within certain bounds—juries should be no more challengeable than judges. He has many doubts as to the maxim that the jury is the judge of the facts and that the judge is the judge of the law. He recognizes the difficulty of applying this statement and while he does not think that the jury should be the judge of the law without instruction, he thinks that the judge should explain what the law is, and ask a series of questions based on the law and the facts for determination by the jury, and that thus, under instruction the jury should find both the law and the facts. We may say that our experience with American juries does not lead us to embrace this proposition with any conviction of success, but in other countries, the different education and up-bringing of the citizens leads to the obtaining of juries of greater fitness. He proposes that the first question should be as to the existence of the fact alleged, the second as to its authorship, and the third as to the guilt of the defendant. The third question should be extended by a complete statement of the law and the defense applicable thereto.

He then takes up the right of the accused to refuse to give evidence. The practise here is so different from the American practise that we may well omit it, but his next problem is one of great interest. He thinks that the jury should be allowed to participate in the determination of the penalty; that the judge should tell them the maximum and minimum penalty, what circumstances may be taken in mitigation of the offense, and then each juror should be allowed a vote as to what penalty he thinks would be just. Theoretically, we deem that this would be ideal, and perhaps in France, where the juries in Somme, Garde, Saone and Loire, and elsewhere have demanded the right to participate in its determination, alleging that they could not reach the sense of guilt without knowledge of what results their action would have, this plan would have good practical results. In Italy, Stoppato confesses that no such demand has been made, but even there the interest of the people in prosecutions might justify it. It is well to remember that Italy at the present time is thoroughly alive to legal reforms, and is enjoying the existence of an active School of Legal Philosophy which we may go so far as to say leads present juridical thought. In America, however, the interest taken by the people, and consequently by the juries chosen from them, is not such as to give one confidence in their ability or willingness to pay sufficient attention for the correct determination of sentences by which criminal justice is upheld. In Switzerland a law allowing such a participation on the part

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of the jury has been passed, but again we must remember that Switzerland is a law unto itself because of its size, its geographical position, and its people.

In conclusion we may say that Stoppato's theory for the decreasing of the number of jurors, for allowing them to determine certain legal propositions under the instruction of the judge, and for allowing them to participate in the quantum of the penalty, and for the reduction in the number of challenges in order to make the jury more representative of the people at large, all seem to us to be theoretically correct, but as impracticable in America as they are theoretically desirable. If they are found promotive of the best interest of criminal justice in Italy we can only say once more that the smaller and homogenous countries have many advantages which our larger and heterogenous unit lacks.

JOHN LISLE.