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SOME FUNDAMENTAL PROBLEMS OF CRIMINAL POLITICS¹.

(Apropos of the Draft Penal Codes of Austria, Germany and Switzerland.)

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Summary: 1. International importance of the Draft Penal Codes of Austria, Germany and Switzerland. 2. Influence on them of Italian criminal politics. 3. The central problem: who ought to be punished? Punishment and measures of security (*sichernde Massnahmen*). The criminal determinable by judicial motives: necessity of punishment: indeterminate sentences. There cannot be a rigid legislative criterion for the application of measures of security: consequent enlargement of the judicial powers: the passing from punishment to measures of security. The measures of security are jurisdictional acts. 4. With the power of substituting measures of security for punishments, and vice-versa, is connected the problem of indeterminate sentences. Objections raised against this institution (Manzini): its advantage in our opinion. 5. The question of punishment by death. Arguments against it (Ferri). It is a question to be resolved according to the conditions of criminality in a determinate country. 6. The American institution of parole as a means for the repression of antisocial activity. A supposed infiltration in the Swiss Draft Code. The problem in Italy. 7. The pecuniary punishment (*Geldstrafe*) in the Tentative Codes under examination: payments by installments: hereditary. 8. Indemnification for damage suffered by the victim of crime. The Tentative Codes aim at a deviation of the State's functions: indemnification for damage must remain a secondary object of the criminal trial. 9. The Tentative Codes of Austria, Germany and Switzerland resemble the Statue of Janus. The criminal justice of to-morrow.

1. The Draft Penal Codes of Austria, Germany and Switzerland are three weighty attempts to reform the system of criminal justice in the modern state, which have attracted the attention of all those who in civilized lands devote their thought and study to that eternal problem of human society, what is criminality? It is not only three drafts of laws under our consideration, but it is really the mental attitude of three civilized nations towards those members of the nation, who lack the self-

¹Figures in parentheses refer to notes at the end of the article.

restraint necessary for collective life. These three Tentative Codes represent our mental attitude, after the long dispute between two great schools of thought, both composed of men of great ability (viz.: the judicial and the socio-anthropological school), as to the best method of regulating our treatment of criminals.

Hence arises the great international importance attached to this admirable work of German criminalists. It is not a question of regulating matters of mere internal interest (in this case we should be thrusting ourselves uselessly into the affairs of other people), but it is a question of three legislative projects, which the other nations of the civilized world regard with great anxiety, because they feel that their own interests are also at stake. Indeed no future legislative work will be able to neglect these three Tentative German Codes, even if they should not become positive laws, and it is the obvious duty of modern students of criminal science to know their fundamental bearings. And the purpose of this article is to make known, with critical valuations, the basic tendencies of these Tentative Codes and I also propose that it shall be the completion of my Italian translation of the general dispositions of the three Tentative Codes, which is appearing in the *Giustizia Penale*. It is not boasting, but merely the truth, to say that *Giustizia Penale* is the only review of criminal law, which has rendered accessible to students, in their native tongue, an examination of the general part of these three Tentative Codes, which seems to me so indispensable for us. Because just as no human description of a natural scenery can truly represent that same natural scenery, so no subjective valuation of a product of the human intellect can represent the work itself. To make possible and easy the study of these German Tentative Codes, without the artificial barriers of any school of thought or any theories, was our object, when we assayed to give the Italian public a translation in their own language.

2. It is undeniable that these three Tentative Codes have been subject to the influence of *modern criminal politics*, which, with all the characteristic exaggerations of reacting movements and one-sided views, has been the flag ever held aloft by the Italian positive school, and above all by its never tiring apostle, Enrico Ferri, whose name is deservedly famous throughout the civilized world. And so, in duty to our country, it must be said that if Italy has not been the first to present a draft code corresponding to modern views of civilized nations confronted by the phenomenon of criminality, yet Italian criminal science is the basis of the German Drafts (1). The German criminalists have worked, in characteristic German fashion, but the materials of their arguments and

their change of psychic attitude towards the criminal are directly derived from Italian thought, which is in all countries famous for its advance in the study of the problems of criminality. We are not of the positive school, nor can we rank ourselves under the banner of Ferri, but we must nevertheless acknowledge and state that the discussions, often bitter, aroused by the positive school have served to hold high the name of Italy in the department of criminal science. So much so that to-day there is not any serious foreign student, who does not make it his duty to study the main works of our criminalists.

3. The fundamental problem is that of penal responsibility. *Who ought to be punished?* That is the great question, before which every legislator stands perplexed to-day. And the perplexity arises from the great amount of truth and reality in many of the new ideas. The classical school of criminal law settled the problem easily: it gave the description of each offense and fixed the equivalent punishment. Whoever does such and such will be punished so and so. But beyond the general motives and the logic of facts, excluding the consideration of the right to inflict punishment, this school did not look more deeply into the circumstances connected with the man to be punished. The bearing of the state in regard to its criminal citizen was an entirely *objective attitude*. This was an exceedingly convenient method for the application of the law, because it afforded a formula easy to apply, an objective rule for determining criminality.

But all study of criminal science (be it of psychological, sociological, political or technically judicial character) aims ultimately, whether directly or indirectly, at attaining one sole purpose: *the diminution of criminality*. Every man, whether working with brain or with hand, has in society a social function and he cannot have other than a social function. The function of criminologist is to co-operate in that great human ideal: the lessening of crime. To this ideal he co-operates also when, as strict jurist, he searches the juridical nature of the offenses and the institutions created by the criminal laws. He then works to the end that the law may be rightly applied. But what is the social end for which penal laws are applied? The repression of crime; and the repression of crime means making an effort to diminish it.

Of course no system will ever succeed in rooting out of men the motives that incite the antisocial act. "To conceive a society without crime is equivalent to thinking of a society of universal physiological beauty. To pretend that any doctrine or code will extirpate criminality is like expecting a second creation" (2). This is true, and no one imagines such a thing possible, but theories are like men: after a certain

length of service, one requires from them an account of the results of their work. A juridical theory cannot be permitted to exist merely because it is perfectly logical. Practical life goes beyond the logic of jurists, used to apply sometimes the microscope even upon the simplest concepts, the investigation of which is not necessary for the practical ends of life. Practical life requires a system of justice and juridical ideas applicable to its function: tending to an ever continuing diminution of social evil, and towards the increase of the collective well-being. That is what is required. Otherwise, the scientist becomes as apart from daily life as the monk (3).

Substantially for these reflections the tendency to-day is to give great importance to establishing *measures of security*. A brief glance at the German Drafts shows us how much consideration their compilers have given to this means of repressing crime.

The idea of *responsibility* remains. The positivists affirmed that society must defend itself from the criminal just as it defends itself from a lunatic or from a mad dog. This will never be. The collective conscience feels *the need of inflicting punishment* on him who by his conduct endangers the social harmony, in so far as he is responsible and capable of being guided in his conduct by juridical motives, which are for the purpose of promoting social harmony. And naturally a different course of action must be adopted in the case of the antisocial man, who is incapable of grasping juridical motives, from that adopted in the case, where the man is thus capable. And this must be so on account of an undeniable psychological phenomenon. In the case of the man who commits a crime and whose psychic nature is responsible and capable of appreciating juridical motives, popular sentiment feels that his chastisement is just. That is proved whenever a crime is publicly committed, by a man who shows himself responsible for his acts; honest men who may be present at it cannot express their desire for revenge. This feeling has become milder in modern time, but men, when a crime has been committed, desire that punishment shall be inflicted. The citizens of Rome would have lynched the man who attempted the life of Victor Emanuel III, while the honor of Italy was being maintained in Libia, if he had not been at once removed. That is the indestructible psychology of human nature. Little by little it will be possible to render the form of punishment more effective and different, but it will never be possible to abolish punishment for the man who is responsible and capable of understanding juridical motives. And this must be so because the old theory of repression by fear of punishment possesses a great amount of truth. Take away punishment, reduce the attitude of

the State towards the criminal to simple defensive measures, more or less pleasant for him who has to undergo them, and you will increase the stream of crime. The man, who, on account of his psychic structure, is capable of dreading the punishment and of abstaining from anti-social conduct for fear of incurring this punishment, cannot be simply placed in a workhouse or otherwise isolated or taken care of, but *he must feel the pain of the punishment*, as a consequence of his conduct. The idea, which Feuerbach above all put into relief, that one must seek to repress the impulse, from which the crime springs, by the menace of inflicting a pain greater than the discomfort that arises from the unsatisfied impulse, is a profound truth, which must be always borne in mind (4).

The pain to be inflicted on the culprits will be changed, but the essential idea of inflicting pain will have to survive. The European States of to-morrow will perhaps regard indiscriminate sentences favorably, which in America are giving good results and which are generally popular, though even in Transatlantic countries they have been subject to criticism. (5) Indeterminate sentences are not contrary to the idea of inflicting pain on the culprit, but they are a more rational application of the idea, from the social standpoint. It is no advantage to society to inflict pain for pain's sake, and at any cost, but it is to its interest to inflict pain when it is efficacious in suppressing the motives which urge the delinquent to the crime. But it is not possible to determine antecedently the amount of pain to be inflicted, since a greater or less amount will be necessary, according to the different psychological characters by which it has to be undergone. Just as in home life to prevent the repetition of the same fault, a hit or a severe look will be enough for one boy, whilst for another it may be necessary to make him go several days without fruits or amusements. The application of these ideas will be difficult, but the inability to find immediately the best means of their actualization cannot constitute a condemnation of them. Even in America indeterminate sentences present grave problems, but this does not make the Americans think of abolishing them.

Now, when the infliction of punishment can bring about in the criminal that state of psychic equilibrium, which results in the social harmony, it ought to be carried out. Namely, the punishment ought to be passed. "Measure of security" (*Sichende Massnahme, Sicherungsmittel*) is a conventional term, because in a strict sense also the punishment is a measure of security, in so far as it is determined and carried into effect for the ends of social security. But now it has been agreed to understand the term "measure of security" as an institution of crim-

inal law different from punishment, namely *every extraprimitive means of social defence against the crime*.

But, though punishment is in a certain sense (and only in a certain sense) a measure of security, one cannot by any means say that every measure of security is necessarily a punishment. (6) Punishment remains a well defined and clear concept: it remains *the pain*, that the judge inflicts on the delinquent for his crime. The measure of security, on the contrary, is not a pain, will not be a pain: it remains *a protective and rehabilitative measure*, which is applied (at least in the system of the three German Drafts, which have given rise to our reflections) to those types of criminals who cannot be punished because they are incapable of being made socially fit through the suffering of some penalty, or to those in whom it is thought that the desired effect would not be produced by the infliction of a penalty.

The three Drafts are animated by the central idea of repressing crime by the two great means, which criminal justice has at its disposal, that is to say, punishments and measures of security.

But what must be the criterion in applying a punishment instead of a measure of security, or a measure of security instead of a punishment? That is a question to which legislators cannot give a rule of thumb for all cases, and so the German Drafts have necessarily been obliged to enlarge *the discriminatory powers of the judge*, and to grant the criminal judge a greater sphere for liberty of action. Such reforms presuppose an intelligent magistracy and Bench of judges, endowed with special culture, otherwise it would be like giving a gun of a new model to the soldiers not instructed in its use. For the needs of the criminal law of the future *the specialization of the criminal judge* is absolutely essential. The civil judge needs more a strictly legal mind, while the criminal judge needs a learning, in which the social and psychological side has been highly developed. The complete criminologist is not merely a lawyer. And it is certain that if an extension of the judicial powers is to be feared, when there is a set of judges incapable of rightly exercising such liberty of action, the best means of attaining the desired end must be a magistracy quite prepared and fitted to fulfill their new tasks. Montesquieu wished that the sentence be *un texte precis de la loi*. (7) I believe that the less the judge's part is a mere mechanical repetition of the law, the more effective will be the execution of criminal justice.

Indeed, the legislator has regard to generalities, while the judge is confronted with actual cases. The former thinks about criminals, the latter has the criminal before himself. What ought to be done? The

legislator cannot tell precisely, any more than we can tell precisely what we shall do, when we are in London. The legislator can only give general directions, leaving to the judge more or less liberty of action in actual cases, according to the prepared or unprepared conditions of the magistracy of his country. One must apply in this case the general argument for liberty. State officials, like other citizens, can be allowed more or less liberty of action, according to the point at which their natures have arrived.

In the German Drafts the transition from punishments to measures of security is very remarkable. Thus § 42 of the Draft German Code of 1909 provides for the placing of the criminal in a workhouse (*Arbeits-hause*), but then goes on to give power to the judge to apply punishment, if the delinquent shows himself incapable of work. Ferri has remarked that "this legislative admission is of itself sufficient to destroy the pretty castle of cards, ingeniously built up to maintain a distinction between punishments and measures of social security, which is the shadowy survival of discarded theories, not light of positive reality." To me, on the contrary, it seems clear as midday light that, if for one remedy another may be substituted, then it is connoted that the two remedies are not identical. And further their difference arises from the fact that punishment is resorted to, when measures of security have been tried in vain. This demonstrates that there is something in punishment, which has a peculiar and distinct efficacy in dealing with crime.

What is the juridical nature of measures of security? Up to a little time ago I agreed with the criminalists of the old tendency in believing that there should be provisions of administrative government, administrative acts (9); but further reflection convinces me that when, in a code, the dealing with crime is so regulated that the judge is allowed to award either punishments or measures of security, it is clear that his powers are not either jurisdictional or administrative, according to whether he sentences the criminal to punishment or to means of security. In the system of criminal justice, presented by the German Drafts, "measures of security" are undoubtedly treated as veritably and exclusively *acts of jurisdiction*.

4. The *indiscriminate length of punishments* is rightly attached to the powers, which are allowed to the judge, of substituting one sentence for another. Read, for instance, the first part of Sect. 32 of the Swiss Draft Penal Code (April, 1908): "When a person, condemned to prison (*Gefangnis*) for a crime (*Verbrechen*), has lived a dissolute life or has been unwilling to work, and his crime is attributable to these causes, if he shows himself able to work or able to acquire habits of work,

the tribunal may suspend the execution of punishment and order the criminal to be sent to a Labor House (Arbeitserziehungsanstalt), instituted exclusively for this purpose."

Thus the idea of punishment, the duration and intensity of which is proportional to the crime committed is abandoned, and the idea of indeterminate sentences remains victorious. Naturally, the task of the criminal judge is thereby made more burdensome. At present, when he has sent a man to prison, he may return home in peace and sure that he need not think any more about it, unless the man commits a new offence. No; it is now desired that the work of the criminal judge should extend beyond the mere condemnation of the criminal, and that what he does for the protection of society should be guided by the results of experience. Just as a doctor must watch the effect on the patient of the medicine he has prescribed, so the criminal judge will have to watch the effect upon the criminal of the punishment inflicted or the other remedial measures. This is also a triumph for the principle that it is the *character of the criminal*, and not the crime committed, which should determine the quality and quantity of the State's counteraction. It is a triumph of the principle which the Germans name *Gesinnungstrafe* (punishment of the character) over the theory of *Schuldstrafe* (punishment of the crime).

Difficulties, great difficulties, in actualization there certainly are. The functions of justice are modified or even changed, and this change requires executive officers of quite different training. The new ideas are confronted with administrative machinery, which is quite unsuitable to them, and official indolence rests comfortably in an armchair stuffed with historical ideas. For this reason the discussions on these German Draft Codes have been enormous (during the last years the German reviews have been full of critical articles and many volumes have appeared in the German language on the same subject) and these new ideas have been met with determined opposition. In Germany especially there is great reluctance to accept new ideas, originating from foreign influences. Certainly every nation, conscious of a position in the world, has its pride, just as every man conscious of his position in society, and both naturally desire the personal freedom of self-government. And so it is not to be wondered at that in Germany, in an atmosphere of national pride and military discipline, the modern ideas of prevention and reformation are often mistrusted for fear that they should diminish the firm military order of national life (10).

The idea of punishment for an indeterminate period is attacked, on the ground that it is juridically absurd and politically impracticable

(11). Objections about juridical absurdities, however, decide nothing, because social necessities, which the administration of justice has to satisfy, do not take account of want of juridical logic. No legal system, engaged in satisfying human needs, troubles itself about its want of logic! With reference to the political impracticability Manzini remarks: "All that is not politically possible, can be nothing else than a Utopia, that is, something actually unreliable in the province of law." But if this were so, how comes it that in one country in the world, in America, the institution of indeterminate sentences has been established and that America has proved to be content with it? That which is possible to one nation is no longer a Utopia, and the positive law of another nation cannot be a Utopia. And can we doubt, even for a moment, that reluctance to accept new ideas arises from early scientific education, impregnated with historical ideas?

Without repeating what I have already observed, I wish again to remark that the institution of indeterminate sentences creates a strong stimulus to self-education. George Stammer, summarizing the scientific results of his journey in America, wrote: "Among us the criminal fights until his condemnation and then he abandons himself to his fate. Here in America the more difficult fighting begins only after the condemnation. The struggle with himself, with his faults and his own weakness." (12).

5. The German Tentative Codes keep *the punishment of Death* (Austrian Draft, § 18; German Draft 1909, § 13): only in the Swiss Draft (April 1908) does it not appear.

The question of capital punishment is a grave one. I believe that it cannot be settled by philosophers, with more or less abstract treatises on the value of human life. It is an eminently practical question, a means of repressing crime, the use of which depends on the peculiar conditions of any given nation. For me the question is not whether capital punishment is right, but only whether it is necessary in a given civilized country.

When crime is on the increase and the value of human life seems to be held in but little account, then capital punishment becomes an inevitable necessity, and also the application of it must be proportionately extended; when, on the contrary, crime is diminishing and respect for human life appears greater in a given civilized community, then the punishment of death is not necessary. This statement of mine is supported by the experience of two nations, Russia and Holland. In Russia the struggle against the revolution has proved the necessity of capital punishment and has rendered its application even more severe. Piont-

kowsky recently observed: "In such times the passions increase and the very force needed for repression causes further excesses. The moral feelings become blunted, crimes increase enormously and the value of human life seems but little respected. Then capital punishment must be considered as obviously necessary." (13). Holland, on the contrary, which formally abolished capital punishment by the law of the 17th September 1870 (in fact it had not been carried out since 1861), feels no need of re-establishing it, because statistics show that crimes have not increased since 1870).

Germany and Austria in relation to the problem of capital punishment stand very nearly in the same position as Russia. They cannot abolish it. Aschrott wrote: "I am convinced that all theoretical arguments against capital punishment will remain without efficacy, as long as the state of civilization in a nation is such that capital punishment is considered superfluous by the popular conscience even for the gravest crimes." (14). And the well-known German review *Deutsche Juristen-Zeitung* last year took a *referendum*; and through it many eminent persons, not all restricted to the legal world, declared themselves favorable to capital punishment, with powerful arguments.

Capital punishment possesses the highest intimidatory force, that is it has greatest power of diverting a man from his criminal intention. Ferri has said: "He who commits a crime, either does it in a moment of sudden passion and then he thinks of nothing; or he does it with premeditation and in the latter case he is led to commit the crime not by a hypothetical comparison of the differences between capital punishment and imprisonment for life, but by the hope of not being discovered and punished." (15). It is, however, easy to meet this argument. The idea of capital punishment, as a consequence of certain misdeeds, is an idea that forces itself slowly into the conscience and produces a deeper horror of crime in general. *Its efficacy reacts upon the crime in general, and it has not only its effect in diverting criminals from the worst forms of crime.* In the human mind mental images become confused and there remains a vague idea of the punishment of death, which produces in honest men a sense of social security, confirms wavering men in a repugnance to criminal acts, and keeps those who are most inclined to crime in the ways of honesty. That capital punishment is effective also in diverting men from other crimes, is clearly evident if one thinks, for instance, how often he who plans a robbery must take into account the possible eventuality of having to kill. Now this slowly growing unwillingness, that gradually forces itself into the mind of the

citizen, also renders less frequent the force of sudden passion and diminishes the hopes of impunity.

In Italy the avalanche of crime has grown in such a manner that it rouses serious apprehensions. Lately Senator Mortara, in the speech at the inauguration of the legal year in Court of Cassation at Rome, mentioned our bad supremacy in this matter (16). And abroad they begin to think that in Italy studies of criminal law are so honored, because crime is also very much honored here. Certainly, studies of penal law and criminality are two things in relation, and it is probable that criminal science is more cultivated where crime is strongest. It is also certain that in the day, in which there will be no more criminals, criminal science would perish, just as medicine will perish on the day when there are no longer any sick men. At any rate the question of capital punishment in Italy is pressing and it is necessary to begin to think about it seriously, instead of considering it as a mere trifle of criminal politics, about which rivers of ink can be written pro and con, without the dispassionate observer being convinced of any thing. In Italy, as Manzini has well remarked (17), the abolition of capital punishment has been a homage rendered by the Italian government towards the cultivated classes of the nation. And I believe that the fear of the greatest possible penalty would be pre-eminently effectual with the people of South Italy, who are endowed with a particularly emotional character.

6. One of the best known American systems of combating anti-social inclinations is the "parole system," that is the promise of good social behavior on parole. Thus in America there is the release on parole, that is the conditional liberation of the prisoner on his parole. One must not believe that this institution is received in America with general enthusiasm. Also beyond the Atlantic, where it is in operation, it has met with severe censures. However, the general results are good and in this also the problem, as in the case of indeterminate sentences, is a problem which depends on how it can best be effectuated. Above all are necessary parole agents (agents entrusted with the surveillance) quite capable of fulfilling their task. And the institution has been also applied as a penal substitute. That is the "Pollard system." Pollard is a judge of the municipal police in St. Louis, who has attained admirable results in the repression of alcoholism by the system of promise on parole.

The promise of good social behavior on parole has not been inserted in the system of measures of security of the German Drafts. We have merely wished to speak of this American institution apropos of the repressive and preventive system of the tentative codes under examina-

tion. Bauer has said that the Swiss Draft Code of April 1908 presents the first example of legislation in continental Europe, which takes into consideration the Pollard system in so far, in the case of conditional remission of punishment, as it authorizes the judge, who subjects the condemned to a special surveillance, to impose on him the duty of abstaining from alcoholic drinks (Swiss Draft Code, Sect. 61, n. 2) (18). We are sorry for the opinion of Bauer, who has written a monograph on this subject, but in the section of the Swiss Draft Code, to which he refers, there is really no idea of the institution of promise on parole on the part of the culprit. There is an ordinary duty imposed by the judge, and the culprit has no active part in assuming it.

All the same might the system of promise of good social behavior on parole be accepted by the legislation of a State of continental Europe? To speak with more authority, let us remain in Italy and make a comparison with the American environment, on the basis of what has been told us and what we have read. The American *character* is a quite peculiar thing, very different from the Italian. From Anglo-American education is produced a different man, who generally possesses a cleaner conscience of social duties and in whom is strongly imbued the sense of responsibility. The Italian character (we will say with all frankness and with the objectiveness, which is proper in scientific investigations) is often weaker, and that not only by the social class, where crime is most prevalent. The environment also, it is true, has great influence on character. In America there is a greater activity and greater opportunity of working than in Italy, so that the activity and the requirements of that activity, in the world surrounding the individual, constitutes a strong agent in co-operating to the maintenance of promise on parole.

However, the fundamental cause, which would oppose the adoption of the parole system as a means for the prevention and repression of criminality in Italy, is the inherent difference of character. Secondly would come the considerations of environment. Indeed, certain flowers attract our admiration in the flora of a country, but, brought elsewhere, they are incapable of living. Also in legislative matters a blind honor must not be paid to foreign institutions, but one has always to keep in view the peculiar conditions of a given country. *There is a universal problem of criminal justice, but a criminal justice alike for all peoples is impossible.* Different languages would first have to be suppressed and Esperanto spoken everywhere!

7. The regulation of pecuniary punishment (*Geldstrafe*) in the system of primitive means of the German Drafts also attracts our attention.

Pecuniary punishment is the criminal sanction, that most nearly approaches to civil sanctions. It is a loss in money, imposed by the State on the criminal.

By the Penal Code, actually in force in Italy (Art. 19) "in the case of payment not executed within two months from the day of intimation of the order, and of the insolvency of the condemned, the fine (*multa*) (19) is converted into detention, a day being equal to ten francs and to a fraction of ten francs of the sum not paid." The same criteria are applied to the *ammenda*, that is, the pecuniary punishment established for contraventions. (In the Italian Penal Code the offences are divided into two fundamental classes: *delitti* and *contravvenzioni*).

It is evident that the unfortunate, who within two months from the intimation of the order has not the money to satisfy his penal duty to the state, has to be imprisoned. That is a condition of inequality in punishment, and a proof of positive law that the law is not equal for all, as is written up in the judiciary halls. Economic inferiority makes the poor man confront his punishment also with less security. The German Tentative Codes try to remedy these inconveniences, above all by the institution of *payments by installments* (Tentative Austrian Code § 27; German, § 31, Swiss, Sect. 36). This is an excellent institution and worthy of being warmly recommended. However, the regulation of these payments by installments is different in the three Drafts Codes. The question is relating to the highest term to be allowed for the extinction of the fine. The German Draft Code allows a year, the Austrian three months, after the sentence is made irrevocable; on the contrary the Swiss Draft Code does not establish a final term for the payments by installments, but gives power to the judge to fix the time for payments, according to the conditions of the condemned (*nach den Verhältnissen des Verurteilten*). If one is inclined to rigid legislative determinations (that are like abstract numbers, when they are mechanically applied to life), the German and Austrian system is preferable; if one thinks that the judge ought to realize and value the individuality of each case and not reduce all his activities to a mere formalism, the Swiss system is preferable.

The German Draft (§ 35) and the Swiss Draft (Sect. 36, n. 5) decree clearly the impossibility of recovering the pecuniary punishment from the succession. On the contrary, the Austrian Draft says (§ 28, alinea 2): "If the condemned has died, after the sentence has been made irrevocable, the same pecuniary punishment is to be recovered from his estate, that would have been received from the criminal himself." But to make pecuniary punishment hereditary cannot be ap-

proved. It is true that the punishment in money much resembles the sanction of civil injury, but nevertheless it always is different in that it is a *punishment* and a consequence of penal wrong-doing. Now modern law cannot approve an infliction of punishment, the consequences of which are visited upon the heirs of the criminal. That would be to return to the harshness of primitive times, and punishment now, in all its forms, must firmly maintain the character of *strict personality* in its application. That is, the punishment must be solely expiable by the culprit.

It should, however, be remembered that even in Germany § 30 of the Penal Code actually in force states: "The pecuniary punishment may be executed upon heirs only when the sentence has become irrevocable while the condemned lived." By § 35 the German Draft aims to abolish this portion of the actual law.

8. Another grave problem, to which the German Drafts call our attention, relates to *the reparation of the damage* resulting from the crime.

Crime causes social and private damage. Of the social damage the State takes account, either by inflicting punishment on the wrong-doer, or by taking against him other defensive measures. Of the private damage the individual citizen takes account, demanding economic reparation. The economic reparation satisfies the immediate needs of the victim of criminal undertaking; the punishment or prophylactic provisions satisfy the immediate needs of the social organism. Society does not see in crime a want of economic balance, but diminished security in the conditions of life.

Now, if the modern legislator must preoccupy himself more than in the past with the victim of crime, taking into account the programme of criminal politics of the sociological school, it will be necessary to proceed with great caution, to avoid excesses and misdirection of the State's functions. *A firm balance must be maintained between the reductions of new ideas on the one hand and the exigencies of practical juridical life.* Criminal justice is wholly animated and permeated by a criterion of public law, and cannot therefore be made accountable for means for the defence of private rights. Modern criminal politics must, certainly, more than formerly insure reparation to the passive subject of crime and must endeavor to suppress the delays of a new suit in the civil courts, but, always holding in view the idea that criminal legislation and justice cannot look to particular or private needs or advantages. In short the question of damage—reparation to the victim of crime—cannot remain other than *an accessory end* of the criminal process, which as a principal

end seeks to defend against the *social* damage, caused by the criminal undertaking.

Ferri put forward the theory that the State which charges taxes for its services, the principal among which is the service of public safety, ought to intervene to secure reparation for private damage caused by criminal acts, save to recovering it from the delinquent, as grantee of the rights of the injured party (20). The Swiss Draft has undergone, for instance, the influence of these ideas, which in Sect. 39, on the disposal of the fines (*Bussen*) and the amounts recovered from confiscated goods, provides thus: "If it is foreseen that the criminal cannot make good the damage caused by the crime (the Swiss Tentative Code distinguishes two fundamental kinds of offence: *Verbrechen* and *Uebertretungen*, that is, as in the Italian Code, crimes and contraventions), the judge may allow to the injured party, in whole or part, either the amount of the fine paid or the sum recovered from goods confiscated. If the tribunal condemns the criminal to a long imprisonment, it may allow to the injured person a part of the prisoner's money earned."

This is only one particular aspect of current modern ideas which desires to enlarge the functions of the State, and to reduce the citizen to a puppet, in all circumstances of his life aided always by the protective mantle of His Majesty the State.

And the German Draft to § 57 provides: "When damage to the injured person arises from the criminal act and this damage is to be recovered by civil law, the tribunal, at the instance of the injured party, must decree, in addition to the punishment, reparation of the injury, when it does not surpass twenty thousand marks and it is possible to ascertain it without delay of the penal process." This proposed innovation does not arouse in us much enthusiasm. To-day, more than ever before, the necessity of specialization of penal judge must be insisted on, because he, from the nature of his function, has to come more in contact with the politic-social currents of life, and therefore needs a *formamentis* different from that of the civil judge, who ought to be solidly and exclusively educated in the technicalities of the law. And even now a jury is entrusted with the decision in affairs of civil law, whilst most reasonably the powers of a popular jury must be confined to deciding on the facts, in which legal elements do not preponderate. And can one doubt that this very easy method of bringing, without any expense, an action for damages would lead to an infinity of trifling claims, often without foundation in facts?

And so we ought to try to improve the methods and operations of

the criminal judges, but we must also be careful to leave to the civil judge his proper functions.

9. These reflections on criminal politics, to which the German Drafts have given rise, cannot be extended further in a review article. We have only wished to dwell upon some fundamental points. To write a complete comparative criticism of the system of criminal politics, proposed by the three Tentative Codes, would require a volume, and that of no little size, even if the study were limited only to the general subject. However, it is not necessary to give excessive weight to these legislations *in fieri*, very much *in fieri*, especially as far as foreign countries are concerned. They doubtless mark a characteristic moment of the mind of man in its struggle with crime, but in substance they are an attempt to actualize the ideas, that during the last few years have always been the subject of much discussion.

Someone has likened these legislative efforts to the statue of Janus, which has two faces which look at the same time one towards the past and the other towards the future (21). Such a comparison would perhaps seem to make a little ridiculous the so-called "eclecticism" of the Tentative Codes of Australia, Germany and Switzerland. However, we believe that any dispassionate investigator must be deeply convinced that the edifice of criminal justice of the future will not be able to do without many elements of the past. Opposite doctrines, from the nature of things, are one-sided, and therefore criminal justice cannot be represented by any of them (22), but, always intent on attaining in the best way the ends of social defence, she must draw from opposite doctrines and from fruitful discussion what best conduces to such an end. She is like an indifferent spectator, who has no enthusiasms, but coldly counts her own gains, when everybody has spoken in defence of his own programme.

(1) Cf. Robert Ferrari, *Criminal Law for Men*; reprinted from vol. 18, n. 12, "Case and Comment."

(2) Stoppato, *La scuola giuridica Italiana e il progresso del diritto criminale*, Bologna 1908, p. 17.

(3) "Nous ne sommes plus au tems où les jurisconsultes, séquestrés de sa vie ambiante et enfermés entre les quatre murs de leur cabinet d'étude, se livraient à des méditations approfondies sur le mal et sur la cause productrice des délits, on bien s'appliquaient à creuser certains problèmes de la procédure concernant le système d'accusation ou de conditions de la légalité, etc. Les savants des temps jadis croyaient leur tâche bien remplie quand ils avaient posé un principe nouveau ou introduit une modification plus ou moins importante dans les détails de la procédure." Eugène De Balogh, *La crise du droit pénal*, Revue de Hongrie, April 1912, p. 247).

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(4) Feuerbach, *Lehrbuch*, §§ 8-20; *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts*, vol. I, ch. I.

(5) Interesting the recent article of Albert H. Hall, *Indeterminate Sentence and Release on Parole*, *Journal of Criminal Law and Criminology*, II, p. 832 seq.

(6) Thus, on the contrary, Ferri, *Il congresso internazionale di antropologia criminale a Colonia*.—*Scuola Positiva*, XXII, p. 13.

(7) Montesquieu, *Esprit des lois*, livre XI, ch. 6.

(8) Ferri, *Giustizia penale e giustizia sociale*.—*Scuola Positiva*, XXI, p. 30.

(9) So, for instance, recently Ugo Conti, *Diritto penale e suoi limiti naturali*, Cagliari 1911, p. 10 and *passim*.

(10) Cfr. Hartmann, *Reform of the criminal law in Germany*.—*Journal of Criminal Law and Criminology*, II, p. 352.

(11) Manzini, *Erattato di diritto penale Italiano*, III, p. 37.

(12) Stammer, *Ergebnisse meiner Amerikafahrt*—*Blätter für Gefängnis-kunde*, vol. 44, p. 780 seq.. In Italy the institution of indeterminate sentence is defended by a prominent representative of the juridical school, Professor Stopato (of the University of Bologna), who, however, desires to force it by any means into the category of historical ideas, going so far as to say that the proportions between punishment and crime are not broken thereby.

(13) Piontkowsky, *Die Todesstrafe in Russland*.—*Leitschrift für die gesamte Strafrechtswissenschaft*, XXXIII, p. 70 seq.

(14) Aschrott, *Strafen Sichernde Massnahmen. Schadenseratz*.—*Reform des Reichsstrafgesetzbuchs* (Aschrott und von Liszt), Berlin 1910, vol. I, p. 71 seq.

(15) Ferri, *Sociologia criminale*, n. 92.

(16) See *L'amministrazione della giustizia penale nel discorso inaugurale del Senatore Mortara*.—*Giustizia Penale*, XVII, vol. 324; and also Sommer, *Die Kriminalität in Italien*.—*Monatschrift für Kriminalpsychologie und Strafrechtsreform*, IX, p. 53 seq.

(17) Manzini, *Politico criminale*, etc., *Rivista Penale* 1911, No. 1. Manzini is also favorable to flogging (*fustigarione*). In our Penal Code in force in Eritrea this special punishment has been accepted, but only to maintain a local tradition. Every nation has the penal treatment that it deserves, and in the colonies, by suddenly instigating the punitive system, some surprising results might supervene. However, the Italian mind revolts against flogging, because it is repugnant to its feelings as a civilized nation, and is considered inadequate to attain the desired end of repression of crime, inasmuch as it lacks, when a punishment by the state, that which ought to be its principal characteristic, as a punishment, application immediately following the offence. I refer the students interested in this question to two recent and important writings: Kuhn Kelly, *Ist Körperliche Züchtigung opportun? Eine Frage und ein Notschrei*. (The author wishes to re-establish corporal punishment for the infamous crimes arising from brutality), and Feder, *Die Prugelstrafe*, Berlin 1911. (The author is against the punishment of flogging).

(18) Otto Bauer, *Das Pollard-System und seine Einführung in Deutschland*, Reutlingen 1911.

(19) *Multa* is the pecuniary punishment applied to the *delitti*.

(20) Ferri, *Sociologia criminale*, n. 88.

(21) Hartmann, art. quoted, loc. cit., p. 353.

(22) Balogh remarks: "Quelle sera, parmi les écoles qui se disputent actuellement la préséance, celle qui l'emportera et qui arrivera ainsi à imprimer à la réforme in preparation son propre cachet, c'est une question oiseuse et qui importe bien peu au fond l'essentiel c'est que la transformation qui va avoir lieu serve à faire avancer la grande cause de l'humanité et qu'elle corresponde, mieux que ne le fait l'état actuel, aux exigences du progrès et de la justice." (Art. quoted, loc. cit., p. 260.) This author, who in his interesting article gives a sufficiently exact picture of criminal science at the present moment, shows himself skeptical as to the efficacy of theoretical discussions (p. 246, 260), whilst indeed no one can deny that the progress which our science is actually making is due chiefly to the beneficial struggles between various schools.