

4. TOWARDS A PRAGMATIC POSITION II

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1. The Liberal Position

THE FIRST modern penal ideology was forged during that memorable turning point in human affairs, the eighteenth century, and tempered in the fires of more than one revolution. It was forged in Europe at a time when Europe was the centre of the world. Its precursors were French philosophers at a time when France was the centre of Europe. Negatively it was part of the revolt against many ancient abuses, positively it was part of a new view of man in relation to himself and to society. Powerful as was the immediate impact, the more far-reaching effects permeated criminal law and its enforcement throughout the nineteenth century and beyond.

The criminal code under the *ancien régime* in France seemed “planned to ruin citizens.”¹ This stricture of Voltaire’s might equally well have been applied to the organization of police, to criminal procedure, to the nature of punishments. It could have been applied, too, to almost any other country on the Continent of Europe at that time. This was the dark side of

¹ P. VIOLLET, “French Law in the Age of the Revolution,” *Cambridge Modern History* (1902), vol. 8, p. 710, at p. 744.

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successful despotism, of arbitrary authority in sovereign, church or aristocracy. It was the negation of the rights of the individual.

The criminal law extended far into spheres which we would now consider matters of private conscience. There were crimes against religion, such as atheism, heresy, witchcraft. There were crimes against the state which penalized criticism of the actions of the régime. Perhaps even worse was the uncertainty of the law. Crimes were ill defined, and both Crown and judges exercised arbitrary powers to convict and punish for acts not legally defined as crimes at all. No one could be sure at any time that he might not be charged with such an act.¹

His danger was greatly aggravated by the nature of the police. Paris had the most ruthless and efficient police machinery in the world. Organized like an army, its head was appointed by the King and owed direct allegiance to him alone. It was concerned not only with the repression of crime and social unrest but with the political opinions and moral behaviour of individuals. It built up a whole network of spies in all walks of society. It operated an extensive system of letter-opening. It had powers not only of arrest but of judgment. It played a large part in the use of the notorious "lettre de cachet," whereby an individual could be spirited away and kept in custody indefinitely on an unknown charge.²

¹ L. J. DE LA MORANDIÈRE, *De la Règle Nulla Poena sine Lege* (1910), pp. 45-99 and 161-199 and ADOLF SCHOITTLÄNDER, *Die geschichtliche Entwicklung des Satzes: Nulla poena sine lege* (1911).

² In the article on "Police," included for the first time in the 7th edition of the *Encyclopædia Britannica*, a prominent place was given to an account of the French system: six out of eighteen columns were devoted to it, see 7th ed., 1842, vol. XVIII, pp. 248-256, at pp. 253-256. In the subsequent edition the

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If the person arrested came before a judge the rules of criminal procedure gave him little better chance. Indeed, his fate might well be worse. He was cut off from legal aid, denied knowledge of the charge until proceedings were well advanced; witnesses against him were examined in secret and so was he. If there was some balance of evidence against him (and the word of a master was enough in the case of a domestic servant), he could be tortured to make him confess. Having been condemned, he could be tortured again to make him reveal his accomplices.¹

Punishments were, in general, as arbitrary and barbarous as the rest of the procedure. They were unequal in application in that the nobility were exempt from some of the most painful and degrading. Some were determined by law or local custom, others left entirely to the discretion of the judges. Even where a punishment was prescribed by law, it could be modified or aggravated by the judge. The only real restriction was that he could not invent a completely new penalty. There was little need of that: existing punishments were cruel and of exaggerated severity, ranging from burning alive or breaking on the wheel to the galleys and many forms of mutilation, whipping, branding and the pillory.²

subject received even more attention: fifteen columns out of fifty-one; *ibid.* (8th ed., 1859), vol. XVIII, pp. 183-209. The conclusion, that France possessed "the most elaborate police machinery that human ingenuity has yet built up, by dint of long-continued application, and under little check from outside," was true as ever.

¹ A. ESMÉIN, *A History of Continental Criminal Procedure with special Reference to France* (1914), pp. 183-287; see pp. 322-350 for a comparison with the criminal procedure in England.

² R. GARBAUD, *Traité Théorique et Pratique du Droit Pénal Français* (3rd ed., 1913), vol. 1, pp. 135-161 ("Du Droit Pénal Français avant la Révolution").

Throughout Europe, as in France, criminal legislation was based upon the principles of intimidation and vengeance. It has been said that in punishments there had been no progress since the end of the Roman Empire and the beginning of the middle ages. In some respects things had got worse.

It is against such a background that we must consider the views of mankind and of society so conveniently summed up in the phrase "the enlightenment."¹ It is hard to generalize from the theories of philosophers so diverse as Rousseau and Voltaire, Montesquieu and Diderot, each of them ranging widely in his own opinions and feelings. But a few leading ideas emerge beyond dispute. All were affected by the growing scientific approach. All turned to reason and common sense as weapons against the old order. All revolted against the unquestioning acceptance of tradition and authority. All found easy targets in the inefficiency, corruption and sheer chaos of existing institutions. All protested against the pervading superstition and cruelty.

Their vision of the rights of man and the duties of society was in direct conflict with what they saw around them. Their

¹ See J. LOUGH, *The Encyclopédie of Diderot and D'Alembert*, selected articles with an introduction (1954); P. HAZARD, *European Thought in the Eighteenth Century* (1954); D. MORNET, *Les Origines Intellectuelles de la Révolution Française* (1933); A. M. WILSON, *Life of Diderot* (1957). Now we have in English the incisive account of European society and European thought on the eve of the French Revolution by G. LEFÈBRE, *The French Revolution from its Origins to 1793* (1962), pp. 3-115. Also important for a fresh assessment of the whole philosophical current is A. COBBAN, *In Search of Humanity: the Role of the Enlightenment in Modern History* (1960) and P. GRAY, *The Party of Humanity. Studies in the French Enlightenment* (1964).

starting point was the appeal to "natural law," "natural rights," "natural equality,"—as interpreted by the voice of reason.

In the original state of nature, they maintained, man had been free. The development of society had made him dependent on others and thereby restricted his freedom. Law was the only means by which his freedom could be restored, his natural right to liberty preserved. This freedom of the individual was "the most precious of all goods." It included a man's freedom to dispose of himself and his belongings as seemed best for his own happiness, subject only to respect for the similar rights of others. It followed both that the individual should not be oppressed by unnecessary laws and that such laws as were passed should be designed to preserve his essential freedoms.

The doctrine of equality, though given great weight, was more cautiously defined. It still took the individual, not the State, as both starting point and goal. But it was not prepared to go the length of attacking inequalities in property or rank. Though men had been equal in a state of nature they could not be so in society: authority and subordination must remain though they must cease to be abused. Nevertheless the fact that equality could not be expected in wealth and power made it the more vital to recognize it where it did exist—in the very fact of humanity itself. Because all were equally human beings, slavery was precluded, so was tyranny. The law must restore the basic equality. The equality of all before the law would prevent abuse of social and political inequalities. For the protection of equality, as of liberty, justice was the necessary cornerstone.

One might even go further. Liberty and equality might be

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regarded as dreams but justice, as a historian of the French Revolution observed, "is something which even a slave, even the prisoner at the bar, expects."¹ It was inevitable, therefore, that the oppressive system of criminal justice should become a major and specific target of criticism. Amongst the many social and political institutions under attack it stood out in all its illogical and oppressive barbarity. Moreover, it lent itself not only to general philosophizing but to specific schemes of reform.

Ideas for remodelling the whole system of criminal justice had been afloat for some time in more than one European country. In France as early as 1721 Montesquieu had examined, in his "Lettres persanes," the nature and efficacy of punishments. Afterwards, in the famous chapter 12, book 6, of the "Esprit des lois," he expounded what he considered the true principles of penal law. He and Voltaire alike demanded that all should be equal before the law and that the law should protect the subject. They condemned the arbitrary powers of judges, the secret trial and the use of torture.² Contemporaries

¹ J. M. THOMPSON, *The French Revolution* (1944), p. 131. On the criminal law reforms urged by the États Généraux see A. DESJARDINS, *Les Cahiers des États Généraux en 1789 et la Législation Criminelle* (1883). As Professor Friedmann reminds us "the development of the individual to his full potentialities is an old idea . . ." and has to be distinguished from " . . . the conception of a society based on definite rights of the individual citizen . . ." a conception which is " . . . a relatively modern one, developed in reaction, first against the medieval order of society and, secondly, against the absolutist government of the modern state, in the seventeenth and eighteenth centuries"; see *Legal Theory* (4th ed., 1960), p. 367.

² Some hundred and fifty years ago G. W. BÖHMER, not without reason

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in other countries, such as Joseph von Sonnenfels in Austria and K. F. Hommel in Germany, were independently reaching conclusions very much akin.¹

However, it was the young and hitherto obscure Cesare Bonesana, Marchese di Beccaria, who produced the book to match the hour. In 1764 there appeared anonymously, in the little Italian town of Leghorn, *Dei delitti et delle pene* (Of Crimes and Punishments).² The fear that it might bring down persecution upon its author was not unjustified. Beccaria was denounced both in his own country and in France for sedition and irreligion. Only the generous intervention of Count

called Montesquieu the "Vater der Kriminalpolitik," *Handbuch der Literatur des Kriminalrechts* (1816), p. 859. For a good survey of the contribution made to the reform of the criminal law by Montesquieu and Voltaire see E. HERTZ, *Voltaire und die französische Strafrechtspflege im 18. Jahrhundert* (1887) and M. T. MAESTRO, *Voltaire and Beccaria as Reformers of Criminal Law* (1942).

¹ W. MÜLLER, *Joseph von Sonnenfels* (1882) and K. V. ZAHN, *K. F. Hommel als Strafrechtsphilosoph und Strafrechtslehrer* (1911); see also EBERHARD SCHMIDT, *Einführung in die Geschichte der deutschen Strafrechtspflege* (2nd ed., 1951), pp. 208-212.

² The literature about Beccaria is considerable and there are innumerable references to him in textbooks on criminal law and criminology all over the world. The essay by COLEMAN PHILLIPSON, *Three Criminal Law Reformers* (1923), pp. 3-106, still holds its own. The translation (with a useful introduction) by James Anson Farrer, *Crimes and Punishments* (1880), though very competent, has now been superseded by H. PAOLUCCI, *On Crimes and Punishments* (1963), and by A. MANZONI, *The Column of Infamy, prefaced by CESARE BECCARIA'S Of Crimes and Punishments* (1964) with an introduction by A. P. D'Entrèves.

The recent bicentenary celebrations of Beccaria's book have produced a spate of fresh studies and interpretations. The forthcoming publication of the reports presented to the conference convened by the Academy of Sciences of Turin (4-6 October 1964), with a brilliant introduction by Professor Franco Venturi, will be found particularly instructive. See also the important recent edition of Beccaria's essay by Venturi, published by Giulio Einaudi in 1965.

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Firmian, the liberal minister of Maria Theresa who ruled over that part of Italy, secured the safety of the writer. Yet soon he was being welcomed as a brother by Voltaire, assured of immortality by d'Alembert, invited to Paris to be acclaimed as a benefactor of mankind, and awarded a gold medal by the Economic Society of Berne. Even in his native town of Milan he found himself appointed to the Chair of Political Economy and made a Councillor of State. The book was translated into French by Morellet, annotated by Diderot, prefaced by Voltaire. In France it ran through six editions in as many months. It was bought enthusiastically in every major European language.¹

Enlightened rulers were not to be outdone by philosophers. There were effusive tributes from Frederick the Great, a visit from the King of Naples, an invitation from the Empress Catherine. "I was desirous of defending the truth," Beccaria once confided to a friend, "without becoming her martyr." He had succeeded in becoming her acknowledged prophet.

Condemnation of the abuses of the *ancien régime* was only the starting point for Beccaria. His unique achievement was to express, in the most coherent and concentrated form, that whole new conception of criminal justice emerging from the ideas of the enlightenment and the growing force of liberalism. Not only did he bring to bear upon existing abuses a wrath that Faustin Hélie has so aptly called "la force qui détruit."² Having destroyed he went on immediately to rebuild.

¹ To quote a striking comparison made by FERRI, "it could be said that Adam Smith was to political economy what Beccaria was to criminal law" ("Si puo dire che Adamo Smith sta all'economia politica come Cesare Beccaria sta al diritto criminale"), *Sociologia Criminale* (5th ed. by A. Santoro, 1929), vol. 1, p. 25.

² See his introduction to a French edition of BECCARIA'S *Des Délits et des Peines* (2nd ed., 1870), p. xviii.

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The impact of his proposals was greatly heightened by his style—eloquent, yet strictly reasoned, forceful, pointed and laconic. It was heightened even more by his profound humanity, his ardent belief in human reason and the perfectibility of social institutions. His faith in progress was intense: from every page of his book flows that confident hope of which Europe was then so much in need. "Dei delitti et delle pene" was the manifesto of the liberal approach to criminal law, its rallying cry and its plan of campaign.

May I try to outline, very briefly, the essentials of the liberal doctrine of criminal law?

First, as to its substance. Since law, and especially criminal law, placed restrictions upon individual freedom, there should be as little of it as possible. To prohibit an action unnecessarily increases rather than decreases crime. Moreover, it was not the function of the law to enforce moral virtue as such, but simply to serve the needs of a particular society. (In his awareness of the relativity of criminal law, Beccaria was ahead of his time, more realistic and more perceptive than those philosophers who had hoped to base an ideal code upon a system of "natural law.")

Second, as to the administration of justice. It was no accident that nine out of the forty-one chapters of Beccaria's book were devoted to this topic. It was here, above all, that the rights of the individual had suffered most in the past and here that it was most necessary to build secure lines of defence against the encroachments of the State. Specific guaranties were more valuable than any formal declarations about the ideal essence

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of freedom. At all stages the rights of the person suspected, accused, tried, sentenced or punished must be scrupulously protected. Presumption of innocence should be the guiding principle: the maxim, so fashionable at the beginning of the nineteenth century, that it is better that ten guilty persons escape than that one innocent man should suffer, tersely expressed this deeply felt concern.

Third, as to the form of the criminal law. Here the essentials were clarity and certainty. Both offences and their punishments should be defined in advance. There was no place for retrospective legislation, no place for judicial interpretation or judicial discretion. A clear prior knowledge of the penalties laid down by law would safeguard individual rights and deter potential offenders more effectively than any system of indiscriminate and uncertain terror.

Fourth, carrying the last point to its logical conclusion, there should be a complete written code of criminal law as a standing memorial of the "social contract." The people as a whole could then judge how effectively their liberties were being preserved in the administrations of criminal justice.

Fifth, as to the justification of punishment. Essentially this was retributive: "everyone must suffer punishment so far to invade the province of his own rights as the crime he has committed has penetrated into that of another." The basic justification was that individual rights had been attacked.

Sixth, as to the severity of punishment. This must be strictly limited. Whilst it should be proportionate to the crime, it should not go beyond the point necessary to prevent the criminal from injuring anew his fellow-citizens and to deter others. This could be secured by ensuring that the evil

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inflicted on the offender exceeded any advantage derived from his crime: "all beyond this is superfluous and consequently tyrannical."

Seventh, as to the nature of penalties. Punishment should correspond with the offence in nature as well as extent. Thus a fine would be appropriate for a simple theft, corporal punishment and labour for a crime of violence. The savage penalties of the past were to give place to the punishments most suited to an age that valued liberty above everything, the punishment of imprisonment. This may corroborate Tardé's doctrine that in every epoch the dominant punishment is related to the most valued good.¹ But other factors were also at work. In particular, imprisonment lent itself extremely well to an exact gradation of the degree of punishment to the offence. Also it could be applied with more equal force than fines to those with means and those without.

Eighth, as to the certainty of punishment. Not only must penalties be clearly laid down by law and correspond closely with the offence, they must also be inflicted with speed and certainty. The association of ideas was the cement of the whole fabric of the human intellect: without it pleasure and pain would be ineffective. Crime and punishment should be so sharply associated "that insensibly they come to be considered, the one as the cause and the other as its necessary and inevitable consequence." The superior deterrent power of a system of moderate and proportionate penalties would proceed largely from the fact that it would be easier to enforce.

Ninth, as to what was excluded from punishment. Since the individual could only be made to suffer evil corresponding with that he had committed, there could be no place for the

¹ G. TARDÉ, *Penal Philosophy* (1912), p. 490.

exemplary punishment, no place for the dictum of the Reverend Sydney Smith that "when a man has been proved to have committed a crime, it is expected that society should make use of that man for the diminution of crime; he belongs to them for that purpose."¹ Similarly, there was no room for attempts to impose reformatory measures beyond the punishment itself. Reformation "is not to be thrust even on the criminal; and while, by the very fact of its being enforced, it loses its usefulness and efficiency, such enforcement is also contrary to the rights of the criminal, who never can be compelled to anything save suffering the legal punishment." Nor could the punishment, based as it was to be upon the objective criterion of the crime, be varied to suit the personality or circumstances of the offender. The penologists of the liberal school would unite to proclaim that criminals should be punished strictly for what they have done under the criminal law in force, not for what they are or are likely to become.

Tenth, as to the responsibility of the offender. The liberal approach rejected any attempt to guide morals as such, yet it had a strongly moralistic stamp. Outside the narrow and rigidly defined categories recognized by law, it took little, if any, account of the possibility that crime might be socially and individually conditioned, with all the grades and shades of responsibility, all the variations in treatment that this might imply. The potential offender was seen as an independent, reasoning individual, weighing up the consequences of crime and deciding the balance of advantage. He was assumed to

¹ *Works of the Reverend SYDNEY SMITH* (4th ed., 1878), vol. II, p. 352, note. He was a famous contributor to the influential *Edinburgh Review* in the early nineteenth century.

have the same powers of resistance as other individuals, to deserve the same punishment for the same crime and to react in the same way to the same punishment. To have admitted any variation beyond this would have opened the gate once more to inequality, to uncertainty and to judicial discretion if not prejudice. The whole basis was a reasoned system of retribution for clearly defined wrongs.¹

Eleventh, as to the prevention of crime. The ambivalent attitude of the liberals to the idea of police, and especially to the idea of preventive police, reflects their reaction against the wide interference with personal liberty under the old system. It is true that Beccaria proclaimed what was then a new principle: "It is better to prevent crimes than to punish them. This is the chief aim of every good system of legislation." But prevention as he understood it consisted in a clear and limited code of laws, supplemented by the improvement of education and the rewarding of virtue. The idea of an official agency charged permanently with the control of crime, however hedged round by guarantees of individual liberty, was antipathetic to the liberal mind and its vision of a free society. Such measures of control and prevention as had hitherto been pursued were rejected as "the chimera that narrow-minded men pursue, when they have power in their hands." The whole liberal position on this can be summed up in the warning of Wilhelm von Humboldt, whose essay "The Sphere and

¹ This approach was the guiding tenet of the liberal position in criminal law everywhere. It is particularly instructive to retrace its development in the theory and practice of German penal thought. See on this H. DANNENBERG, *Liberalismus und Strafrecht im 19. Jahrhundert* (1925); H. RAUCH, *Die klassische Strafrechtslehre in ihrer politischen Bedeutung* (1936); R. MAURACH, *Grundlagen des rätenssichen Strafrechts* (1933), chap. 7, p. 97 et seq.; MAURACH, *Deutsches Strafrecht. Allgemeiner Teil* (2nd ed., 1958), pp. 39-41.

Duties of Government," has well been called "the masterpiece of political individualism,"¹ breathing the air of the French Revolution. If it were possible to make an accurate calculation of the evils which police regulations occasion, and of those which they prevent, the number of the former would, he believed, in all cases exceed that of the latter.² The mainstay of prevention must be not regulation of morals, not control of suspects, but punishment of actual crime.

Beccaria's own pioneering advocacy of the total abolition of the death penalty, even for murder, was a departure from the strict logic of the liberal creed as a whole. He himself justified it, in terms of the "social contract," by arguing that no man would voluntarily yield to society the right to take his life. Opponents were quick to point out that such an objection might be advanced against most other penalties, and few of his adherents were prepared to go all the way with him. But many shared what lay at the heart of his reasoning—the fierce protest against the callous and indiscriminate use of the death penalty under the *ancien régime*. The determination to eliminate that went with the liberal creed everywhere.

The impact of the whole new conception of criminal justice was a powerful one and its reverberations have con-

¹ G. DE RUGGIERO, *The History of European Liberalism* (tr. by R. G. Collingwood, 1927), pp. 221–222.

² W. VON HUMBOLDT, *The Sphere and Duties of Government* (Engl. ed. of 1854), p. 112. The essay, written in 1792, was posthumously published in 1851.

tinued to the present day. Its extent, its nature and its effectiveness differed, however, in different political settings.

There was, first, the ecstatic welcome accorded to the doctrines of Beccaria by the "enlightened despots" who ruled most of Europe in his time. In one or two cases the enthusiasm for reform was genuine and comparatively unmixt. The majority, however, were swayed partly by self-interest, partly by the philosophical fashions of the time.

In presenting themselves as the saviours of their people they had no intention of relinquishing their despotic power. Their flirtation with the philosophers was carried on with a clear eye to the main chance. They were already aware of the tension that precedes the earthquake and they adopted the new ideas just in so far as they might be useful to fortify their own positions. If the clergy were getting out of hand they could be put in their place by purging the criminal law of superstition. If the aristocracy were becoming too strong, their privileges could be cut by upholding the equality of all classes before the law. The restriction of the death penalty, the abolition of torture, would enhance the picture of the monarch as the merciful father of his people.

There were considerable gains. The death penalty was totally abolished in Tuscany and for a time in Austria, and its scope was greatly reduced elsewhere.¹ Torture, as a means of extracting information, was on its way out. Nevertheless, the venter of benevolence everywhere was thin. A contemporary visitor to Austria, seeing prisoners manning the

¹ On the trend of these continental reforms see L. RADZINOWICZ, *A History of English Criminal Law and Its Administration from 1750* (1948), vol. I, p. 286 *et seq.*

galleys as an alternative to capital punishment, found it "so repulsive a spectacle that even an executioner who has become familiar with breaking upon the wheel will turn his eyes away."¹ Even the celebrated code of Tuscany was by no means tender in devising ways to replace the punishment of death. There was, indeed, little room for Beccaria's doctrines of moderation and proportion, little idealism about individual rights, in the despotic state.

Far more wholehearted was the welcome accorded to such aspirations in the first flush of the great revolutions. Old traditions and abuses had been demolished wholesale, and the sites swept clear for the construction of new systems of law and justice. For these the principles which had fed the revolutions themselves provided the obvious framework.

They were faithfully followed. The Declaration of Independence in America and the Declaration of the Rights of Man in revolutionary France, the two outstanding charters of modern liberalism, echo the phrases of the philosophers.² "Ignorance, forgetfulness or contempt of the rights of man," ran the preamble of the French manifesto, "are the sole causes of the national ills." It was proclaimed that the limits of natural rights should be determined only by law, which should be equal for all and should establish only such penalties as were strictly necessary. There should be no more arbitrary punishments and everything should be done to safeguard the rights

¹ Quoted by VON BAR in *A History of Continental Criminal Law* (1916), p. 252, note 7. "Barbarisch" was the term used by L. GÜNTHER in his *Die Idee der Wiedervergeltung* (1895), Abt. III, Erste Hälfte, p. 82, note 195.

² "The 'historical' character of the Declaration," observed Lefebvre, "is none the less evident: under each article its authors—and their contemporaries—mentally placed concrete facts which had caused their sufferings"; see G. LÉFÈVRE, *The French Revolution. From its Origins to 1793* (1962), p. 147.

of the accused. Even the stranglehold of the police was broken, though not for long.

It was one of the major tragedies of the French Revolution that its swift degeneration into a ruthless struggle for personal power so soon made a mockery of the ideals it had so proudly proclaimed.¹

In America their fate was far happier. There a reaction against the old English penal code was one of the first expressions of the new national spirit after 1776. But the way had already been paved for it, as has been suggested by a historian of the movement in Pennsylvania, by the effects on colonial thought of the wider movement represented by Montesquieu, Voltaire, Diderot, Beccaria, Paine and Bentham. Here is a significant and often quoted passage from a tract published in 1793 by William Bradford, Attorney General of the United States, Justice of the Supreme Court of Pennsylvania, and chief architect of the revised Pennsylvania penal codes of 1790-1794:

We perceive . . . that the severity of our criminal law (that is, the old criminal law inherited from England), is an exotic plant, and not the native growth of Pennsylvania. It has been endured, but, I believe, has never been a favorite. The religious opinions of many of our citizens were in opposition to it: and, as soon as the principles of Beccaria were disseminated, they found a soil that was prepared to receive them. During our connection with Great Britain no reform was attempted; but, as soon as we separated from her, the public sentiment disclosed itself and this benevolent undertaking was enjoined by the constitution. This was one of the first fruits of

¹ On the terrible impact of these events upon the administration of criminal justice, see E. SÉJOURMAN, *La Justice en France pendant la Révolution*, vol. I (1901) and vol. II (1913).

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liberty and confirms the remark of Montesquieu, "That, as freedom advances, the severity of the penal law decreases."¹

Later on, it is fascinating to discover how closely akin to the penal ideology of the period of enlightenment is Edward Livingston's famous "System of Penal Law" for the State of Louisiana.² It was in the emerging democracies that the liberal approach to criminal law found itself most at home.

What of its impact on England, England the country of Magna Carta, the country which had long prided itself on having established the rule of law, the liberty of the individual? Her system of criminal justice and procedure had served as a model to the philosophers themselves, a shining example to which they could point if they were accused of utopian dreams. The process of prosecution, the publicity of trial, the rules of evidence, the role of the jury, combined to provide strong legal safeguards for the accused. Torture was virtually unknown. The power of the executive had already been limited by an independent judiciary. A stream of diaries, letters and memoirs, written by trained lawyers and casual travellers alike, and lasting from the end of the seventeenth to the middle of the nineteenth century, mirror the admiration felt by visitors from the Continent.

Yet there were those in England too who realized how necessary, even there, was the message of Beccaria. The very

¹ W. BRADFORD, *An Enquiry How far the Punishment of Death is Necessary in Pennsylvania*, etc. (1793), p. 20, and H. E. BARNES and N. K. TEETERS, *New Horizons in Criminology* (ed. of 1943), pp. 472-473.

² The recent article by J. C. MOULEDOUS, "Pioneers in Criminology: Edward Livingston," in *Journal of Criminal Law, Criminology and Police Science* (1963), vol. 54, p. 288, with its several references shows again that the achievement of Livingston as a jurisprudential thinker and criminal legislator against the background of his times, still awaits full-scale treatment.

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emphasis on criminal procedure, the confidence that no innocent man would be convicted, had helped to perpetuate and even extend the most barbarous system of capital punishment even for quite minor offences. The English translation of the second edition of *Dei delitti* emphasized that "the number of criminals put to death in England is much greater than in any other part of Europe."¹ Here, more than anywhere, there was urgent need of the doctrines of proportion, of moderation and of certainty, as far better deterrents than capricious severity.

Sir Samuel Romilly, and all who succeeded him in the great campaigns for the reduction of the death penalty in the late eighteenth and early nineteenth centuries, were deeply versed in Beccaria's arguments and used them continuously. That most critical of philosophers, Bentham, was moved to unwonted eulogy: "Oh, my master, first evangelist of Reason, you who have raised your Italy so far above England . . . ; you who have made so many useful excursions into the path of utility, what is there left for us to do?—Never to turn aside from that path."²

All this, perhaps, was to be expected. These were reformers to whom Beccaria came as an obvious inspiration and ally. But what of tributes such as that paid by Edmund Burke, renowned for his conservative and insular outlook? "The merit of the essay before us is so generally known and allowed, that it may seem unnecessary to inform our readers that it has gained the attention of all ranks of people in almost every part of Europe; and that few books on any subject have ever been more generally read, or more universally applauded."³

¹ Preface (anonymous) to the second English edition of 1769.

² Quoted by E. HAILEVY, in *The Growth of Philosophic Radicalism* (1928), p. 21.

³ *Annual Register* (1767), vol. 10 (Characters), pp. 316-320.

Even more significant was the impression made upon Sir William Blackstone, whose *Commentaries on the Laws of England*, published only a year after Beccaria's essay, already reflected the Italian's decisive and immediate influence. Sir William Holdsworth, who occupied the Vincian Chair of the Laws of England in the University of Oxford some hundred and seventy-five years after Blackstone, states:

that it was Beccaria's book which helped Blackstone to crystallize his ideas, and that it was Beccaria's influence which helped him to give a more critical tone to his treatment of the English criminal law than to his treatment of any other part of English law.¹

To have stimulated and given direction to the ideas of a cautious traditional lawyer, deeply committed to stability and convinced of the wisdom of precedents, was indeed an achievement. In his influence upon English criminal law Beccaria undoubtedly repaid the debt he owed to the example of her criminal procedure.

The penal position which emerged from the liberalism of the end of the eighteenth century grew into the Classical School of Criminal Law of the nineteenth. This consisted of a powerful grouping of professors with judges and administrators following their lead. It was a school in the sense recently defined by a Florentine professor of criminal law: "a vast current of ideas, which all have a common direction

¹ Sir WILLIAM HOLDSWORTH, *A History of English Law* (1938), vol. 11, p. 578.

and, being part of an organic system, differ from other currents of ideas in presenting a characteristic and distinct originality of content."¹ Even on the Continent of Europe such a school of criminal law was something quite new. A word is needed to explain what brought it about, and why no similar school developed in the English-speaking world.

There, and above all in England itself, the position of influence in the sphere of criminal law has always been the prerogative of the judiciary, the original makers of the law and its accredited interpreters. To them the formulation of an all-embracing doctrine and the emergence of a school was something quite alien. This is still the case to-day and was even more so in the past. The contrast in attitudes was remarked upon by Sir Evelyn Ruggles-Brise who, as Chairman of the International Prison Commission, was well versed in this aspect of continental tradition. "England," he commented, "has not participated to any great extent in these controversies of the criminological schools, which have been so active and have excited so much interest on the continent of Europe. . . . It may almost be said that there is no school of criminology in England."² This remark would be still more true if "criminal law" were added, or even substituted for "criminology."

In contrast, the growth of such schools on the Continent resulted partly from the powerful position of professors of criminal law, with a long tradition behind them, a strong *esprit de corps* and a position equal, and often superior, to that of High Court judges. It resulted also from the practice of embodying the law in written codes, often in the constitution itself. The professors played a leading part in the preparation

¹ R. A. FROSALI, *Sistema Penale Italiano* (1958), vol. 1, p. 17.

² SIR EVELYN RUGGLES-BRISE, *Prison Reform at Home and Abroad* (1925), p. 16.

and revision of these codes. Even when mixed commissions were set up, including judges, prosecutors and high officials of the Ministries of Justice, they invariably turned to the professors for advice and guidance. A school of criminal law could thus exert great influence. Writings, teaching, codes, their interpretation by the courts and their enforcement by administrators, seemed all to spring from a similar foundation, exhibit a similar approach and reach basically similar conclusions.

Such a method of law-making accorded particularly well with the liberal and classical tradition. In so far as the law must above all be clear and definite, punishments above all proportionate to crimes, experience in the hurly-burly of courts of the administration of the penal system had less to contribute than the mind trained in logical argument and the traditions of jurisprudence.

A hundred years after the publication of *Dei delitti et delle pene* the classical school was approaching the height of its influence. Its brightest luminary was Francesco Carrara of Pisa. My Roman professor, Enrico Ferri, in his inaugural lecture at Pisa, referred to Beccaria and Carrara as "the two brilliant terminal points of a scientific school" ("i due termini fulgenti di una scuola scientifica").¹ There were two principles underlying everything that Carrara ever wrote, principles which may be taken as the motto of his entire work. First, that the chief object of criminal law and criminal science is to prevent abuses on the part of the authorities. Second, that crime is not an entity in fact but an entity in law. These two

¹ E. FERRI, "Da Cesare Beccaria a Francesco Carrara," in *Studi sulla Criminalità* (2nd ed., 1926), p. 351, at p. 352; see also "Francesco Carrara e L'Evoluzione del Diritto Penale," *op. cit.*, p. 369.

tenets were also at the foundation of Beccaria's outlook on criminal law.

This unity underlying the thought of all adherents of the classical school was still apparent in the work of Karl Binding of Leipzig. He lived much later than Carrara and belonged to a very different culture, but his treatise *Die Normen und ihre Übertretung* is just as classical. This does not mean, however, that its approach was identical.¹

So, too, with the continental criminal codes. In spite of the great cultural diversity, the changing social and political conditions, of the many European countries, it is remarkable how much their criminal codes have in common. Thus the French Code of 1791, drawn up by Le Pelletier de Saint Fargeau, and the Bavarian Code of 1813, the work of Paul Johann Anselm von Feuerbach, are regarded as the first, exceptionally characteristic, products of liberalism in criminal law. And so they undoubtedly were. Yet they also revealed many significant differences, not only in the special part concerned with the definition of the various offences, but also in the general part where the principles governing responsibility and punishment were laid down.²

Even with the same country two classical codes, though separated by a relatively short span of time and both belonging to the same ideological current, might exhibit marked

¹ On Binding see EBERHARD SCHMIDT, *Einführung in die Geschichte der deutschen Strafrechtspflege* (2nd ed., 1951), pp. 293-299 and KARL ENGISCH, *Die Lehre von der Willensfreiheit in der strafrechtsphilosophischen Doktrin der Gegenwart* (1963), pp. 7-8; on Carrara see UGO SPIRITO, *Storia del Diritto Penale Italiano* (2nd ed., 1932), pp. 93-100.

² Compare H. REMY, *Les Principes Généraux du Code Pénal de 1791* (1910) and M. GRÜNHUT, *A. von Feuerbach und das Problem der strafrechtlichen Zurechnung* (1922).

dissimilarities. Thus the Code of 1791, which marked the first stage in the evolution of modern French criminal law, differed considerably from the Code Napoleon of 1810.¹

The Code of 1791 faithfully reflected the liberal creed in its most undiluted form. The scope of capital punishment was reduced from over a hundred offences to thirty-two. All aggravated forms were abolished. Degrees of punishment were closely adapted to degrees of offence. The discretionary powers of the courts were also abolished so as to ensure that the enforcement of the laws should be equal and consistent. The reaction against arbitrary punishment was complete. The judge, in the opinion of Saint-Fargeau, "must be able to open the law and find in it the exact penalty applicable to a proved offence"; his duty should be simply to impose that penalty.²

The Code of 1810, it has been said, was that of Napoleon, not that of France. Pellegrino Rossi, the enlightened professor of criminal law who made this comment, added "just as the Empire was a détour, perhaps a necessary one, in the advance of the French people towards liberty, so the penal code was no more than the product of a state which once existed and now has vanished." Though this, too, was essentially a classical code, its classicism was much diluted by the political element. The use of discretion in punishment was reintroduced. Instead of fixed penalties the judges were allowed to sentence between fixed minima and maxima. The prerogative of mercy was restored. There was a compromise, in fact, between the arbitrary powers of the old despotism and the rigid classicism of the first

¹ H. DONNEDIEU DE VABRES, *Traité de Droit Criminel et de Législation Comparée* (3rd ed., 1947), pp. 27-28.

² REMY, *op. cit.*, p. 33.

revolutionaries, a compromise which enhanced the authority of the head of State.

Punishments once more became severer. The death penalty was extended to include offences dangerous to the régime. Perpetual imprisonment was reintroduced. It is true that the Code of 1791 had been far from merciful in some of its penalties. This reflected the element of impersonal hardness which, though foreign to the attitude of Beccaria, went with the logic of classicism as such. Under the Napoleonic Code there was added the ruthless determination of the dictator to protect himself and his system, to impose order at whatever cost to the individual. On the credit side could be claimed the more realistic approach to the problem of discretion, the wisdom of the man of action, as against the pure theorist.

Every political revolution brings with it its own criminal legislation. Many such revolutions occurred in many European countries during the nineteenth century. Yet with all the diversity of background, of political and social conditions, it is remarkable how much appeared in common amongst the many systems of criminal law eventually evolved. The Codes of Austria (1852), of Sweden and Denmark (1866), of Belgium (1867), of the various German States leading to that of Prussia (1851), of the German Empire (1872), of Holland (1881), or Italy (1889), all bear the same unmistakable imprint. They all stem from the concept of criminal law launched by Beccaria almost a century before and developed by the Classical School.

Even in England the liberal and classical influence was at work producing results and prompting criticisms similar to those on the Continent of Europe.

The old policy of "suspended terror," which required that the threat of death should hang alike over the widest range of

offences, had no room for legal differentiation in apportioning the punishment to the crime. As soon as secondary punishments had to be prescribed the problem of proportion came to the fore. Before long the means of eliminating offenders, either by death or transportation, had dwindled almost to vanishing point. As on the Continent, imprisonment took their place, and imprisonment, as has been seen, was a penalty precisely adapted to the classical approach. The so-called tariff system, whereby sentences were matched in length and severity strictly to the gravity of the offence, became the guiding principle in England until the end of the nineteenth century. Logically the exact definition of offences and their arrangement in order of gravity was the corollary of such a system. If the punishment was to fit the crime, the crime should be allocated its due place in a comprehensive criminal code.

For nearly thirty years a series of Law Commissions wrestled with the thankless task of trying to produce such a code for England. It was only in 1879 that a lawyer of outstanding brilliance and perseverance was able to complete a Criminal Code for submission to Parliament. This was the work of Sir James Fitzjames Stephen, whom his continental colleagues would have had no hesitation in describing as a classicist, or at least a neo-classicist.¹ Most of the specific changes he proposed were in the classical tradition and comparison of the whole code with its German or Italian counterparts of 1872 and 1889 clearly shows that they came from the same ideological stable.

Stephen's scheme failed to gain acceptance, but the independence of English criminal law can be over-emphasized.

¹ On this see L. RADZINOWICZ, *Sir James Fitzjames Stephen, 1829-1894* (1957), p. 24 *et seq.*

In some respects it followed fairly closely the continental patterns. Monsieur Marc Ancel, Judge of the Supreme Court of France and a distinguished student of criminal matters, has rightly pointed out that the M'Naghten Rules of 1843 are virtually identical with the provisions laid down in article 64 of the French penal code of 1810, provisions which are recognized as crystallizing one of the essential positions of classical penal law as regards criminal responsibility.¹ There is also a similarity in the way in which intent and motives came to be distinguished also in other segments of the general part of the criminal law.

In one sphere, however, Sir James Fitzjames Stephen was on his own, committed to a doctrine of expiation that was Kantian rather than Benthamite. To him moderation in the punishment of criminals was the outcome of a "misplaced and exaggerated" tenderness. He had a nostalgia for capital punishment and elimination. Yet he was aware that his views did not represent those of his time, indeed that his time was moving in the opposite direction. And he was able to prophesy accurately what that direction would be.²

Not so Francesco Carrara, the acknowledged head of the continental classical school of criminal law. Comfortably wrapped up in his refined juristic formulae, in the objective,

¹ M. ANCEL, *Introduction comparative aux Codes Pénaux Européens*, vol. 1 (n.d.), p. V, at p. LIX; see also *Introduction au Droit Criminel de l'Angleterre* (1959), ed. by M. Ancel and L. Radzinowicz, my introduction, p. 1, at pp. 16-21.

² See JAMES FITZJAMES STEPHEN, "The Punishment of Criminals," in *The Cornhill Magazine* (1863), vol. VII, p. 189; "Variations in the Punishment of Crime," in *The Nineteenth Century* (1885), vol. XVII, p. 755; "Capital Punishment," in *Fraser's Magazine* (1864), vol. LXIX, p. 753; *A History of the Criminal Law of England* (1883), vol. 2, pp. 79-83 and 91-93.

almost impersonal, acts or omissions that might amount to a punishable entity, he deliberately ignored and cut himself off from the social, moral and penal conditions that have so intimate a bearing upon the proper understanding of crime and its control. He failed to perceive any impending change in the climate of opinion. To him the new dogmatic edifice had been completed down to its last details, and rested upon a foundation that could no more be challenged. The triumph of classicism was complete.

In conformity with this conviction, widely shared at the time, he advised the undergraduates of the University of Pisa, at his inaugural lecture in 1873, to devote themselves to the study of criminal procedure rather than to that of the substantive law, because, in the latter field, as he put it, "there remains little to be added to what has already been done by your fathers."¹

The records of history are full of such complacent assumptions, followed by their irreverent reversal.

2. The Deterministic Position

"We can count in advance how many individuals will soil their hands with the blood of their fellows, how many will be swindlers, how many poisoners, almost as we can number in advance the births and deaths that will take place. . . . Here is a budget which we meet with a frightful regularity—it is that of prisons, chains, and the scaffold."

"Suddenly, one morning, on a gloomy day in December, I found in the skull of a brigand a very long series of atavistic abnormalities . . . analogous to those that are found in inferior vertebrates. At the sight of these strange abnormalities—as an extensive plain is lit up by a glowing horizon—I realized that the problem of the nature and generation of criminals was resolved for me."

THE FIRST of these startling insights comes from Lambert-Adolphe-Jacques Quetelet and he announced it in the eighteen thirties.¹ The second was proclaimed by Cesare Lombroso in the eighteen sixties.² We are here at the sources of the two

¹ QUETELET continued to reproduce this formula, though with some slight modifications, in all his subsequent writings. See for instance: "Recherches sur le Penchant au Crime aux différents Ages," report presented to the Royal Belgian Academy of Sciences (9 July 1831), in *Nouveaux Mémoires de l'Académie* (1831), vol. VII, p. 1, at pp. 80-81; see also *Physique Sociale*, etc. (ed. of 1869), vol. 2, p. 317.

² See LOMBROSO's opening address in the *Comptes—Rendus du VI-e Congrès International D'Anthropologie Criminelle*. Turin (1906) (1908), p. XXXI, at

¹ F. CARRARA, "Il diritto penale e la procedura penale," in *Opuscoli di diritto criminale* (1874), vol. V, p. 11, at p. 48.